

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

APPLICATION TO CHANGE WATER)	
RIGHT NO. 41I 30071601 BY HAMLIN)	PRELIMINARY DETERMINATION TO
FAMILY REVOCABLE LIVING TRUST)	GRANT CHANGE

On December 8, 2014, Hamlin Family Revocable Living Trust (Applicant or Hamlin) submitted Application to Change Water Right No. 41I 30071601 to change Water Right Claim Nos. 41I 89277-00, 41I 89278-00 and 41I 89279-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Helena Regional Office then transferred the application to the Lewistown Regional Office for processing. 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 4, 2015. Applicant responded with information dated March 11, 2015. The Application was determined to be correct and complete on May 11, 2015.

The Department met with the Applicant and its consultant, Dave Baldwin of Water Right Solutions, Inc. on November 14, 2014. An Environmental Assessment for this Application was completed on October 7, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606 – Application to Change an Existing Irrigation Water Right
- Form 606-PA – Application for Change of a Water Right, Change in Purpose Addendum
- Attachments
 - Memorandum dated August 20, 2014 from Dave Baldwin to Bryan Gartland, Deputy Regional Manager with the Department (memo was supplied with the application materials)
 - Maps
 - Copy of an affidavit by Robert Garber

- Lewis & Clark County water commissioner records
- Information Received after Application Filed:
- Applicant's March 11, 2015 response (including attachments) to the Department's March 4, 2015 deficiency letter
- Phone conference between the Department and Applicant, and Applicant's consultant, on June 16, 2015
- Email correspondence from Applicant's consultant on September 29, 2015 amending the flow rate of this application from 3.88 CFS to 2.97 CFS.

Information within the Department's Possession/Knowledge

- Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association
- Statements of Claim for the water rights proposed to be changed.
- File for Change Authorization No. 41I 30050020 by Eastgate Water & Sewer Association
- Department Irrigation Change Application Technical Report
- Department Return Flow Report
- 1957 Lewis & Clark County Water Resources Survey and associated field notes and materials
- Lewis & Clark County water commissioner records
- Water allocation records from the Helena Valley Irrigation District
- Assorted aerial photos and topographic maps
- Environmental Assessment

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 water rights Applicant seeks to change are shared with an adjacent landowner, Eastgate Water and Sewer Association (Eastgate). The elements of the water rights (under the combined ownership) as decreed in the Basin 41I Temporary Preliminary Decree are as follows:

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41I 89277	Irrigation	1.25 Cubic Feet per Second (CFS)	Feb 15 – Nov 30	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Nov 24, 1866	352.7
41I 89278	Irrigation	1.69 CFS	Mar 15 – Nov 19	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Feb 10, 1869	352.7
41I 89279	Irrigation	0.94 CFS	Mar 15 – Nov 19	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Oct 15, 1866	352.7

2. Both co-owners historically appropriated water for irrigation purposes from Prickly Pear Creek near East Helena, Montana. However, in 2011, Eastgate changed its proportionate share of the water rights from irrigation to “mitigation water.” The purpose of the Eastgate change was to mitigate surface water depletions to Prickly Pear Creek caused by a groundwater well it uses in a nearby subdivision (the groundwater well was authorized under Provisional Permit No. 41I 30026328).

3. While the Eastgate change authorization does not expressly indicate the flow rate it was permitted to change to “mitigation water”, the depletionary impact to the stream from its groundwater well is 410 gallons per minute, or 0.91 CFS. Therefore, the Department considers the flow rate changed by Eastgate for its combined water rights to be 0.91 CFS. Further, the flow rate changed for each individual water right is considered to be proportionate to the combined flow rate changed (0.9 CFS) to the total flow rate of the three water rights (3.88 CFS), or roughly 23%.

4. During the Eastgate proceeding the Department found the historic use of two elements of the water rights to be different than that claimed (period of use and place of use/acres irrigated). The Department's determination on all elements of the water rights was made by exclusively considering the evidence and information supplied by Eastgate. In this current proposed change, Hamlin has provided additional information for the Department to determine historic use that was not available in the Eastgate proceeding.

CHANGE PROPOSAL

FINDINGS OF FACT

5. Applicant proposes to change its share of three supplemental/overlapping irrigation water rights to the purpose of Marketing for Mitigation or Aquifer Recharge. The proposed service area is Prickly Pear Creek located between the historic point of diversion in the SESENE Section 36 T10N R3W (headgate for Company Ditch), and the SWSW Section 23 T11N R3W, the point where Prickly Pear Creek discharges into Lake Helena. The amount of water to be changed is that volume associated with Hamlin's historic irrigated acres, and the remaining flow rate of the three combined water rights that was not changed to Mitigation Water in the 2011 Eastgate proceeding. Email correspondence from Applicant's consultant on September 29, 2015. Later in this Preliminary Determination the Department identified the amounts of water to be changed as a flow rate of 2.97 CFS, a diverted volume of 240.2 AF, and a consumed volume of 96.7 AF. Finding of Fact Nos. 39-40. The water is proposed to be left instream as a means to mitigate future consumptive uses. File.

6. Water has historically been diverted from Prickly Pear Creek and used for irrigation purposes, and the proposed plan is to leave the water instream to market for future mitigation needs (replace water that is depleted by future appropriations). Applicant proposes to immediately leave instream its entire portion of the water rights upon authorization of the change, and will no longer divert any water for irrigation. The pattern of water use will therefore change. File; Applicant's March 11, 2015 response to the Department's March 4, 2015 deficiency letter.

Map 1: Proposed Change



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

7. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

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

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

(b) Except for a change in appropriation right for instream flow to protect, maintain, or

enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

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

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

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

9. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶ 43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins,

Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

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

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

....

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

(italics added).

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

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

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

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

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

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any

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).

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.

11. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, (DNRC Final Order 1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, (DNRC Final Order (1992)); In the Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H, Proposal for Decision and Memorandum at pgs. 8-22, adopted by Final Order (January 9, 1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

12. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re

[Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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

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

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

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

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

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

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

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

....

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

....

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

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

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

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

Historic Use:

FINDINGS OF FACT

Point of Diversion and Conveyance Facilities

18. The historic point of diversion is the Company Ditch diversion dam and headgate located in the SESENE Section 36 T10N R3W in Lewis & Clark County. The point of diversion is identified on the 1956 Lewis & Clark County Water Resources Survey (WRS) and was verified by the Department on May 25, 2011 during a field investigation for a change application on the subject water right for Eastgate Water and Sewer Association (Eastgate). The Company Ditch supplies the place of use with appropriations from Prickly Pear Creek. File; Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association (Finding of Fact No. 13).

Place of Use

19. The claimed place of use for each of the three water rights proposed for change consists of 352.7 acres, generally located in Section 20 T10N, R2W, Lewis & Clark County. The acreage is shared by two owners, the Applicant (Hamlin) and Eastgate. In 1959, the Helena Valley Irrigation Canal (HVIC) was constructed, bisecting the claimed place of use. The Applicant now owns the claimed place of use north of the HVIC, as well as a portion to the east-southeast, and Eastgate owns the place of use south of the HVIC in the SW1/4 Section 20. Statements of Claim for the water rights proposed to be changed; Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association

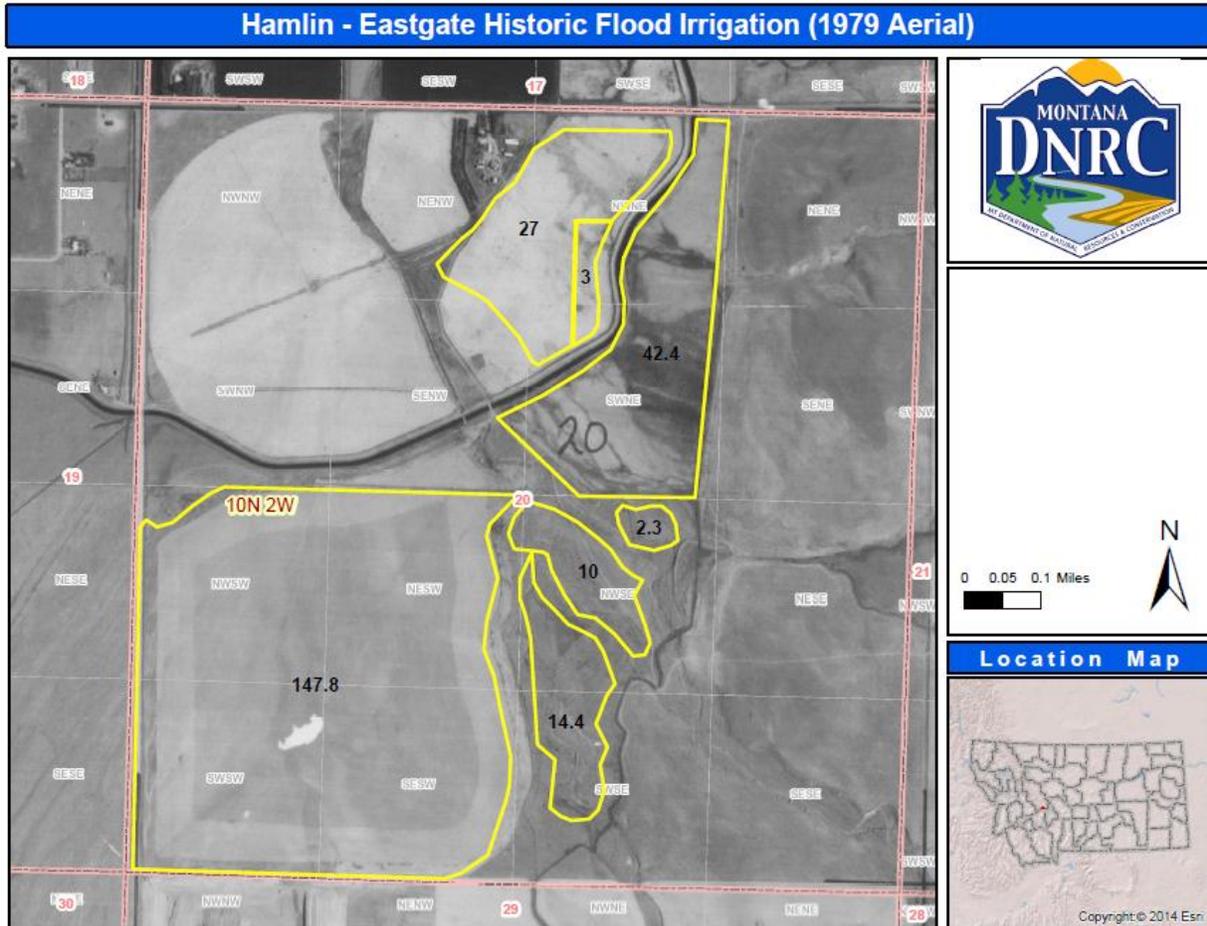
20. In the 2011 Eastgate change proceeding the Department found the combined, historic place of use for the two owners to be 210.8 acres, of which Hamlin was found to irrigate 63.0 of the 210.8 acres (Eastgate irrigated 147.8 acres). Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association (Finding of Fact No. 19).

21. Hamlin did not participate as an applicant in the 2011 Eastgate change application process, and did not bring forth evidence of historic use. In this present change application process, Hamlin, as Applicant, has brought forth new evidence regarding the historic place of use. File.

22. To determine the Applicant's historic place of use, the Department reviewed multiple aerial photos, spanning multiple decades; the 1957 Lewis & Clark County Water Resources Survey; consulted with the Helena Valley Irrigation District; and held multiple conversations with Hamlin and Hamlin's consultant. The Department's Technical Report provides analysis of each of the resources used to determine the historic place of use, and a specific description of the place of use. The Department finds Applicant's portion of the place of use historically consisted of 99.1 acres, or 36.1 acres more than it found in the Eastgate change proceeding. The total acreage found for both co-owners is 246.9 acres, and is displayed on the following map.

Department Technical Report.

Map 2: Historic Use



Period of Diversion/Use

23. The claimed period of diversion/use for the three water rights to be changed is March 15 to November 15. The standard growing season in Climatic Area III is April 15 to October 15. In the 2011 Eastgate change proceeding the Department found the historic period of diversion and period of use for the Company Ditch to be April 1 through August 31, substantiated by water commissioner records and an affidavit provided by Mr. Gary Poepping. In this current change proceeding, Hamlin provided copies of the evidence submitted in the Eastgate proceeding, and acknowledged the historic period to be that found in Eastgate. Therefore, the Department finds the historic period of diversion and period of use to be April 1 through August 31. File;

Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association (Finding of Fact No. 22); Department Technical Report.

Flow Rate

24. The combined claimed flow rate for the three water rights to be changed is 3.88 cubic feet per second (CFS). Both in the 2011 Eastgate change proceeding and this present change proceeding for Hamlin, the co-owners indicate they each used the maximum flow rate, on a rotational basis, to irrigate their fields. In the Eastgate change proceeding the Department analyzed water commissioner records, stream gauging data, and calculations by Eastgate's consultant to determine the historic flow rate. In that proceeding, the flow capacity of the Company Ditch was determined to be greater than the combined flow rate of the three water rights to be changed. The Department therefore found the historic flow rate beneficially used to equal the combination of water rights, or 3.88 CFS. Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association (Finding of Fact No. 25); Department Technical Report.

25. Applicant Hamlin supports the evidence filed in the Eastgate application in regard to flow rate. File. The Department finds that Hamlin used the full, combined flow rate of 3.88 CFS for irrigation of its portion of the water rights on a rotational basis. The flow rate for each water right is limited to the rate claimed on the individual water right. Department Technical Report.

Consumed Volume

26. In the 2011 Eastgate change proceeding the Department found the consumptive use to be 10.87 inches per acre, based on evidence supplied by Eastgate's consultant. The value in Eastgate was slightly less than the value found in the Department's administrative rules for determining consumptive use. ARM 36.12.1902(16). It was based on estimates for the type of crop irrigated and operation schedule of each water right, including how long each water right was typically in priority on the stream. The volume was determined to be applicable to the entire place of use, including Hamlin's portion. Applicant Hamlin has agreed in the current proceeding that the per-acre volume previously found in Eastgate is applicable to its historic consumed volume for crop water use. Hamlin's place of use consists of 99.1 acres, therefore its crop

consumptive volume is 89.8 acre-feet (10.87”/12” X 99.1 acres = 89.8 AF). Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association (Finding of Fact Nos. 30 and 32); File.

27. The determination for volume identified in Finding No. 23 is applicable to crop consumptive use, but not non-crop consumptive use. In this current proceeding for Hamlin the Department will calculate non-crop consumptive use, otherwise known as irrecoverable losses, using its administrative rule for such calculation. ARM 36.12.1902(17). Accordingly, historic consumptive volume for Hamlin’s portion of the water rights is equivalent to crop consumptive volume (89.8 AF), plus irrecoverable evaporative losses. The Department estimates irrecoverable losses by assuming 5% of the volume applied to the field for flood irrigation systems is lost and does not make it back to the source. In this matter, the Department has determined the volume applied to the field is 138.1 AF, based on an estimated on-farm efficiency of 65%. (89.8 AF/0.65 = 138.1 AF). The Department, therefor, calculates irrecoverable losses to be 6.9 AF (138.1 AF X 0.05 = 6.9 AF). File; Department Technical Report.

28. The Department finds the combined historic consumptive use to be 96.7 AF, based on crop consumptive use of 89.8 AF and irrecoverable losses of 6.9 AF. The consumptive use for each water right is described in the table below. Department Technical Report.

WR #	Priority Date	Flow Rate (CFS)	Total Acres	Consumptive Volume (AF)
41I 89277-00	11/24/1866	1.25	99.1	30.9
41I 89278-00	2/10/1869	1.69	99.1	42.6
41I 89279-00	10/15/1866	0.94	99.1	23.2
Total		3.88	99.1	96.7

Diverted Volume

29. The Department calculated diverted volume for Applicant’s portion of the combined water rights by factoring in system efficiencies, days of operation (including how long the water rights were in priority on the stream), acres irrigated, seepage losses, and the historically consumed volume. An explanation of the operation schedule is included in the Technical

Report. The combined diverted volume for all three water rights is 240.2 AF, and the diverted volume applicable to each water right is defined in the table below. Department Technical Report.

WR #	Priority Date	Flow Rate (CFS)	Total Acres	Diverted Volume (AF)
41I 89277-00	11/24/1866	1.25	99.1	76.8
41I 89278-00	2/10/1869	1.69	99.1	106.0
41I 89279-00	10/15/1866	0.94	99.1	57.4
Total		3.88	99.1	240.2

Summary of Hamlin’s Portion of the Water Rights to be Changed

30. The Department finds Hamlin’s historic portion of the water rights to be changed are as follows:

WR Number	Purpose	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres	Div. Volume (AF)	Cons. Volume (AF)
41I 89277	Irrigation	1.25 Cubic Feet per Second (CFS)	April 1 – August 31	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Nov 24, 1866	99.1	76.8	30.9
41I 89278	Irrigation	1.69 CFS	April 1 – August 31	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Feb 10, 1869	99.1	106.0	42.6
41I 89279	Irrigation	0.94 CFS	April 1 – August 31	SESENE Sec 36, T10N, R3W	Sec 20, T10N, R2W	Oct 15, 1866	99.1	57.4	23.2

CONCLUSIONS OF LAW

31. 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).

32. 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).

33. 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.

34. 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).

35. 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)

36. 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”).

37. 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)).

38. “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.

39. 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.

40. 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 adopt findings for crop consumptive use as determined in the 2011 Eastgate proceeding, and the Department has additionally factored in consumptive use for irrecoverable losses. (FOF No. 25)

41. I find the Applicant has proven by a preponderance of the evidence the historic use of its portion of Water Right Claim Nos. 41I 89277, 41I 89278, and 41I 89279 to be 240.2 AF in diverted volume, 96.7 AF in consumed volume, and a flow rate of 3.88 CFS. The amount of water applicable to each individual water right is identified in the table in FOF 30 above.

Adverse Effect:

FINDINGS OF FACT

42. Applicant seeks to change the point of diversion, place of use, and purpose of use of its proportionate share of Statement of Claim Nos. 41I 89277-00, 41I 89278-00, and 41I 89279-00. Upon authorization of the change, Applicant will retire 99.1 acres of the historically irrigated 246.9 acres, and leave the water instream for purposes of marketing for mitigation or aquifer recharge. The mitigation plan will be executed to replace water depleted from Prickly Pear Creek by future appropriations. At such point in time that Hamlin markets the mitigation water to an appropriator, the plan must be effective within the reach of stream from the historic point of diversion (Company Ditch headgate) to Lake Helena. File; Department Technical Report.

43. The amount of water that may be changed in this proceeding cannot enlarge the water rights co-owned by Hamlin and Eastgate. In 2011 Eastgate changed 0.91 CFS in flow rate for the purpose of Mitigation Water to offset surface water depletions to Prickly Pear Creek caused by its groundwater appropriation. Finding of Fact Nos. 2-3. Since the historic combined appropriation of Eastgate and Hamlin is 3.88 CFS, any combination of future uses cannot exceed 3.88 CFS. Therefore, Hamlin is limited in this proceeding to a change in flow rate of 2.97 CFS ($3.88 - 0.91 = 2.97$ CFS) for its portion of the combination of water rights. Hamlin has agreed to this limitation on flow rate and has amended its application to reflect so. Email correspondence from Applicant's consultant on September 29, 2015. Application.

44. The volume of water associated with the change is a diverted volume of 240.2 AF and a consumed volume of 96.7 AF.

45. While the pattern of water use will change under the proposal, including the return flow pattern, the amount of water depleted from the stream will remain the same as was historically depleted by irrigation. Any alteration in the timing and pattern of water use will not adversely affect other water users so long as the mitigation water and return flows are left instream at the headgate.

46. Applicant historically shared water rights and conveyance facilities with Eastgate. Applicant may change its proportionate share of the water rights provided it will not adversely affect Eastgate's interests. Eastgate changed its historic portion of the water rights in 2011 to mitigate its own groundwater development, and no longer uses the irrigation facilities. Evidence in the record does not show that Eastgate will be adversely affected. File; Preliminary Determination To Grant, Application to Change a Water Right No. 41I 30050020 by Eastgate Water and Sewer Association.

47. Hamlin is required to notify the Department within 30 days each time it markets water and executes a portion of the mitigation change. See the Conditions section in this Order for specific requirements. §85-2-420(4)(b), MCA.

48. The Department finds no adverse effects will occur to other appropriators based on evidence in the record.

CONCLUSIONS OF LAW

49. 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).

50. 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).

51. 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.

52. 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).

53. 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*.

54. 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.

55. 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. 45, 46 and 48).

Beneficial Use

FINDINGS OF FACT

56. Applicant proposes to use water for marketing for mitigation or aquifer recharge. Water will be left instream in the amount of 2.97 CFS, a diverted volume of 240.2 AF, and a consumed volume of 96.7 AF. This amount of water will be available to offset depletions to Prickly Pear Creek by future appropriations. File; Finding of Fact Nos. 43-44.

57. Prickly Pear Creek is located within the Upper Missouri River Basin Closure Area. §85-2-343, MCA. The Department may not grant new, consumptive water use permits in the closure area, with limited exceptions. The closed status of the basin elevates the importance of changes to existing water rights for meeting future demands. Having mitigation water available to facilitate future development and growth will be beneficial to the region and Montana.

58. Applicant has requested 20 years to complete its plan to market water for mitigation purposes. Pursuant to §85-2-420, MCA, the Department determines that a completion period of 20 years is a reasonable period to execute the plan. Applicant will leave instream all of its portion of the water rights to be changed immediately upon authorization of the change. Applicant must notify the Department within 30 days each time a portion of the water is sold or leased for mitigation as set forth in the Conditions section. Any portion of water not converted for mitigation during the completion period retains the original beneficial use for irrigation upon expiration of the completion period. §85-2-420, MCA.

59. The Department finds the purpose of marketing for mitigation or aquifer recharge with a flow rate of 2.97 CFS, a diverted volume of 240.2 AF, and a consumed volume of 96.7 AF, to be a beneficial use of water.

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; Toohy. 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).

63. The amount of water to be marketed for mitigation or aquifer recharge is 2.97 CFS, a diverted volume of 240.2 AF, and a consumed volume of 96.7 AF. Applicant has proven by a preponderance of the evidence the proposed use of water is a beneficial use. §85-2-402(2)(c), MCA (FOF No. 59)

Adequate Diversion

FINDINGS OF FACT

64. The proposed change is to leave three existing irrigation water rights instream, rather than to continue diverting water, in order to offset depletions to Prickly Pear Creek by future appropriations. No diversion facilities are necessary to leave the water instream. 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.

Possessory Interest

FINDINGS OF FACT

65. This application is for marketing for mitigation or aquifer recharge in which water will be made available to another to offset future depletions to Prickly Pear Creek. The Applicant is not required to prove it has a possessory interest in the place of use for a change in appropriation right pursuant to §85-2-420, MCA, for mitigation or marketing for mitigation. See §85-2-402(2)(d)(iii), MCA.

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 41I 30071601 should be **Granted**. The purpose of use is changed from irrigation to marketing for mitigation or aquifer recharge. The amount of water changed is a flow rate of 2.97 CFS, a diverted volume of 240.2 AF, and a consumed volume of 96.7 AF. The service area for mitigation is Prickly Pear Creek located between the SESENE Section 36 T10N R3W (headgate for Company Ditch), and the SWSW Section 23 T11N R3W, the point where Prickly Pear Creek discharges into Lake Helena.

CONDITIONS

1. PURSUANT TO § 85-2-420, MCA, THE APPROPRIATOR SHALL HAVE A 20-YEAR PERIOD FOR COMPLETION OF THIS CHANGE AUTHORIZATION. IF THE FULL AMOUNT OF WATER AUTHORIZED FOR CHANGE TO MITIGATION IS NOT SOLD OR LEASED AS MITIGATION PRIOR TO THE 20-YEAR COMPLETION DATE, THE WATER RIGHT RETAINS THE BENEFICIAL USE IN PROPORTIONATE AMOUNTS NOT PERFECTED FOR MITIGATION AND AS AUTHORIZED PRIOR TO THIS CHANGE AUTHORIZATION. THE APPROPRIATOR SHALL NOTIFY THE DEPARTMENT

WITHIN 30 DAYS EACH TIME A PORTION OF THE CHANGE IS COMPLETED ON A FORM PROVIDED BY THE DEPARTMENT.

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 8th day of October 2015.

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Regional Office
Department of Natural Resources
& 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 8th day of October 2015, by first class United States mail.

HAMLIN FAMILY REVOCABLE LIVING TRUST
1625 UNIVERSITY ST
HELENA, MT 59601-5953

Lewistown Regional Office
(406) 538-7459