

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

APPLICATION TO CHANGE A WATER RIGHT NO. 41A 30072650 BY MONTANA) DEPARTMENT OF FISH, WILDLIFE AND) PARKS)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On March 12, 2015, Montana Department of Fish, Wildlife and Parks (Applicant or DFWP) submitted Application to Change a Water Right No. 41A 30072650 to change Statement of Claim No. 41A 110699 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), September 8, 2015. Applicant responded on September 25, 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 May 5, 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 25, 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 the following 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 110699	Irrigation	Long Creek	12.50 CFS	May 1 – Sept 15	Two diversions located in the SE Sec. 16 and SW Sec. 21, T13S, R4W	Sections 20, 21, 28, and 29, T13S, R4W	Oct. 15, 1888	505.0

CHANGE PROPOSAL

FINDINGS OF FACT

2. Applicant proposes to change Statement of Claim No. 41A 110699 to the purpose of Instream Flow, for a portion of the irrigation season, for a temporary period of 10 years. The reach of stream to benefit from the Instream Flow change is Long Creek beginning in the SWNWSW Section 21, T13S, R4W, to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The proposed flow rate to be changed to Instream Flow is up to 7.0 cubic feet per second (CFS) in July, 4.0 CFS in August, and 3.0 CFS from September 1 through 15. A volume of 765.4 acre-feet (AF) is proposed to be changed upstream of the point where return flows historically entered Long Creek from irrigation practices, and a volume of up to 461.7 acre-feet (AF) downstream of the historic return flow point (protected reach). The water right will continue to be used for irrigation purposes in May and June, as it historically has, and shift to Instream Flow purposes from July 1 through September 15. During the period July 1 through September 15, irrigation of the historic place of use will cease.

3. The amount of water to be changed to Instream Flow purposes is based on the amount historically associated with irrigation practices during the latter half of the irrigation season, and is different upstream of the historic places of use than it is downstream. Upstream of the point where return flows have accrued to Long Creek from the irrigation operation, the amount of water changed is reflective of the amount historically diverted and applied for irrigation purposes. Downstream of the point where return flows from irrigation have accrued to Long Creek, the amount historically *consumed to the reach* will be left instream for the partial season. That amount is 461.7 AF. This downstream segment is considered to be the protected reach, and 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 amount of water to be changed to Instream Flow in the upstream reach of Long Creek (upgradient of the return flow point) are flow rates of up to 7.0 cubic feet per second

(CFS) in July, 4.0 CFS in August, and 3.0 CFS from September 1-15, and a total volume of up to 765.4 acre-feet (AF). These are the amounts of water the Applicant claims were typically available for appropriation in Long Creek, from July 1 through September 15. Application.

5. The amount of water to be changed to Instream Flow in the downstream reach of Long Creek (downgradient of the return flow point), or the protected reach, are flow rates of up to 4.92 CFS in July, 2.06 CFS in August and 1.10 CFS from September 1-15, and a total volume of up to 461.7 acre-feet (AF). 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.

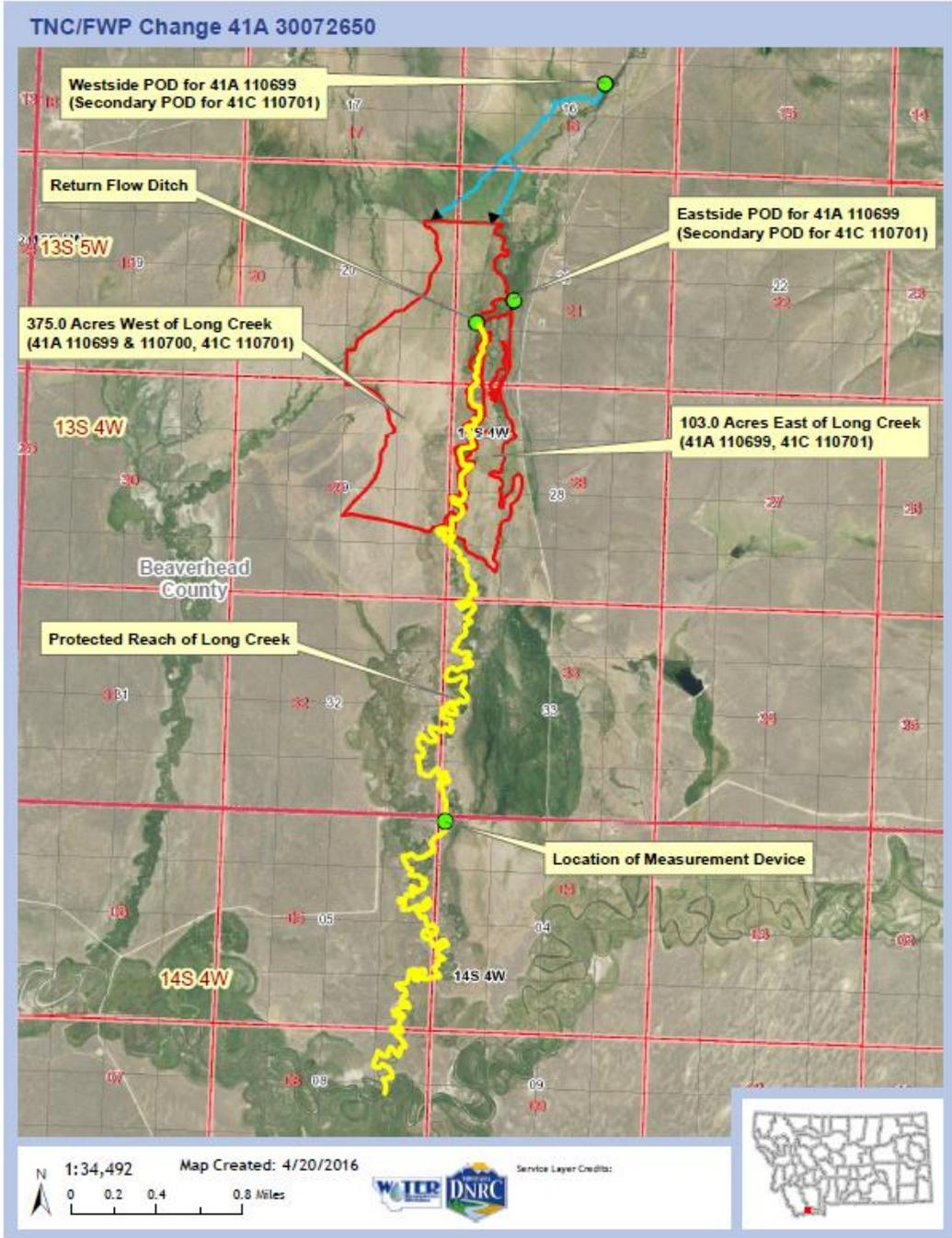
6. The proposed change to Statement of Claim No. 41A 110699 is part of a multi-water right change by the Applicant to benefit the fishery (Arctic Grayling) in Long Creek. The amounts of water protected in the downstream reach (FOF 5) are commensurate with the amounts proposed for protection in a simultaneous change process for Statement of Claim No. 41C 110701 (an appropriation from Divide Creek). Historically, the two sources have been comingled and diverted/applied to the same places of use. Application; verbal communication with Andy Brummond, DFWP.

7. 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 complete effects of the proposal to enhance the fishery in Long Creek (41A 30072573, 41A 30072651, and 41C 30072652).

8. In this proposal a change from historic flood irrigation practices to instream flow will occur during the period of July 1 through September 15. Therefore, 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.

9. 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).

10. A map of the proposed change follows:



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

11. 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.

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

13. 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).

14. 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.

15. 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*).

16. 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](#).

17. 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).

18. 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.

19. 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.

20. 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).

21. 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

22. The source of water for Statement of Claim No. 41A 110699 is Long Creek. Water is diverted from two points from the source: 1) NENWSE Section 16, T13S, R4W, and 2) NWNESW Section 21, T13S, R4W. The diversion points and ditch systems are evident on aerial photo resources, showing the physical connection from the diversions to the places of use.

Topographic map review confirms the physical ability to convey water from the point of diversion to the places of use. Aerial photo; topographic map.

23. The claimed period of appropriation is May 1 through September 15. The Application indicates May 1 is the earliest date appropriations historically occurred. Additional information in the application asserts that Long Creek has been used at various periods between early May through mid-September. The general growing season for Climatic Area IV is April 20 to October 10. The Department finds the claimed period of appropriation and use to be reasonable. Statement of Claim No. 41A 110699; application; ARM 36.12.112(1)(c)(4).

24. The historic flow rate identified in Statement of Claim No. 41A 110699 is 12.5 CFS. Appropriations occurred via two ditches in Long Creek. Applicant included evidence of the capacity of each ditch to convey at least 12.0 – 13.5 CFS, based on headgate and ditch dimensions acquired during a site investigation, and modeled appropriations. The estimates show that the combined capacities of the two ditches exceed the claimed flow rate of 12.5 CFS. The Department finds the historic flow rate to be 12.5 CFS. File (see February 11, 2015 memorandum from Andy Brummond, DFWP Water Conservationist).

Place of Use

25. The claimed place of use for Statement of Claim No. 41A 110699 is 505 acres generally located in Sections 20, 21, 28, and 29, T13S, R4W, Beaverhead County. The place of use overlaps with two other claimed water rights (41C 110701 and 41A 110700). Statement of Claim No. 41A 110699; application.

26. The Department's examination for adjudication purposes found the claimed 505 acres as irrigated. File for Statement of Claim No. 41A 110699.

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

28. During initial review of the application to determine if it was correct and complete, the Department sent the Applicant a deficiency letter. The Department questioned the historic use on 27 of the 505 claimed acres, lying east of Long Creek. Applicant responded agreeing that the 27 acres were not irrigated, and that the proposed acreage to be retired is 478 acres.

29. 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 478 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 478 acres were historically irrigated. Department Technical Report; Applicant's deficiency letter.

Volume of Water Historically Diverted and Consumed

30. Water usage on the 478 historically irrigated acres was accomplished under a combination of three rights and three different sources of water. The volume of water diverted and consumed from each source to irrigate overlapping places of use varies each year depending on snowpack, precipitation and runoff conditions in each drainage. The application materials and verbal communications with the Applicant acknowledge the historic variability of appropriations. The Department's findings for the amounts of water used reflect amounts that could conceivably have occurred under each individual water right if that right was the sole source of water. However, the water rights and sources of water also need to be considered conjunctively, since they are co-mingled and beneficially used on the same place of use. The Department proceeds in this matter with the recognition that stream conditions and appropriations are variable. The diverted and consumed volume for the places of use in any given year shall not be construed to be the sum total assigned to the combination of overlapping water rights. The combined amounts of water used are constrained by beneficial use on the irrigated place of use.

31. Applicant used the Department's administrative rule to define the historic crop consumptive use as 348.9 AF on 478 irrigated acres. Applicant further calculated irrecoverable and conveyance losses at 90.3 AF, for a total consumptive volume of 439.2 AF (348.9 AF + 90.3 AF = 439.2 AF). The estimate for irrecoverable losses was based on the Applicant's estimate for diverted volume. Application; February 1, 2016 Memorandum from Andy Brummond to Doug Mann.

32. While the Applicant conformed to the administrative rule for crop consumptive volume, it did not do so for diverted volume. The diverted volume was calculated under a different methodology. The historic diverted volume was calculated by the Applicant to be 1,806.5 AF,

based on the actual historic pattern of appropriations and the availability of water, not on the Department’s methodology for determining diverted volume. Applicant’s method results in a diverted volume that is slightly greater than what would be calculated under the Department’s method. The on-farm efficiency rate of Applicant’s estimation results in 19% efficiency for the wild flood irrigation system, a value that is supported as reasonable by Department Hydrologist Mike Roberts. The Department finds Applicant’s method for estimating diverted volume and consumed volume (including irrecoverable losses) is reasonable. The diverted volume is 1,806.5 AF, and the consumed volume is 439.2 AF. February 1, 2016 Memorandum from Andy Brummond to Doug Mann; verbal communication with Mike Roberts, DNRC Hydrologist, on February 1, 2016

Historic Use

33. The Department’s findings of historic use for Statement of Claim No. 41A 100699 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 110699	12.5 CFS	1,806.5 AF	439.2 AF	Irrigation	May 1 – Sep 15	478 acres	Oct 15, 1888	Long 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 of Statement of Claim No. 41A 100699 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 change Statement of Claim No. 41A 110699 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 enhancing the fishery in Long Creek. During the period of July 1 through September 15 irrigation appropriations at the two diversions in Long Creek will cease, and the water right will be changed to non-consumptive Instream Flow to primarily benefit Arctic Grayling. The downstream reach of stream (protected reach) to benefit from the Instream Flow change is Long Creek beginning in the SWNWSW Section 21, 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.

46. From July 1 through September 15 the amount of water historically diverted under the irrigation operation will, instead, be left instream. This amount will be protected upstream of the point where return flows from the irrigated places of use accrue to Long Creek (below the two diversion points). Below the return flow point, only the volume of water historically consumed to the reach, and during the period of appropriation, will be protected. That volume is 461.7 AF. Finding of Fact No. 3.

47. The historical method of irrigation has been wild flood with an estimated on-farm/field efficiency of 19%. The appropriator historically diverted a flow rate of 12.5 CFS, with a diverted volume of 1,806.5 AF. Statement of Claim No. 41A 110699 is associated with two additional water right claims (41C 110701 and 41A 110700). The sources of water for the associated water rights are Divide Creek and Waste and Seepage. The combination of sources/water rights are used on all or a portion of the 478 acres identified as historically irrigated in this matter. Water that was formerly diverted and/or consumed from Long Creek during the months of July, August and September, will be converted to instream non-consumptive use. The diverted and consumed volume for the water right to be changed in this

matter, as well as that for the other associated water rights, will vary each year, depending on water availability and stream conditions in each drainage.

48. 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. Specifically, return flows have historically accrued to Long Creek at a point that the Applicant identifies as the East Ditch, in the SWNWSW Section 21, T13S, R4W.

49. 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. 50 summarizes the Department's analysis under the April 1, 2016 policy.

50. 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 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 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 right. Finding of Fact No. 33.

51. 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.

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

53. 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 from irrigation operations to the Red Rock River. Only the volume of water historically consumed to the reach during the period July 1 through September 15 (up to 461.7 AF) will be protected from the point where historic return flows accrued in Long Creek to the Red Rock River. See Finding of Fact No. 3 for an explanation of “consumed to the reach.” A measuring device will be located in Long Creek just above the return flow point in order to administer the plan and account for beneficial use. A second measuring device will be located in Long Creek at a downstream point nearer the Red Rock River in order to administer the protected consumed flow rate and volume of water. In addition, since this change is but one of a package of related changes, the Applicant will be implementing another measuring location in order to administer the package. It will measure a wastewater return ditch that collects water generated from upgradient irrigation, and this inflow of water will be administered in conjunction with Long Creek and Divide Creek flows so as not to exceed the collective amount authorized for Instream Flow purposes. The Department finds the Applicant’s plan for measurement of water to be reasonable and necessary for accounting for the benefit to the fishery, the amount it appropriates, and the administration of water. The Department imposes a measurement condition, based on this plan, as part of this decision. See Conditions section.

54. Under the conditions imposed in this determination, and in consideration of the Department’s return flow policy, 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

55. 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).

56. 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).

57. 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.

58. 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).

59. 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.

60. 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.

61. 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. 52 and 54.

Beneficial Use

FINDINGS OF FACT

62. 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.

63. The flow rate proposed to be changed to meet fishery needs *upstream* of the historic return flow point is 7.0 CFS in July, 4.0 CFS in August, and 3.0 CFS from September 1 through September 15. The volume to be changed in the same reach is up to 765.4 AF.

64. The flow rate to be changed in the protected reach of stream *downgradient* of the historic return flow point is 4.92 CFS in July, 2.06 CFS in August and 1.10 CFS in the first half of September, and the volume to be changed within the reach is 461.7 AF. These amounts apply to the individual water right proposed for change in this matter (41A 110699), or may be used in combination with two other water rights proposed for change in two associated application

processes (simultaneous processes to this change proceeding). Application. 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 (AF)	Water Applied To Field (AF)	*Return Flows (AF)	Change in Monthly Return Flows (AF)	Historic Monthly Volume To Be Left Instream (Based on 7, 4 & 3 CFS Diverted Protection) (AF)	Historic Monthly Applied Volume To Be Left Instream Minus Change In Monthly Return Flows (AF)	Monthly Flow (CFS)
July	640.2	302.6	0.0	39.6	-95.5	398.1	302.6	4.92
Aug	552.4	126.4	0.0	31.1	-119.6	246.0	126.4	2.06
Sep	186.4	32.8	0.0	28.3	-56.5	89.3	32.8	1.10
							461.7	

65. 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 proven the proposed amounts of water in this matter and as combined in this and the two other associated change processes, are beneficial and reasonable for enhancing the grayling fishery in Long Creek. The breakdown of flow rate and volume per month is shown in the following table for the water right to be changed.

Month	Consumed Flow Rate (CFS)	Days Diverted (#)	Volume Protected (AF)
Jul	4.92	31	302.6
Aug	2.06	31	126.4

Sep 1-15	1.10	15	32.8
		SUM =	461.7

66. The Department finds the proposed amounts of water to be changed to Instream Flow purposes are beneficial. FOF Nos. 63-65.

CONCLUSIONS OF LAW

67. 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.

68. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff’d on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For*

Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, *Deaterly v. DNRC et al.*, Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

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

69. 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).

70. 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 Nos. 64 and 65 are beneficial and the amounts needed to sustain the fishery.

Adequate Diversion

FINDINGS OF FACT

71. 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

72. 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

73. Applicant proposes to change an irrigation water right with two points of diversion on Long Creek 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 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.

74. The amounts of water protected upstream and downstream of the historic return flow location in Long Creek are indicated in Findings of Fact Nos. 63-65. Those identified amounts may be used under the water right proposed for change in this matter (41A 110699), or in combination with the water rights proposed for change in this and the following: Application To Change An Existing Irrigation Water Right Nos. 41A 30072651 and 41C 30072652. From year to year the amounts of water protected from each source may vary, but shall not exceed an amount that can be beneficially used in combination for Instream Flow purposes.

Protected Reaches and Flow Rates

75. The protected reach proposed by the Applicant includes a 6 mile reach of Long Creek, beginning in the SWNWSW Section 21, T13S, R4W to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The flow rate protected in Long Creek to the point where return flows historically entered Long Creek is up to 7.0 CFS in July, 4.0 CFS in August, and 3.0 CFS from September 1 through September 15.

The flow rates protected in the reach downstream of the point where return flows historically entered Long Creek to the Red Rock River are 4.92 CFS in July, 2.06 CFS in August and 1.10 CFS from September 1 - 15.

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

Protected Volume

77. For purposes of this change (Instream Flow), the Applicant is entitled to protect the historically diverted volume for the water right at the point where return flows from the historic irrigated places of use enter into Long Creek. That volume of water is 765.4 AF, based on continuous flows of 7.0 CFS in July, 4.0 CFS in August, and 3.0 CFS from September 1 through 15. The protected volume of water is applicable to the water right being changed in this matter, but also shall be considered in combination with the water rights proposed for change in parallel proceedings for the same project.

The volume of water protected in the reach downstream of the point where return flows historically entered Long Creek to the Red Rock River is 461.7 AF.

78. Pursuant to §85-2-408, MCA, the full diverted volume for a water right may be protected instream in the reach of the source from the point of diversion to the point at which any return flows enter the source. 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 461.7 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

79. Applicant's plan for operation and measurement of the instream flows proposed for protection is as follows: 1) measurement of Long Creek at the point just upstream of where return flows historically entered Long Creek; 2) measurement of a ditch that collects wastewater originating from upgradient irrigation practices and discharges into Long Creek immediately below the point of measurement identified in the preceding section. This will allow the Applicant to adjust its protected amounts of water in the downstream protected reach; and 3) measurement of Long Creek approximately 1.5 miles upstream of its confluence with the Red Rock River. The plan will allow for operation of all water rights associated with this and three other change applications. It will allow the Applicant to administer its water rights beneficially for the purposes of Instream Flow. 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

80. 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

81. 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)

82. 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)

83. 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)

84. 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.

85. The Applicant has provided a measurement plan and specific information on the stream reach to be protected. FOF Nos. 75 and 79.

86. 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. 54).

87. 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. 75 and 77.

Salvage Water

This Application does not involve salvage water.

CONDITIONS

WATER MEASUREMENT RECORDS REQUIRED:

1. THE APPROPRIATOR SHALL MEASURE WATER IN THE FOLLOWING LOCATIONS:
 - a. IN LONG CREEK IN THE SENWSW SECTION 21, T13S, R4W, AT A POINT JUST UPSTREAM OF THE LOCATION WHERE RETURN FLOWS FROM IRRIGATION OF THE PLACES OF USE ENTER LONG CREEK. THIS POINT REPRESENTS THE MOST DOWNSTREAM LOCATION THAT THE FOLLOWING AMOUNTS OF WATER CAN BE PROTECTED IN LONG CREEK: *UP TO 7.0 CFS IN JULY, 4.0 CFS IN AUGUST, AND 3.0 CFS FROM SEPTEMBER 1 THROUGH SEPTEMBER 15.*

- b. 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: UP TO 4.92 CFS IN JULY, 2.06 CFS IN AUGUST, AND 1.10 CFS IN FROM SEPTEMBER 1 THROUGH SEPTEMBER 15.
- c. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF ALL FLOWS MEASURED AT ALL OF THE POINTS NOTED ABOVE, INCLUDING THE PERIOD OF TIME.

IMPORTANT INFORMATION

2. THE WATER RIGHT AUTHORIZED TO BE CHANGED IN THIS MATTER (41A 110699) WILL BE ADMINISTERED IN CONJUNCTION WITH THE FOLLOWING TWO WATER RIGHTS: 41C 110701 AND 41A 110700. THE THREE WATER RIGHTS HAVE BEEN CHANGED TO THE SAME PURPOSE OF INSTREAM FLOW TO BENEFIT THE FISHERY IN LONG CREEK, AND ARE USED IN COMBINATION WITH ONE ANOTHER WHEN WATER IS AVAILABLE FROM THE THREE SOURCES. THE COLLECTIVE MONTHLY FLOW RATE THAT MAY BE PROTECTED IN LONG CREEK FOR THE COMBINATION OF WATER RIGHT NOS. 41A 110699 AND 41C 110701 IS 4.92 CFS IN JULY, 2.06 CFS IN AUGUST, AND 1.10 CFS IN FROM SEPTEMBER 1 THROUGH SEPTEMBER 15. WHEN WATER RIGHT NO. 41A 110699 IS USED IN CONJUNCTION WITH WATER RIGHT NO. 41A 110700, THE COLLECTIVE MONTHLY FLOW RATES MAY NOT EXCEED 5.49 CFS IN JULY, 2.77 CFS IN AUGUST AND 1.80 CFS FROM SEPTEMBER 1 THROUGH 15. AT ANY TIME THAT WATER RIGHT NO. 41A 110699 IS THE ONLY WATER RIGHT OF THE THREE BEING USED, THE MONTHLY FLOW RATES MAY NOT EXCEED 4.92 CFS IN JULY, 2.06 CFS IN AUGUST, AND 1.10 CFS IN FROM SEPTEMBER 1 THROUGH SEPTEMBER 15.

3. THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED WATER USE MEASURING DEVICES AT POINTS DESCRIBED ABOVE. WATER MUST NOT BE ADMINISTERED UNTIL THE REQUIRED MEASURING DEVICES ARE 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. THE APPROPRIATOR SHALL KEEP A SEPARATE ACCOUNTING FOR THE FLOW RATE AND VOLUME APPROPRIATED FOR INSTREAM FLOW PURPOSES UNDER EACH OF ITS WATER RIGHTS (41A 110697, 41A 110699, 41A 110700 AND 41C 110701). 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 30072650 should be **GRANTED**. Applicant is authorized to change Statement of Claim No. 41A 110699 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 SWNWSW Section 21, T13S, R4W to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The flow rate protected in Long Creek to the point where return flows historically entered Long Creek is up to 7.0 CFS in July, 4.0 CFS in August, and 3.0 CFS from September 1 through September 15, and a volume of up to 765.4 AF. The flow rates and volumes of water protected in the reach downstream of the point where return flows historically entered Long Creek to the Red Rock River are 4.92 CFS in July, 2.06 CFS in August and 1.10 CFS from September 1 – 15, and a volume of up to 461.7 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