

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

APPLICATION TO CHANGE WATER)	PRELIMINARY DETERMINATION TO
RIGHT NO. 41G 30072179 by SKS LAND)	GRANT CHANGE WITH
COMPANY)	MODIFICATIONS

On January 28, 2015, SKS Land Company (Applicant) submitted Application to Change Water Right No. 41G 30072179 to change Beneficial Water Use Permit No. 41G 33238 to the Helena 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 July 17, 2015. The Applicant responded with information dated September 10, 2015. The Application was determined to be correct and complete as of January 22, 2016, at which time the Applicant was provided with Department’s Technical Report.

The Department met with the Applicant’s consultant, David Baldwin from HydroSolutions Inc, on January 21, 2015. An Environmental Assessment for this Application was completed on May 20, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606

Information Received after Application Filed:

- Applicant’s response to the Department’s Deficiency letter, by HydroSolutions Inc., received on September 10, 2015.

Information within the Department’s Possession/Knowledge

- United States Department of Agriculture (USDA) Farm Service Agency image from 2005.
- United States Geological Survey (USGS) Digital Orthophoto Quarter Quadrangles from 1995.

- Return Flow Report dated December 1, 2015, by DNRC Water Management Bureau Groundwater Hydrologist, Russell Levans.
- Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly.
- Environmental Assessment dated May 20, 2016.
- Beneficial Water Use Permit file 41G 33238.

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 RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change most of the place of use for Beneficial Water Use Permit 41G 33238. Permit 41G 33238 is a perfected permit with a priority date of May 26, 1981, for the purpose of irrigation in Section 4, Township (T) 2 North (N), Range (R) 1 East (E), Broadwater County. Four groundwater wells provide 1,700 gallons per minute (GPM) up to 540 acre-feet (AF) for the irrigation of 270 acres located approximately 5 miles north of the town of Three Forks, Montana. The Department verified the perfection of Permit 41G 33238 and the previous change on February 23, 1994.

Table 1: BENEFICIAL WATER USE PERMIT PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
41G 33238	Irrigation (270 acres)	1,700 GPM	540 AF	4/15 to 10/15	SESENW, SWNWSE, SENWSE, SENWNW Sec. 4, T2N, R1E	NW, SW, SE Sec. 4 T2N, R1E	5/26/1981

2. A previous change on Permit 41G 33238 was authorized to replace well #3, add well #4 and clarify the location of the 270 acres of irrigation; issued April 18, 1988.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change most of the place of use for Permit 41G 33238. The proposed new place of use is directly north of the historic place of use. Historically, 41G 33238 irrigated 270 acres in Section 4, T2N, R1E, with 170 acres under pivot irrigation and 100 acres under wheel-line sprinkler irrigation. The Applicant proposes to irrigate 236.8 acres with two pivots in the N2 of Section 4, T2N, R1E, and the S2 of Section 33, T3N, R1E. The existing four groundwater wells will continue to be used. The perfected flow rate of 1,700 GPM up to the perfected volume of 540 AF will not be exceeded with the proposed change in place of use.

4. On September 10, 2015 the Department received signed documentation that the Applicant agrees to the following measurement condition:

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

§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

5. 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.

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

7. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water

right is the pattern of historic use; beneficial use is the basis measure and the limit); 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).

8. 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.

9. 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*).

10. 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](#).

11. 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).

12. 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.

13. 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.

14. 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).

15. 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

16. As per ARM 36.12.1902(1)(b), historic use of a perfected permit is defined as it was used at the filing date of the completion notice. The project completion notice for 41G 33238 was received February 24, 1987 and verified by the Department on February 23, 1994. The Department verified the permit to be complete for 270 acres irrigated with 1,700 GPM up to 540 AF.

17. The historic consumptive volume was calculated using the Irrigation Water Requirements (IWR) computer program (NRCS, 2003), the Trident weather station data and a management factor (MF) of 79.5 % from ARM 36.12.1902(16). The historic consumptive volume for 41G 33238 is calculated to be 399.3 AF (262.5 AF for pivot (170 acres x (23.31 in ÷12 in/ft) x

79.5 % MF and 136.7 AF for wheel-line sprinkler (100 acres x (20.64 in ÷ 12 in/ft) x 79.5% MF)). Irrecoverable losses are calculated to be 10% of the applied volume and are considered a consumptive loss component. Based on the 540 AF applied volume the Department verified and crop consumption, a field efficiency of approximately 74% was used to calculate the following historic use for 41G 33238:

TABLE 2: TOTAL HISTORIC USE FOR 41G 33238 ON 270 ACRES

Month	NIR* (in)	Application	Crop Consumption (AF)	Irrecoverable Losses (AF)	Not Consumed (AF)
May	1.80	43.5	32.2	4.4	7.0
June	5.29	128.0	94.7	12.8	20.6
July	7.05	170.6	126.1	17.1	27.4
August	6.09	147.4	109.0	14.7	23.7
September	2.09	50.5	37.3	5.0	8.1
Total	22.32	540.0	399.3	54.0	86.7

*NIR = Net Irrigation Requirement

(Return Flow Report dated December 1, 2015, by DNRC Water Management Bureau Groundwater Hydrologist, Russell Levans)

18. Although aerial photography from 1987 has not been obtained, USGS Digital Orthophoto Quarter Quadrangles from 1995 support irrigation of the full 270 acre place of use. Also, USDA Farm Service Agency images from 2005 support irrigation on 250 acres. Based on the verified information and the aerial photography, the Department finds the following historic use for 41G 33238:

Water Right #	Purpose Acres	Flow Rate	Period of Use	Point of Diversion	Place of Use	Priority Date	Diverted Volume	Consp. Vol. + Irrec. Losses
41G 33238	Irrigation 270 acres	1,700 GPM	4/15 to 10/15	SESENW, SWNWSE, SENWSE & SENWNW Sec. 4, T2N, R1E	SE, NW & SW Sec.4, T2N, R1E	5/26/1981	540 AF	453.3 AF

(Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly)

CONCLUSIONS OF LAW

19. 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).

20. 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).

21. 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.

22. 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).

23. 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)

24. 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”).

25. 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)).

26. “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.

27. 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.

28. Applicant may proceed under ARM. 36.12.1902, the Department's historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (Finding of Fact No.17)

29. The Department find's that the Applicant has proven by a preponderance of the evidence the historic use of Beneficial Water Use Permit No. 41G 33238 of 540 AF diverted volume and 1,700 GPM flow rate with a consumptive use of 453.3 AF (consumptive volume (399.3) plus irrecoverable losses (54)). (Findings of Fact No.s 16-18)

Adverse Effect:

FINDINGS OF FACT

30. The Applicant proposes to change most of the place of use for Beneficial Water Use Permit 41G 33238 to fields located directly north of the current place of use. The irrigated acres will change from 270 acres (170 acres pivot and 100 acres wheel-line irrigation) to 232.6 acres of pivot irrigation; no other elements of the Permit are proposed to be changed under this Application. The Applicant initially proposed to irrigate 236.8 acres. However, the Department found lots within the subdivided place of use that the Applicant did not have possessory interest in. Based on Applicant's lack of possessory interest in part of the historic place of use and conversion from pivot and wheel-line irrigation to all pivot irrigation the proposed irrigated acreage is 232.6. The points of diversion from four existing groundwater wells are not proposed to be changed.

31. Beneficial Water Use Permit 41G 33238 is a perfected permit, which means the appropriation is commenced, conducted and completed and that the water has been actually applied to the beneficial use specified in the permit. Although subdivision infrastructure has been in place for several years, USDA Farm Service Agency imagery from 2005 shows active irrigation on the historic place of use; therefore there is no adverse effect from prolonged nonuse.

(Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly)

32. As detailed above in Table 2, the historic consumptive use plus irrecoverable losses are calculated to be 453.3 AF. Through this change, the proposed consumptive use plus irrecoverable losses is 407.8 AF (Table 4). The proposed consumptive use and irrecoverable losses are calculated to be 45.5 AF less than the historic use. This is due to the fact that the Applicant does not have possessory interest in 26.7 acres of the historic place of use and the conversion to entirely pivot irrigation yields a different consumptive volume figure per acre. (Return Flow Report dated December 1, 2015, by DNRC Water Management Bureau Groundwater Hydrologist, Russell Levens)

TABLE 4: PROPOSED CENTER PIVOT IRRIGATION USE ON 232.6 ACRES

Month	NIR (in)	Application	Crop Consumption (AF)	Irrecoverable Losses (AF)	Not Consumed (AF)
May	2.18	45.4	33.6	4.5	7.3
June	5.41	112.8	83.4	11.3	18.1
July	7.14	148.8	110.0	14.9	23.9
August	6.16	128.4	94.9	12.8	20.6
September	2.42	50.4	37.3	5.0	8.1
Total	23.31	485.8	359.2	48.6	78.0

33. Due to the Applicant’s lack of possessory interest in part of the historic place of use, fewer acres will be irrigated on the proposed place of use. The irrigation of less acreage on the proposed place of use compared to the irrigated acres on the historic place of use will somewhat affect the rate, timing and amount of return flows to the receiving reach of Mud Spring Gulch. Table 5 below provides a seasonal summary of the change in return flows. As described in the Department’s Return Flow Report, “the change in return flow timing results from the greater distance from the new place of use to the receiving stream and the greater percent of the new place of use that overlies Tertiary-age sedimentary rock.” (Return Flow Report dated December 1, 2015, by DNRC Water Management Bureau Groundwater Hydrologist, Russell Levens)

TABLE 5: CHANGE IN TOTAL RETURN FLOWS DOWNSTREAM OF THE NEW POU

	Historic Return Flows		New Return Flows		Change in Return Flows	
	AF	GPM	AF	GPM	AF	GPM

January	5.7	41.8	6.2	45.5	0.5	3.7
February	4.9	39.4	5.6	45.4	0.7	6.1
March	4.9	35.4	6.0	43.7	1.1	8.3
April	4.4	33.6	5.7	43.2	1.3	9.6
May	5.2	38.2	6.1	44.4	0.8	6.1
June	7.4	55.8	6.5	48.9	-0.9	-6.9
July	10.1	74.1	7.3	53.3	-2.9	-20.8
August	11.5	84.3	7.6	55.7	-3.9	-28.5
September	10.4	78.3	7.2	54.6	-3.1	-23.7
October	8.6	62.7	6.9	50.4	-1.7	-12.3
November	7.1	53.9	6.4	48.5	-0.7	-5.4
December	6.4	46.6	6.4	46.6	0.0	0.0
	86.7		78.0		-8.7	

34. The proposed change will result in an 8.7 AF/YR reduction in return flows to the receiving reach of Mud Spring Gulch in June through November. However, review of several years of aerial photography, satellite imagery and the USGS National Hydrography Dataset (NHD), indicates that Mud Spring Gulch appears to be a non-perennial stream. Therefore, the reduction in return flow will not adversely affect downstream water rights due to Mud Spring Gulch’s intermittent nature.

35. Although the proposed change will result in a reduction in the amount of return flows, overall less water will be withdrawn from the hydrologic system. As described below in Finding of Fact No. 55, the Applicant does not have possessory interest in 26.7 acres and therefore does not propose to change these acres under this Application. The portion of 41G 33238 that the Applicant cannot change is described in Table 6. Although the Applicant does not have possessory interest in these acres, the current lot owners do not have access to the points of diversion which are located on the Applicant’s property and therefore cannot irrigate the 26.7 acres with 41G 33238. The lots that have been developed with residences are using exempt wells to provide water for domestic and lawn and garden uses. (Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly)

TABLE 6: UNCHANGED PORTION OF 41G 33238 THAT WILL NOT BE IN USE

Acres	Application Volume (AF)	Crop Consumption (AF)	Irrecoverable Losses (AF)	Not Consumed (AF)
26.7	54.2	40.1	5.4	8.7

36. Permit 41G 33238 has been perfected and verified to the full permitted flow rate and volume of 1,700 GPM up to 540 AF. Although, several of the lots within the 26.7 acres, that the Applicant does not have possessory interest in, have been developed with residences, lawn and gardens and individual exempt wells, the proposed change in place of use will not exceed the perfected amount. Table 7 below lists the groundwater developments that have been filed with the Department on the historic place of use. (Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly)

TABLE 7: GROUNDWATER DEVELOPMENTS ON THE HISTORIC POU

Water Right	Owner	Purpose	Issued	Flow Rate	Volume
30046489	Beller	Domestic	7/31/2009	15 gpm	1 AF
30049153	Howey	Domestic	8/31/2010	10 gpm	1.33 AF
30065982	Anderson	Domestic	5/14/2013	20 gpm	1 AF
30070387	Richards	Domestic	9/8/2014	35 gpm	6.75 AF
30071736	Price	Domestic	1/22/2016	20 gpm	3.3 AF
30071733	Price	Domestic	1/22/2016	20 gpm	3.3 AF
30071737	Price	Domestic	1/22/2016	20 gpm	3.3 AF

37. As detailed in Finding of Fact No. 4, the Applicant has agreed to a measurement condition to ensure that the proposed volume and permitted flow rate are not exceeded. (File)

CONCLUSIONS OF LAW

38. 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).

39. 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).

40. 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.

41. 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).

42. 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.

43. 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*.

44. 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.

45. 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. (Finding Of Fact Nos. 30-37)

Beneficial Use

FINDINGS OF FACT

46. Applicant proposes to use water for the purpose of irrigation, with a diverted volume of 485.8 AF and a 1,700 GPM flow rate. The proposed amount needed for the beneficial use of irrigation on 232.6 acres is supported by Department's Return Flow Report, Technical Report and Finding of Fact No. 32.

CONCLUSIONS OF LAW

47. 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.

48. 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.

49. 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).

50. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 485.8 AF of diverted volume and 1700 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (Finding Of Fact No. 45)

Adequate Diversion

FINDINGS OF FACT

51. The Applicant proposes to use the existing points of diversion from four groundwater wells for the proposed new place of use. A new pump will be installed in well #4 that is capable of producing a flow rate of 1,570 GPM. The Applicant plans for well #4 to be the primary diversion and will be used with any two of the other three wells; use of wells #'s 1-3 will be alternately. No more than three of the wells will be pumped at one time. (File)

CONCLUSIONS OF LAW

52. 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.

53. 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).

54. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. §85-2-402 (2)(b), MCA. (Finding of Fact No. 51).

Possessory Interest

FINDINGS OF FACT

55. The historic place of use for Permit 41G 33238 was developed into a subdivision and several of the lots were sold without severing the water right. Table 8 below lists the lots and approximate acreage of the historic place of use in which the Applicant does not have possessory interest, for a total of 26.7 acres (5.9 acres of wheel line and 20.8 acres of pivot irrigation). The Applicant does not seek to change the acres they do not have possessory interest in. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (File, Irrigation Change Application Technical Report, by DNRC Water Resource Specialist, Jennifer Daly and Montana Cadastral Website)

TABLE 8: LOTS AND ACRES WHERE THE APPLICANT DOES NOT HAVE POSSESSORY INTEREST

Owner	Lot #	≈Acreage within POU	Wheel-line or Pivot
Dale & Tressia Price	235, 238, 239	3	W
Justin & Tara Forsberg	236	1.0	W
BBG Contractors	237	0.7	W
Christopher Richards	184, 185	1.4	P
Daniel Buchignani	186, 187	1.2	W
Josh & Tracy Knoedler	103, 104, 117, 128, 129, 130	7.9	P
Steve Schlegel	105	1.2	P
Julie Jensen	108	1.1	P
Allan Anderson	109	1.1	P
Zach and Malori Anderson	110	1.2	P
Dale Snell	112	1.2	P
Brett Archer	113	1.3	P
Terri & Nye Howey	116, 119	2.2	P
Jamie Vazquez	118	1.2	P
Mike & Julie Henrich	122	1.0	P

CONCLUSIONS OF LAW

56. 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.

57. Pursuant to ARM. 36.12.1802:

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

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

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

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

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

58. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. §85-2-402(2)(d), MCA. (Finding of Fact No. 55)

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41G 30072179 should be **GRANTED WITH MODIFICATIONS**. The Department determines the Applicant may change the portion of the place of use for Beneficial Water Use Permit 41G 33238 that they have possessory interest in, to irrigate 232.6 acres in the N2 of Section 4, T2N, R1E and the S2 of Section 33, T3N, R1E, Broadwater County. The Department did not find the Applicant had possessory interest in additional acreage of the historic place of use and is therefore authorizing the change in place of use to 232.6 acres instead of the 236.8 acres the Applicant initially proposed. The Applicant will be subject to the following conditions, limitations and restrictions for Application to Change Water Right No. 41G 30072179.

CONDITION

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

NOTICE OF OPPORTUNITY FOR SHOW CAUSE HEARING

This Department has determined your application should be granted in modified form based upon findings specified in the above Preliminary Determination to Grant Change in Modified Form. When an application is granted in modified form the applicant may obtain a hearing pursuant to § [2-4-604](#), MCA, to show cause by a preponderance of the evidence as to why the change in appropriation right should not be granted in modified form by filing a written request for a hearing with the Department within 30-days of service of the preliminary determination. §85-2-310(7), MCA.

This constitutes notice of your opportunity for a hearing to show cause by a preponderance of the evidence as to why your change should not be granted in modified form. If you want to have a hearing, you must file a written request within 30-days of service of the notice of this Preliminary Determination to Grant Change in Modified Form.

In order to exhaust your administrative remedies under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) on a preliminary determination to grant an application in modified form, you must proceed to the show cause hearing and complete the show cause hearing process. Only a person who has exhausted his or her administrative remedies available within the agency and is aggrieved by a final written decision of the Department is entitled to judicial review under Montana Administrative Procedure Act (§2-4-702, MCA). If you file a

written request for a hearing, your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be granted in modified form. A hearing date will be set within 45 days of the date of your written hearing request is filed with the Department and a notice of hearing and appointment of Hearing Examiner will be forwarded to you.

If you do not file a written request for a hearing within 30 days the Department will provide public notice of this Application and the Department's Preliminary Determination to Grant in Modified Form pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the change in appropriation right, the department will grant the change subject to conditions necessary to satisfy applicable criteria.

DATED this 2nd day of June, 2016.

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