

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

\*\*\*\*\*

APPLICATION TO CHANGE A WATER RIGHT NO. 40A 30072563 BY MCFARLAND WHITE RANCH INC.	}	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
--	---	--

\*\*\*\*\*

On February 27, 2015, McFarland White Ranch Inc. (Applicant) submitted Application to Change a Water Right No. 40A 30072563 to change Statement of Claim Nos. 40A 110020 and 40A 30002022 to the Lewistown 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 §85-2-402, Montana Code Annotated (MCA), on August 26, 2015. Applicant responded on September 2, 2015. The Application was determined to be correct and complete on March 18, 2016. An Environmental Assessment for this Application was completed on May 26, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606, attachments, maps and irrigation system design plans.

Field Investigation:

- The Department conducted a field visit of the proposed change on July 21, 2015.

Information Received after Application Filed:

- Applicant's deficiency response received on September 2, 2105.

Information within the Department's Possession/Knowledge

- Publically available aerial photos and topographic maps.
- 1949 Wheatland County Water Resources Survey and associated filed notes and maps.
- District Court Decree – Fourteenth Judicial District, Wheatland County, Case No. 1834, June, 1911.
- Water right records.

- Pre-Application meeting notes.
- Statute and administrative rules.
- Department Policy Memorandum on Return Flows, April 1, 2016.
- Irrigation Change Application Technical Report.
- Irrigation Water Measurement, University of Wyoming (technical publication on water measurement).

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

### **WATER RIGHTS TO BE CHANGED**

#### FINDINGS OF FACT

1. The underlying water rights proposed to be changed are 40A 110020 and 40A 30002022. Statement of Claim No. 40A 30002022 is an implied claim.<sup>1</sup> The following table displays elements of the water rights *as claimed or stipulated to in the Water Court*. Water right records.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

<b>WR Number</b>	<b>Purpose</b>	<b>Source</b>	<b>Flow Rate</b>	<b>Period of Use</b>	<b>Point of diversion</b>	<b>Place of use</b>	<b>Priority date</b>	<b>Acres</b>
40A 110020	Irrigation	Big Elk Creek	12.5 Cubic Feet per Second (CFS)	Mar 1 – Nov 19	SESWSW Section 12, T7N, R13E	Sections 25, 35 and 36, T8N, R13E	June 15, 1900	381.39
40A 30002022	Irrigation	Big Elk Creek	6.58 CFS	Mar 1 – Nov 19	SESWSW Section 12, T7N, R13E	Sec 25, 35 and 36, T8N, R13E	June 15, 1900	381.39

<sup>1</sup> Statement of Claim (SOC) No. 40A 30002022 is an implied claim, generated from information contained in SOC No. 40A 110020. SOC No. 40A 110020 was originally filed in Montana’s adjudication process with a claimed flow rate of 19.08 CFS. However, the water right as claimed for adjudication purposes actually encompassed two historic appropriations that were decreed separately in a 1911 district court case. Wheatland County Case #1834, June 1911, decreed two separate flow rates to the same priority date (June 15, 1900), one for 12.5 CFS to ranch owner John H. Freeser, and the other to neighboring ranch owner William R. Montgomery for 6.58 CFS (combined total is 19.08 CFS). At some point in time the land appurtenant to the two appropriations was consolidated under one ownership, and when the adjudication claim filing process ensued the water user filed a single Statement of Claim for 19.08 CFS. Since the time of the initial claim filing, the Water Court has sought to divide Statement of Claim No. 40A 110020 into two, to reflect two appropriations as characterized in the 1911 court decree. The Water Court generated Implied Claim No. 40A 30002022 to reflect the second appropriation. The associated flow rate for Statement of Claim No. 40A 110020 is pending a water court reduction from 19.08 to 12.5 CFS to match the Freeser decreed appropriation, and the Implied Claim will reflect the 6.58 CFS appropriation of William Montgomery. The two claims combined will total 19.08 CFS.

## CHANGE PROPOSAL

### FINDINGS OF FACT

2. The project is located in Wheatland County about one mile east of the town of Two Dot, Montana, and the source of water is Big Elk Creek. In summary, the Applicant is proposing a multi-water right swap in order to move its most senior water right downstream to cover an existing place of use that is now largely covered under a more junior water right. Beside the changes to water rights proposed in this proceeding, changes are also proposed in two simultaneous application processes in order to accomplish a new management of water for the associated water rights.

3. For purposes of this change proceeding, a point of diversion will be added (headgate/ditch with a secondary pumping system), and the place of use will be reconfigured and increased. Historically, 381.4 acres were flood irrigated, and under the new plan, 378.7 acres will be sprinkler irrigated, and 99.2 acres will continue to be flood irrigated (the center pivots have been in use since at least 2001). Considering the combined types of systems (sprinkler and flood), irrigated acreage will increase from 381.4 to 477.9 acres. One of the two pivots irrigates 216.1 acres in Sections 25, 26, 35 and 36, T8N, R13E, of which 86.4 acres are located on state land in the north half of Section 36 (The State of Montana is not currently listed as an owner of the water right, but officials for the state (Department of Natural Resources and Conservation) have been made aware of the issue, and will be public noticed of the proposed change). The other pivot irrigates 162.6 acres in Sections 35 and 36, T8N, R13E, of which 34.6 acres are located on state land in the west half of Section 36. The flood irrigation is located in the SW1/4 Section 35 and E1/2 Section 25, T8N, R13E.

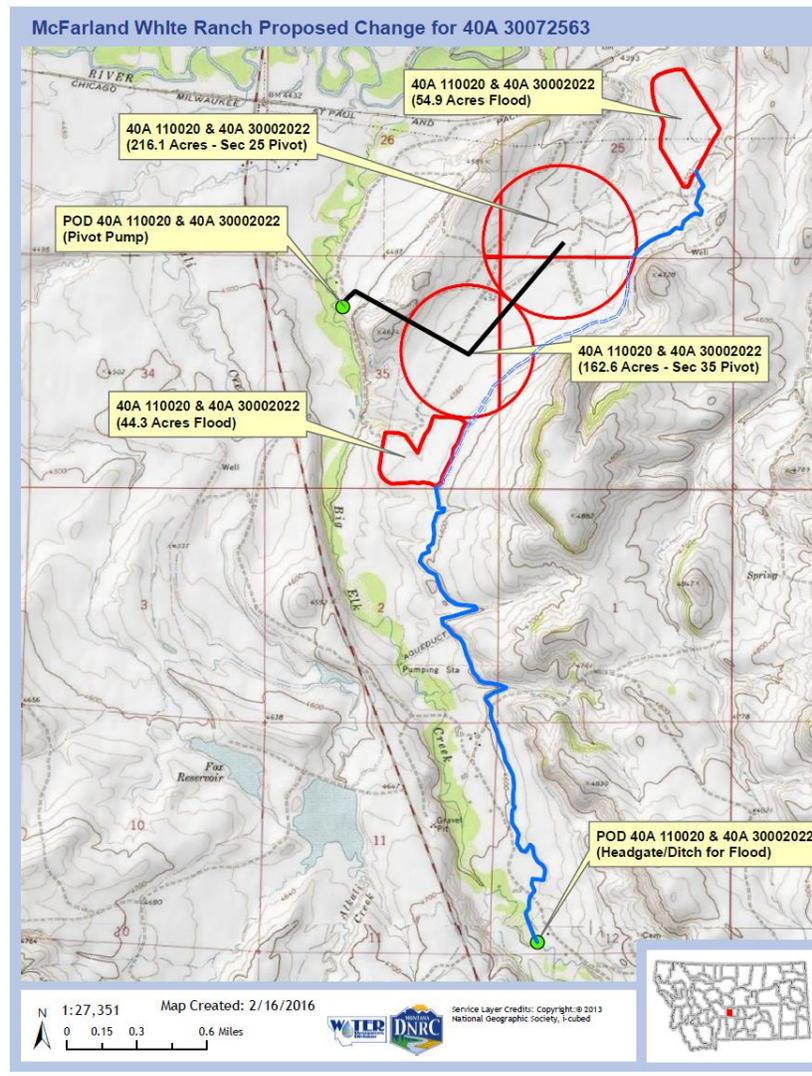
4. A point of diversion is proposed to be added in the NWSNW Section 35, T8N, R13E to supply the two center pivots. The historic diversion, the Freeser-Montgomery Ditch and headgate, will continue to be used for flood irrigation of the 99.2 acres and is located in the SESWSW Section 12, T7N, R13E. The proposed flow rate for the center pivot ditch and pumping facility is 4.68 CFS, and 10 CFS will be appropriated by the Freezer-Montgomery headgate for the 99.2 acres of flood irrigation.

5. Under this proposed change, water consumption will not increase even though an acreage increase will occur. The same amount of water (consumed volume) will be used by the more

expansive place of use as was historically used on the lesser, existing acreage. Additional water will be provided to the two center pivots under a simultaneously-proposed change to Statement of Claim No. 40A 110018 (Change Application No. 40A 30072562).

6. The application materials indicate a flow meter will be installed to measure appropriations. Therefore, the Department imposes a measurement condition on the Authorization so that water use can be monitored and to ensure compliance with the elements of the Authorization. See the Conditions section for specific language of the condition. Application.

7. A map of the proposed project follows:



## §85-2-402, MCA, CRITERIA

### GENERAL CONCLUSIONS OF LAW

8. 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.

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

10. 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).

11. Montana's change statute simply codifies western water law.<sup>2</sup> One commentator describes the general requirements in change proceedings as follows:

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

(italics added).

---

<sup>2</sup> Although Montana has not codified the law in the detail, Wyoming has, and the two states' requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Colorado follows a similar analysis under its requirement that a "change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy

District (Colo. 1986), 717 P.2d 955, 959, the court held:

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

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

12. 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*).

13. 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](#).

14. 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).

15. 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.

16. 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.

17. 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).

18. 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**

##### **Water Source, Diversion Point, Conveyance Facilities, Period of Diversion, and Flow Rate**

19. The source of water for Statement of Claim Nos. 40A 110020 and 40A 30002022 is Big Elk Creek. Water is diverted from the source into the Freeser-Montgomery Ditch at a point in

the SESWSW Section 12, T7N, R13E, Wheatland County. The diversion/conveyance facility is evident on aerial photo resources, the Wheatland County Water Resources Survey, and was observed by Department staff during a July 21, 2015 field visit. Topographic map review confirms the physical ability to convey water from the point of diversion to the places of use.

20. The claimed period of appropriation for adjudication purposes is April 15 through October 1. Statements of Claim. Applicant signed a stipulation in 1999 indicating the historic period to be March 1 through November 19. The NRCS guidelines for Climatic Area IV are April 20 through October 10.

21. The Application indicates the Freeser-Montgomery headgate has historically been left open throughout the claimed period of April 15 through October 1, and water diverted when sufficient in supply. Sufficient supply for irrigation purposes is not typically available on Big Elk Creek past July, but Applicant asserts it has occurred throughout the claimed period on occasion.

22. Water commissioner records from the 1930s and 1940s show that the range of irrigation on the source is from early May to early September. However, when water commissioners have been placed on the source, it has likely been when water supplies are tight due to drier conditions. The Department finds the claimed period of diversion to be reasonable. April 15 through October 1 is the period of diversion.

23. The flow rates claimed to be historically diverted are 12.5 CFS and 6.58 CFS for the two water rights to be changed, for a combined appropriation of 19.08 CFS. The flow rates were decreed in their claimed amount in Case No. 1834, Fourteenth Judicial District, Wheatland County, June, 1911. Applicant supplied facility/ditch dimensions for the Freeser-Montgomery Ditch which include the following: 48-inch flat-bottom headgate; Parshall Flume with a 2-foot throat width; ditch with a 2-foot bottom width and a top width of 8 feet; depth of water is about 30 inches at maximum diversion. Applicant's consultant estimated that the ditch capacity is 33 CFS, and the Department corroborated the estimation by referencing a technical publication on water measurement with Parshall Flumes. The ditch capacity exceeds the claimed flow rates. The Department finds the flow rates for Statement of Claim Nos. 40A 110020 and 40A

30002022 to be 12.5 CFS and 6.58 CFS, respectively. Department Technical Report; Irrigation Water Measurement, University of Wyoming.

#### Place of Use

24. The claimed place of use for each of the water rights is 399.2 acres generally located in Sections 25, 35 and 36, T8N, R13E, Wheatland County. However, the Applicant/Claimant stipulated to a place of use of 381.4 acres in the adjudication process after the initial claim filing.

25. The 1949 Wheatland County Water Resources Survey supports 273.4 acres of irrigation at the time of the survey. Department Technical Report.

26. The Department's interpretation of 1970 and 1980 aerial photos support all 381.4 acres as being irrigated. Department Technical Report; Water Resources Survey.

27. The Department finds that 381.4 acres were historically irrigated by the Freeser-Montgomer Ditch for the two water rights proposed to be changed in this matter. The places of use are generally located in Section 25, 35 and 36, T8N, R13E. See map in the Department's Technical Report for a detailed explanation of acres irrigated.

#### Volume of Water Historically Consumed and Diverted

28. Water usage on the 381.4 historically-irrigated acres occurred under a combination of two rights, both appropriating water from Big Elk Creek. Both water rights hold the same priority date of June 15, 1900 and are administered together (the two water rights are administered as if they are one). The amount of water appropriated varies from year-to-year, based on stream runoff patterns, precipitation events, priority status of the water right on the stream, etc. Application.

29. Applicant did not submit a Historical Water Use Addendum with the application materials. Therefore, the Department calculated historic consumptive and diverted volume based on its administrative rules. ARM 36.12.1902(16).

30. The combined, historic consumptive volume for both water rights is calculated to be 290.5 acre-feet (AF), including estimates for crop consumption and irrecoverable losses associated with 381.4 irrigated acres. Department Technical Report.

31. The combined, historic diverted volume for the two water rights is calculated to be 988.1 AF, including consideration of irrigation system efficiency, seasonal conveyance losses, and ditch evaporation losses. Department Technical Report.

32. Applicant delineates amounts of water associated with each water right based on the proportionate share each flow rate is in comparison to the combined flow rate (40A 110020 = 65.5%; 40A 30002022 = 34.5%). The following table reflects the amounts of water found by the Department to be associated with each of the water rights. Department Technical Report.

TABLE 2: VOLUME OF WATER ASSOCIATED WITH WATER RIGHTS.

WR Number	Diverted Volume (AF)	Consumed Volume (AF)
40A 110020	647.2	190.3
40A 30002022	340.9	100.2

Historic Use

33. The Department’s summarized findings for historic use for Statement of Claim Nos. 40A 110020 and 40A 30002022 follow in the table below.

Table 3: Historic Use

W.R. NO.	FLOW RATE (CFS)	DIVERTED VOLUME (AF)	CONSUMED VOLUME (AF)	PURPOSE	PERIOD OF USE	PLACE OF USE	PRIORITY DATE	SOURCE
40A 110020	12.5	647.2	190.3	Irrigation	Apr 15 – Oct 1	381.4 Acres	June 15, 1900	Big Elk Creek
40A 30002022	6.58	340.9	100.2	Irrigation	Apr 15 – Oct 1	381.4 Acres	June 15, 1900	Big Elk Creek

Combined Total	19.08 CFS	988.1 AF	290.5 AF	Irrigation	Apr 15 – Oct 1	381.4 Acres	June 15, 1900	Big Elk Creek
-------------------	-----------	----------	----------	------------	-------------------	----------------	---------------	------------------

### CONCLUSIONS OF LAW

34. 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).

35. 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).

36. 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.

37. 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).

38. 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)

39. 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”).

40. 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)).

41. “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.

42. 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.

43. Applicants 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 the Applicant adopted the Department rule for crop consumptive volume but not for diverted volume. The Applicant's estimate for diverted volume is reasonable.

44. Evidence of historic use for Statement of Claim Nos. 40A 110020 and 40A 30002022 has been proven by a preponderance of the evidence as set forth in these findings, and as summarized in the table in Finding of Fact No. 33.

### **Adverse Effect**

#### **FINDINGS OF FACT**

45. Applicant proposes to add a point of diversion (ditch and secondary pumping facility), reconfigure the place of use, and add places of use. The water rights requested to be changed in this proceeding are associated with multiple other changes that will result in a shift in water management on the ranch. The changes have been proposed to facilitate, in part, a conversion from flood to sprinkler irrigation, as well as an exchange in water right priority dates in certain locations. Total acreage irrigated under the two water rights will increase from 381.4 to 477.9 acres, however, the estimated consumptive volume of water used will remain the same (i.e. there will be no difference between historic consumptive use and future consumptive use).

Additionally, the volume of water diverted will not increase over historic appropriations and the period of diversion and use will remain the same. Application.

46. The timing and amount of return flows will change as a result of the conversion from flood to sprinkler irrigation in Big Elk Creek. As a normal course of protocol the Department analyzed the disposition of return flows under the proposed change and generated a Return Flow Report. File. However, on April 1, 2016 the Department issued a policy memorandum explaining how it will analyze return flows for all water right change applications from that date forward. Since the policy was issued prior to issuance of the Preliminary Determination in this matter, the Department will follow the April 1 guidance document. Finding of Fact No. 47 summarizes the Department's analysis under the April 1, 2016 policy.

47. According to Department policy, under the changed conditions return flows will only be reviewed under a limited adverse effect analysis absent a valid objection. For purposes of this Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that will be left instream after the change is available during the period of diversion either below the point of diversion or where return flows accrued to the source. Department Policy Memorandum on Return Flows, April 1, 2016.

48. In this instance, both criteria are met for Big Elk Creek. Return flows under the proposed change will enter back into Big Elk Creek prior to the next appropriator, and any non-consumed water that was historically diverted will now be left instream and be available for other appropriators during the period of diversion below the point where return flows accrued. This will help ensure downstream water users in Big Elk Creek have similar or greater opportunity to appropriate water than they historically did, during the period of diversion. For purposes of Big Elk Creek, the policy directs no further detailed analysis to be undertaken by the Department prior to objections, provided there will be no enlargement of the amounts of water historically diverted or consumed. That has been determined to be the case here - there will be no enlargement of the water rights. Finding of Fact No. 45. If any other water right holder believes they will be adversely affected by a change in the timing and amount of return flows, they may file an objection to the proposed project and further analysis will occur. Department Policy Memorandum on Return Flows, April 1, 2016.

49. Applicant agrees to measure appropriations in both the Freeser-Montgomery Ditch and the pump that will supply water to the two center pivots. Application. Therefore, the

Department imposes measuring conditions in order to monitor and comply with the amount of water authorized.

50. Under the conditions imposed in this determination the Department finds the proposed change will not adversely affect the use of 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.

#### CONCLUSIONS OF LAW

51. 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).

52. 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).

53. 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.

54. 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).

55. 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.

56. 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.

57. The Applicant has proven the proposed change in appropriation right will not adversely affect the use of 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, provided water measurement conditions are complied with. §85-2-402(2)(b), MCA.(FOF No. 50)

## **Beneficial Use**

### **FINDINGS OF FACT**

58. The proposed beneficial use is irrigation of agricultural crops. Irrigation is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

59. The combined (both water rights) amount of water associated with flood irrigation and diverted at the Freeser-Montgomery Ditch will be a flow rate of 10 CFS, a diverted volume of 257.0 AF, and an estimated 75.6 AF per year of consumptive volume. The appropriation will supply irrigation water to 99.2 acres. The per-acre allocation for flow rate is 45 gallons per minute, 2.6 AF in diverted volume, and about 0.8 AF in consumptive volume. The per-acre allocation for diverted flow rate is required due to the length of ditch and losses associated with transport. The per-acre allocation for diverted volume is not uncommon for ditch conveyances

and flood irrigation in Montana. The estimated per-acre allocation for consumed volume is well short of full-service irrigation, but conforms to historic use and will result in greater crop production than dryland cropping. The Department finds the proposed flow rate, diverted volume and consumed volume for flood irrigation purposes to be a beneficial use of water. Application.

60. The combined amount of water associated with center pivot sprinkler irrigation and diverted by the ditch and secondary pumping facility will be a flow rate of 4.68 CFS, a diverted volume of 373.3 AF, and an estimated 214.9 AF per year of consumptive volume. The appropriation will supply irrigation water to 378.7 acres. The per-acre allocation for flow rate is 5.5 gallons per minute, 1.0 AF in diverted volume, and about 0.6 AF in consumptive volume. The per-acre allocation for diverted flow rate is common for high efficiency sprinkler systems. The per-acre allocation for diverted and consumed volume is short of full-service irrigation, but additional water rights are being proposed in a simultaneous change process to move to the two center pivots. The proposal will provide supplemental water to the pivot operation. The Department finds the proposed flow rate, diverted volume and consumed volume for sprinkler irrigation to be a beneficial use of water. Application.

#### CONCLUSIONS OF LAW

61. 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.

62. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to

appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly*, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, *Deaterly v. DNRC et al.*, Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. The Department can also consider waste in a change proceeding. Hohenlohe ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

63. 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).

64. Applicant proposes to use water for Irrigation purposes. Irrigation is supported as a beneficial use of water in §85-2-102(4)(a), MCA. Applicant has proven by a preponderance of the evidence that Irrigation is a beneficial use and that the flow rates and volumes of water indicated in Finding of Fact Nos. 58-60 are beneficial.

### **Adequate Diversion**

#### **FINDINGS OF FACT**

65. Water will be appropriated from Big Elk Creek for irrigation purposes by two different diversion methods: an existing headgate and ditch, and a new 220-foot ditch segment that conveys water to a station with two pumps. The flow rate diverted at the Freeser-Montgomery headgate will be 10 CFS and the flow rate diverted at the ditch and pumping station will be 4.68 CFS.

66. The diversion works for the Freeser-Montgomery Ditch is located in the SESWSW Section 12, T7N, R13E. It consists of a 48-inch flat bottom headgate, a ditch that is 3 feet wide at the bottom and 8 feet wide at the top. A 2-foot wide Parshall Flume measures appropriations, which evidence in the file indicates the ditch is capable of conveying up to 33.0 CFS. The same ditch system will be used for conveying the water as historically to the 99.2 acres of flood irrigated place of use. The Department finds the proposed means of diversion, construction, and operation of the appropriation works for flood irrigation purposes to be adequate.

67. The diversion works for sprinkler irrigation is a headgate located in the NWSNW Section 35, T8N, R13E, with a 220-foot ditch segment that delivers water to a concrete intake basin with two Cornell pumps. The Cornell pumps are 75 and 100 horsepower respectively, with 1800 RPM electric motors. The pumps supply a common 16-inch diameter pipeline, and operate simultaneously to run both pivots. The pumping facility is equipped with a McCrometer totalizing flow meter to monitor flow rate and volume of water diverted. The pumps are capable

of appropriating 4.68 CFS. The Department finds the proposed means of diversion, construction, and operation of the appropriation works for sprinkler irrigation purposes to be adequate.

#### CONCLUSIONS OF LAW

68. 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.

69. 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).

70. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. §85-2-402 (2)(b), MCA. (FOF Nos. 66 and 67).

### **Possessory Interest**

#### **FINDINGS OF FACT**

71. The Applicant signed and had the affidavit on the application form notarized affirming it 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.

#### **CONCLUSIONS OF LAW**

72. Pursuant to § 85-2-311(1)(e), MCA, an 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 use has 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 under the permit.

73. 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.

**74.** 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. § 85-2-311(1)(e), MCA. (FOF No. 71)

### **Salvage Water**

This Application does not involve salvage water.

### **CONDITIONS**

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 40A 30072563 THE DEPARTMENT FINDS THE FOLLOWING CONDITIONS ARE NECESSARY TO MEET THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT § 85-2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

#### **\*\*WATER MEASUREMENT AND RECORDS REQUIRED**

THE APPROPRIATOR SHALL INSTALL DEPARTMENT-APPROVED MEASURING DEVICES IN THE FREESER-MONTGOMERY DITCH AND DIVERSION WORKS FOR THE TWO CENTER PIVOTS. THE LOCATION OF THE MEASURING DEVICES MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED BY EACH OF THE DIVERSION FACILITIES, INCLUDING THE PERIOD OF TIME.

RECORDS OF APPROPRIATIONS FOR EACH SET OF DIVERSION WORKS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

SUBMIT RECORDS TO:  
LEWISTOWN WATER RESOURCES REGIONAL OFFICE  
613 NE MAIN ST, SUITE E  
LEWISTOWN, MT  
PHONE: 406-538-7459  
FAX: 406-538-7012

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 40A 30072563 should be **GRANTED**. Applicant is authorized to add a point of diversion, reconfigure and add places of use for irrigation purposes for Statement of Claim Nos. 40A 110020 and 40A 30002022. The additional point of diversion for pivot irrigation shall be a ditch and pumping station, with the headgate located in the NWSENE Section 35, T8N, R13E, and the method and place of use shall be two center pivots irrigating 378.7 acres generally located in Sections 25, 26, 35 and 36, T8N, R13E (see map in this Order). The combined (both water rights) amount of water associated with center pivot sprinkler irrigation and diverted by the ditch and secondary pumping facility will be a flow rate of 4.68 CFS and a diverted volume of 373.3 AF annually. 99.2 acres will continue to be flood irrigated by the Freeser-Montgomery Ditch, and the places of use for flood irrigation are generally in the SW1/4 Section 35 and E1/2 Section 25, T8N, R13E. The combined amount of water associated with flood irrigation and diverted at the Freeser-Montgomery Ditch will be a flow rate of 10 CFS and a diverted volume of 257.0 AF per season.

The Appropriator shall monitor, record and report on water use as described in the Conditions section of this Preliminary Determination.

### **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 21st day of July, 2016.

/Original signed by Scott Irvin/  
Scott Irvin, Regional Manager  
Lewistown Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 21<sup>st</sup> day of July, 2016, by first class United States mail.

MCFARLAND WHITE RANCH INC  
PO BOX 235  
TWO DOT, MT 59085

MIKE MEREDITH  
HYDROSOLUTIONS INC  
1500 POLY DRIVE SUITE 103  
BILLINGS, MT 59102

---

Lewistown Regional Office  
(406) 538-7459