

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

APPLICATION TO CHANGE A WATER RIGHT NO. 41A 30072573 BY MONTANA) DEPARTMENT OF FISH, WILDLIFE AND) PARKS)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On March 3, 2015, Montana Department of Fish, Wildlife and Parks (Applicant or DFWP) submitted Application to Change a Water Right No. 41A 30072573 to change Statement of Claim No. 41A 110697 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 §85-2-302, Montana Code Annotated (MCA), August 28, 2015. Applicant responded on September 2, 2015. The Application was determined to be correct and complete on November 19, 2015. Applicant waived the statutory timelines for a Preliminary Determination on March 3, 2016. An Environmental Assessment for this Application was completed on April 29, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606, addendums and attachments

Information Received after Application Filed:

- Deficiency response on September 2, 2015
- Email dated January 21, 2016 from Andy Brummond, DFWP, to Doug Mann, DNRC, estimating the capacity of a Long Creek Ditch
- Phone communication with Andy Brummond, Applicant (DFWP) on January 22, 2016 clarifying the reach of stream proposed for instream flow

- Memorandum dated January 29, 2016 from Andy Brummond, DFWP, to Doug Mann, DNRC, correcting/amending consumptive use calculations for historic use and the proposed post-change conditions
- Verbal communication with Mike Roberts, DNRC Hydrologist, on February 1, 2016, regarding Applicant’s methodology for determining amounts of water used
- Verbal communication with Russell Levens, DNRC Groundwater Hydrologist, on February 3, 2016, regarding Applicant’s assessment of historic diversions and return flows
- Multiple email and verbal communications with Andy Brummond (DFWP) discussing protected flow rates and volumes, beginning February 15, 2016

Information within the Department’s Possession/Knowledge

- Publically available aerial photos and topographic maps
- Water right records, including files for the Statement of Claims proposed to be changed
- USDA Web Soil Survey
- Pre-Application meeting
- Statute and administrative rules
- Irrigation Change Application Technical Report

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

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant proposes to change one Statement of Claim.

Table 1: CLAIMED WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41A 110697	Irrigation	Waste/Seepage UT Long Creek	2.5 CFS	May 1 – Sept 15	Two diversion points located in the NE and SE Sec. 29, T13S, R4W	SW Sec. 28 and SE Sec. 29, T13S, R4W	Oct. 7, 1915	113.0

CHANGE PROPOSAL

FINDINGS OF FACT

2. Applicant proposes to change Statement of Claim No. 41A 110697 to the purpose of Instream Flow for a temporary period of 10 years. This application is one of four applications being processed simultaneously by the Department to meet the goal of enhancing the fishery in Long Creek. The reach of stream to benefit from the Instream Flow change (protected reach) in this matter is Long Creek beginning in the SE 1/4 Section 29, T13S, R4W, to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. This is the reach of stream that return flows from the place of use historically accrued to Long Creek. The source for the right to be changed is waste and seepage water derived from upgradient irrigation practices. The water right will continue to be used for irrigation purposes in May and June, as it historically has, and change to Instream Flow during the period July 1 through September 15. During the period July 1 through September 15, irrigation of upgradient irrigated parcels will cease, which will eliminate the development of waste and seepage water that was historically used for irrigation on the 113-acre place of use.

3. Starting in July, due to the cessation of upgradient irrigation, water will either be allowed to flow downstream in Long Creek or collected in a ditch and directed into Long Creek at a point in the SWNWSW Section 21, T13S, R4W. The ditch is located upstream of the protected reach and the same location that return flows from upgradient irrigation practices will be directed into Long Creek. The proposed amount to be protected for Instream Flow is the amount historically consumed from the source during the period of July 1 through September 15. That amount is 205.1 AF. The consumed amount includes water that was formerly evapotranspired by the crop and other irrecoverable losses, as well as non-consumed water that was diverted for irrigation but did not migrate back to the stream until after the irrigation season in the form of return flows. All of the water considered “consumed to the reach” in this downstream segment was unavailable to other water users during the period of July 1 through September 15. File; verbal communications with Andy Brummond, DFWP.

4. The flow rates to be protected in Long Creek downstream of the historic return flow point are 1.66 CFS in July, 1.38 CFS in August, and 0.61 CFS in September. These are the amounts of water the Applicant claims were historically consumed to the downstream reach of Long Creek

during the July through September period. Verbal communication with Andy Brummond, DFWP.

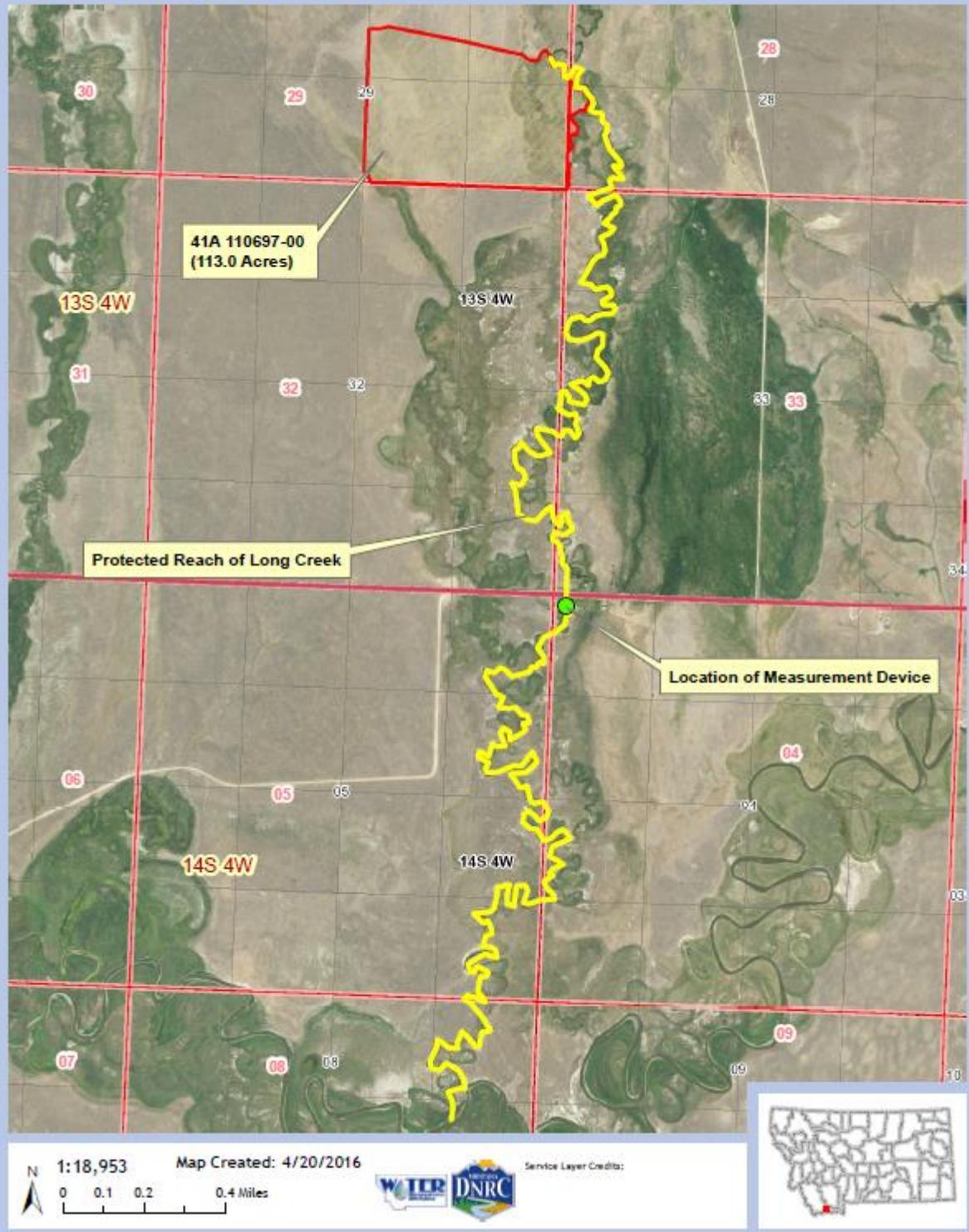
5. The proposed change to Statement of Claim No. 41A 110697 is part of a multi-water right change to enhance the fishery (Arctic Grayling) in Long Creek. As such, the Preliminary Determinations for this application and the following applications are associated and should be read in conjunction with one another in order to understand the full effects of the proposal (41A 30072650, 41A 30072651 and 41C 30072652).

6. In this proposal a change from historic flood irrigation practices to instream flow will occur during the period of July 1 through September 15. As such, the timing of irrigation applications on the place of use and return flow pattern in Long Creek will change. The effects of these changes are discussed in the Adverse Effect section below.

7. Applicant has included specific information on the length and location of the stream reach to be protected and submitted a measurement plan as required by statute. Application; MCA 85-2-436(2)(c).

8. A map of the water right proposed for change follows:

TNC/FWP Change 41A 30072573



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

11. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶ 43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

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

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

....

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

directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

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

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

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

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

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

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

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

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

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

decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

14. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. [Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 \(1905\)](#). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. [In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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

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

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

volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

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

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

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

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

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

....

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

....

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

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

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

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

Historic Use

FINDINGS OF FACT

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

20. The source of water for Statement of Claim No. 41A 110697 is Waste and Seepage. Waste and seepage water is derived from upgradient irrigation practices, with waters that originate from Long Creek, Divide Creek, West and Middle Creeks. The water rights appurtenant to the upgradient irrigation include Statement of Claim Nos. 41A 110699, 41A

110700 and 41C 110701, which are separately proposed for change in simultaneous proceedings for the same goal in this matter of enhancing the fishery in Long Creek. Water that is not consumed under the upgradient irrigation operation flows and seeps to two points of diversion, where it is then captured, rediverted and reused under Statement of Claim No. 41A 110697. The two diversion points are located in the SWNENE Section 29, and the NENESE Section 29, both in T13S, R4W, Beaverhead County. The diversions and conveyance systems that distribute water throughout the place of use are observable on multiple aerial photos. Topographic map review confirms the ability of the ditch system to convey water from the diversions to the places of use. Application; Department Technical Report.

21. The claimed period of appropriation is May 1 through September 15. The Application indicates May 1 is the earliest date appropriations historically occurred. Water diverted from the various sources and applied to upgradient parcels historically began on May 1, and accrued into the parcel to be changed at the same time. The general growing season for Climatic Area IV is April 20 to October 10. The Department finds the claimed period of appropriation and use of May 1 to September 15 to be reasonable. Statement of Claim No. 41A 110697; application; ARM 36.12.112(1)(c)(4).

22. The historic flow rate identified in Statement of Claim No. 41A 110697 is 2.5 CFS. Appropriations occurred via two diversions located in channels and ditches upgradient of the place of use. However, appropriations under the water right in this matter are best characterized as an extension of upgradient water use under three other water rights, as multiple ditches from upgradient irrigation practices convey water into the place of use. The ditches from above have been extended and physically connected with ditches subject to this water right to be changed. The primary ditch supplying the upgradient irrigation originates from Long Creek and the Applicant provided ditch capacity estimates showing the conveyance system has a capacity of at least 12.0-13.5 CFS. Preliminary Determination for Application to Change No. 41A 30072650. The claimed flow rate of 2.5 CFS in this matter derives its source of water from the appropriation from Long Creek and other sources. The Applicant also provided a photograph of the most northerly of the two diversions serving 41A 110697-00, taken at a time when water use was occurring. The photo shows water flowing in the ditch (a discernable flow can be seen in the

photo) with an ATV parked alongside the ditch. The ATV provides a visual reference as to the size of the ditch (the ditch appears to be as wide as the ATV). The Department finds that the Applicant has provided sufficient evidence that the two points of diversion are collectively capable of diverting the claimed flow rate of 2.5 CFS. File; Department Technical Report; Applicant's Deficiency Response; Preliminary Determination for Application To Change An Irrigation Water Right No. 41A 30072650.

Place of Use

23. The claimed place of use for Statement of Claim No. 41A 110697 is 113 acres generally located in the SW1/4 Section 28 and SE1/4 Section 29, T13S, R4W. The Department's examination for adjudication purposes verified the claimed 113 acres as irrigated. File for Statement of Claim No. 41A 110697.

24. No Water Resources Survey was published in Beaverhead County, therefore, that resource is unavailable for review.

25. For purposes of this change proposal, the Department reviewed aerial photos taken in 1954, 1965, 1967 and 1979. Its interpretation of the photos indicate that 113 acres were historically irrigated, with ditches traversing throughout the place of use. Varying levels of shade contrast consistent with irrigation practices are observable within the place of use. The Department finds that 113 acres were historically irrigated. Department Technical Report.

Volume of Water Historically Diverted and Consumed

26. Water usage on the 113 historically irrigated acres developed from and occurred as a result of water flowing and seeping from upgradient irrigation practices. Appropriations under three other water rights essentially extended downgradient into the place of use for the water right proposed for change in this matter.

27. Applicant used the Department's administrative rule to define the historic crop consumptive use as 82.5 AF on 113 irrigated acres. Applicant did not calculate irrecoverable losses into its consumptive volume because of the nature of the water source (waste and seepage). The application materials indicate that irrecoverable losses should not be calculated as part of the consumptive use because they were already accounted for in the upgradient irrigation

that creates the waste and seepage. The Department agrees with Applicant and finds the historic consumptive volume to be 82.5 AF. Application; February 1, 2016 Memorandum from Andy Brummond to Doug Mann.

28. The Applicant conformed to the administrative rule for crop consumptive volume, a volume of 82.5 AF. The Department methodology for estimating diverted volume is the historic consumptive use of 82.5 AF divided by the on-farm efficiency of 25%, or 330.0 AF annually. February 1, 2016 Memorandum from Andy Brummond to Doug Mann.

Historic Use

29. The Department’s findings of historic use for Statement of Claim No. 41A 110697 is summarized in the table below.

W.R. NO.	FLOW RATE	DIVERTED VOLUME	CONSUMED VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	PRIORITY DATE	SOURCE
41A 110697	2.5 CFS	330 AF	82.5 AF	Irrigation	May 1 – Sep 15	113 acres	Oct 7, 1915	Waste & Seepage

CONCLUSIONS OF LAW

30. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. §85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of

Montana water law and imperative to MWUA change provisions, *citing Featherman v. Hennessy*, (1911) 43 Mont. 310, and *Quigley v. McIntosh*, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 *Water and Water Rights* at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

31. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right, or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, reflecting basic water law principles).

32. The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. *Id.* at Pg. 14.

33. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of

Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

34. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16)

35. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

36. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights*

in Rio Grande County, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

37. “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, *supra*.

38. The Department has the authority to consider waste in determining a volume for change in a water right.

The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.](#)

Hohenlohe ¶ 71.

39. 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 and the Department calculated the diverted volume.

40. Evidence of historic use for of Statement of Claim No. 41A 100697 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. 29.

Adverse Effect

FINDINGS OF FACT

41. Applicant proposes to change Statement of Claim No. 41A 110697 to the purpose of Instream Flow from July 1 through September 15, annually, for a temporary period of 10 years. The proposed change is part of a multi-water right change for purposes of the same project and goal of supporting the fishery in Long Creek. During the period of July 1 through September 15 upgradient irrigation practices will cease, which will result in cessation of irrigation for this Waste and Seepage water right. The water right will be changed to non-consumptive Instream Flow to primarily benefit Arctic Grayling. The reach of stream to benefit from the Instream Flow change is Long Creek beginning in the SE ¼ Section 29, T13S, R4W, to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. Irrigation diversions will continue to occur from May 1 through June 30, during which period the same amount of water will be diverted and consumed as it has historically in those months.

42. From July 1 through September 15 the amount of water historically consumed under the irrigation operation will, instead, be diverted to Long Creek for instream purposes.

43. The historical method of irrigation has been wild flood with an estimated on-farm/field efficiency of 25%. The appropriator historically rediverted waste and seepage water from upgradient irrigation practices of up to 2.5 CFS, with a diverted volume of 330 AF and a consumed volume of 82.5 AF. Under the proposed plan, since upgradient irrigation practices will cease during the months of July, August and September, no waste water will be generated from upgradient lands, and therefore irrigation will cease on the subject 113-acre place of use.

44. The timing and amount of return flows will change as a result of the partial-season conversion from irrigation to instream flow. Given the topography and proximity of the place of use to Long Creek, return flows from the Applicant's historically irrigated acreage accrued to Long Creek upstream of the Red Rock River confluence.

45. 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. 43 summarizes the Department's analysis under the April 1, 2016 policy.

46. According to Department policy, return flows will only be reviewed under a limited adverse effect analysis absent a valid objection. For purposes of the Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that is left instream is available during the period of diversion either below the point of diversion or where return flows returned to the source. Department Policy Memorandum on Return Flows, April 1, 2016. In this instance, the same amount of water will be available for other appropriators during the period of diversion below the point where return flows historically accrued. This will help ensure downstream water users have similar or greater opportunity to appropriate water than they historically did, during the period of diversion. The policy directs no further detailed analysis will be undertaken by the Department unless objections relative to return flows are received, 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 right. Finding of Fact Nos. 41 and 42.

47. 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.

48. Based on guidance provided in policy, the Department preliminarily finds that changes to return flows resulting from the proposal will not cause an adverse effect.

49. MCA 85-2-436(3)(c) requires the Applicant to provide specific information on the length and location of the protected reach of stream, and a detailed streamflow measuring plan. The length and location of the protected reach in Long Creek is from the historic return flow point to the Red Rock River. Only the historic consumed volume of water during the months of July 1 through September 15 will be protected in this reach. A measuring device will be located in Long Creek approximately one mile downstream of the return flow accretion point in order to administer the protected consumed flow rate and volume of water. The Department finds the Applicant's plan for measurement of water to be reasonable and necessary for accounting for the benefit to the fishery and the administration of water. The Department imposes a measurement condition, based on this plan, as part of this decision. See Conditions section. File.

50. Under the conditions imposed in this determination, the Department finds that the proposed change would 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 Applicants have proven that 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. §85-2-402(2)(b), MCA.(FOF Nos. 48 and 50)

Beneficial Use

FINDINGS OF FACT

58. The primary proposed beneficial use is Instream Flow to benefit the Arctic Grayling fishery in Long Creek. Applicant (Montana Department of Fish, Wildlife and Parks) indicates that other species of aquatic life will benefit from the change as well. Irrigation operations will continue to occur in the months of May and June, when runoff conditions are typically sufficient to meet fishery needs. The change to instream flow will occur from July 1 through September 15, during the period when flows can be critically low. The critical time for survival of young grayling is from spawning through incubation and emergence, which generally extends to the end of July. In August and September additional flows are desirable to allow for sufficient food production for fish, allow fish movement from pool to pool, and maintain water temperatures conducive to the grayling fishery. Application.

59. The flow rates to be changed in the protected reach of stream *downgradient* of the historic return flow point are up to 1.66 CFS in July, 1.38 CFS in August, and 0.61 CFS in

September, and the volume to be changed 205.1. This is commensurate with the amount historically consumed from the source during the period of July 1 through September 15. This estimate includes any water that was unavailable to other water users during the July through September period, but returned to Long Creek outside that period. See table below for calculated volumes and flow rates.

Historic Irrigation (Jul – Sep)			*Proposed Change To Instream Flow (Jul-Sep)					
Month	Water Applied To Field (AF)	Return Flows During July-Sept (AF)	Water Applied To Field (AF)	*Return Flows From May-June Appropriations (AF)	Change in Monthly Return Flows (AF)	Historic Monthly Applied Volume To Be Left Instream (AF)	Historic Monthly Applied Volume To Be Left Instream Minus Change In Monthly Return Flows (AF)	Monthly Flow (CFS)
July	116.94	21.78	0.0	7.03	-14.75	116.94	102.19	1.66
Aug	100.9	22.55	0.0	6.39	-16.16	100.9	84.74	1.38
Sep	34.04	22.03	0.0	6.19	-15.84	34.04	18.20	0.61
							205.13	

* Return Flows (AF) – The numbers cited in this column result from irrigation water applied during May and June that returns to Long Creek during the period of July through September.

60. Montana Department of Fish, Wildlife and Parks (DFWP) is a state agency charged with management of fisheries in Montana. DFWP is staffed with fishery and hydrology experts that understand fishery needs and the amount of water required to support fishery habitats. The Department finds that the Applicant (DFWP) has expert knowledge of the subject and has proven the proposed amounts of water in this matter are beneficial and reasonable for enhancing the grayling fishery in Long Creek. The breakdown of protected flow rate and volume per month is shown in the following table for the water right to be changed.

Month	Consumed Flow Rate	Days Diverted	Volume Protected
	(CFS)	(#)	(AF)
Jul	1.66	31	102.19
Aug	1.38	31	84.74
Sep 1-15	0.61	15	18.20
		SUM =	205.1

61. The Department finds the amounts of water to be changed to Instream Flow purposes are beneficial. FOF No. 59.

CONCLUSIONS OF LAW

62. 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.

63. 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.

64. 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).

65. Applicant proposes to use water for an additional purpose of Instream Flow, which is a beneficial use. §85-2-102(4)(c), MCA. Applicant has proven by a preponderance of the evidence that Instream Flow is a beneficial use and that the flow rates and volumes of water protected and indicated in Finding of Fact No. 57 are beneficial.

Adequate Diversion

FINDINGS OF FACT

66. This application is excepted from the criteria of §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.” (emphasis added)

Possessory Interest

FINDINGS OF FACT

67. This application is excepted from the criteria of §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.” (emphasis added).

Instream Flow Change Requirements 85-2-436, MCA

FINDINGS OF FACT

68. Applicant proposes to change an irrigation water right based on waste and seepage water to Instream Flow purposes. The period in which the change will be effective is from July 1 through September 15, annually. Simultaneous to this proceeding are three other water right

change proposals/applications from the Applicant to benefit the same purpose during the same period. The combination of proposals, including multiple sources of water, will benefit the Arctic Grayling fishery in Long Creek. As proposed by the Applicant, this temporary change will be for a period of 10 years with an option to renew.

Protected Reaches and Flow Rates

69. The protected reach proposed by the Applicant for this change is Long Creek beginning in the the SE ¼ Section 29, T13S, R4W to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The flow rates protected in the reach are 1.66 CFS in July, 1.38 CFS in August, and 0.61 CFS in September. Finding of Fact No. 59. The flow rate assigned for each month is calculated based on the volume of water consumed from the source, averaged evenly throughout the month.

70. The Department finds that the monthly flow rates the Applicant proposes to protect are reasonable and supported by the evidence.

Protected Volume

71. The protected volume of water for Instream Flow purposes is 205.1 AF from July 1 through September 15. Finding of Fact No. 59.

72. Pursuant to §85-2-408, MCA, in the reach below the point at which return flows enter Long Creek, the amount of water historically consumed may be used to maintain or enhance streamflows to benefit the fishery. The protected volume of 205.1 AF is the amount of water that is estimated to have been historically unavailable to other appropriators during the period of July 1 through September 15 (the period the water right is proposed to be changed to Instream Flow). The estimate includes the volume of water historically applied for irrigation purposes, minus the reduction in estimated return flows from ceasing irrigation July through September. This is considered by the Department to be the amount of water consumed from the source.

Plan for Operation and Measurement

73. Applicant's plan for operation and measurement of the instream flows is to install a measuring device in Long Creek approximately one mile downstream of the historic return flow accretion point in order to administer the protected consumed flow rates and the volume of water. The length and location of the protected reach in Long Creek is from the historic return flow point to the Red Rock River. Only the consumed volume of water during the months of

July 1 through September 15 will be protected in this reach. The Department finds the Applicant's plan for measurement of water to be reasonable and necessary for accounting for the benefit to the fishery and the administration of water. The Department imposes a measurement condition, based on this plan, as part of this decision. See Conditions section. File.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

79. The Applicant has provided a measurement plan and specific information on the stream reach to be protected. FOF Nos. 69 and 73.

80. The Applicant has proven by a preponderance of the evidence that the temporary change authorization will not adversely affect the rights of other persons. FOF No. 50.

81. The Applicant has proven by a preponderance of evidence that the amounts of water indicated in the Protected Reaches and Flow Rates, and Protected Volume sections above are the amounts needed to maintain or enhance instream flows to benefit the fishery resource. FOF Nos. 69 and 71.

Salvage Water

This Application does not involve salvage water.

CONDITIONS

WATER MEASUREMENT AND RECORDS REQUIRED:

1. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED WATER USE MEASURING DEVICE IN LONG CREEK IN THE NWNWNW SECTION 4, T14S, R4W, LOCATED APPROXIMATELY 1.5 MILES ABOVE THE CONFLUENCE OF LONG CREEK AND THE RED ROCK RIVER. THIS POINT REPRESENTS THE MEASURING POINT FOR WATER PROTECTED IN THE CONSUMED REACH OF STREAM. WATER MUST NOT BE ADMINISTERED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN WEEKLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER ADMINISTERED UNDER THE PLAN INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 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 DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:
HELENA WATER RESOURCES REGIONAL OFFICE
1424 NINTH AVE
PO BOX 201601
HELENA, MT 59620-1601
(406)444-6999

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. 41A 30072573 should be **GRANTED**. Applicant is authorized to change Statement of Claim No. 41A 110697 to the purpose of Instream Flow, for a portion of the irrigation season (from July 1 through September 15), for a temporary period of 10 years. The reach of stream to benefit from the Instream Flow change is Long Creek beginning in the SE ¼ Section 29, T13S, R4W to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The flow rates of water protected for instream flow purposes in the reach downstream of the point where return flows historically entered Long Creek to the Red Rock River are 1.66 CFS in July, 1.38 CFS in August, and 0.61 CFS in September. The total volume that is protected in the reach is 205.1 AF.

The Permittee 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 5th day of May, 2016.

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 5th day of May, 2016, by first class United States mail.

MONTANA FISH, WILDLIFE AND PARKS
PO BOX 200701
HELENA, MT 59620-0701

Lewistown Regional Office
(406) 538-7459