

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

PETITION TO MODIFY CHANGE AUTHORIZATION NO. 41C 30072652 BY STATE OF MONTANA, DEPARTMENT OF FISH, WILDLIFE AND PARKS)))	PRELIMINARY DETERMINATION TO GRANT PETITION TO MODIFY CHANGE AUTHORIZATION
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On February 11, 2021 the State of Montana, Department of Fish, Wildlife and Parks (Applicant) submitted Petition to Modify Change Authorization No. 41C 30072652 (Petition) to the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Petition was determined to be correct and complete as of August 10, 2021. The Petition was forwarded for processing to the Lewistown Water Resources Regional Office on August 12, 2021. The Petition requests that DNRC modify a water measurement condition placed on the Change Authorization as issued on July 18, 2016. The water measurement condition was imposed as a means of complying with a statutory provision for changing an appropriation right to an instream flow purpose (§ 85-2-436(3)(c), MCA), and ensuring the adverse effect statutory criteria (§ 85-2-402(2)(a), MCA) were met. An environmental assessment was adopted and sent for posting to the Department website on September 9, 2021.

INFORMATION

The Department considered the following information for its Determination.

Application as Filed

- Petition to Modify Permit (Petition) and Cover Letter submitted with Petition.
- Applicants Attachment to Petition to Modify Change Authorization

Information within the Department’s Possession/Knowledge

- Water Right Records, including:
 - file for Change Authorization 41C 30072652;
 - file for Statement of Claim No. 41C 110701; and

- files for other water rights on Long Creek and Divide Creek.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED MODIFICATION

FINDINGS OF FACT

1. Change Authorization 41C 30072652 was issued by the Department on July 18, 2016, to the State of Montana, Department of Fish, Wildlife and Parks (Applicant), authorizing an additional purpose to an existing appropriation of water on Divide Creek (the existing appropriation is for Irrigation purposes). The Applicant was authorized to change Statement of Claim No. 41C 110701 by adding a purpose of Instream Flow, for a portion of the irrigation season, for a temporary period of 10 years. The appropriation includes an importation of water from Divide Creek into the Long Creek drainage (Basin 41A), via a ditch. Authorization was granted to change the management of water in Long Creek during the period of July 1 through September 15 to benefit the fishery. The reach of stream to benefit from the Instream Flow purpose is Long Creek beginning in the NESWNE Section 31, T12S, R3W (Long Creek at the confluence with Jones Creek), to its confluence with the Red Rock River in the NWSENE Section 8, 14S, R4W. The flow rates protected in Long Creek from the Jones Creek confluence to the point where return flows historically entered Long Creek is 7.0 CFS in July, 4.0 CFS in August, and 3.0 CFS from September 1 through September 15, up to a volume of 765.4 AF. The flow rates 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 through September 15 up to a volume of 461.7 AF. Change Authorization No. 41C 30072652.

2. Applicant proposes to modify Condition No. 1.B of the Change Authorization. Petition. Condition No. 1.B imposes a requirement for stream measurement in Long Creek as required by statute (§ 85-2-436(3)(c), MCA). Condition No. 1.B states as follows:

WATER MEASUREMENT RECORDS REQUIRED:

THE APPROPRIATOR SHALL MEASURE WATER IN THE FOLLOWING LOCATIONS:
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 FROM DIVIDE CREEK 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.*

3. Applicant proposes to modify the condition for two reasons: 1) the stream reach of Long Creek where the measuring point is currently located is the subject of extensive beaver activity, resulting in recurring stream level modifications and disruption in acquiring accurate measurement/discharge data; and 2) an existing and stable measuring station is available on another segment of Long Creek which will allow all existing water users on the source to access the point by a public road crossing.¹ Petition.

4. Applicant proposes to move the measuring point approximately 2.5 miles upstream on Long Creek, to a long-term measuring station that has been in operation for a decade. The site is in the NESESW Section 10, T13S, R4W, Beaverhead County. There are four intervening irrigation diversions between the existing and proposed measuring sites, and the Applicant proposes to monitor/measure two of those diversions using existing measuring flumes to account for appropriations in the intervening stream reach. The other two irrigation diversions do not need to be monitored/measured because they are associated with the water right that was changed to Instream Flow in this present matter. Appropriations for irrigation cannot occur from those two diversions during the period that DFWP leases the water right for Instream flow purposes. Petition.

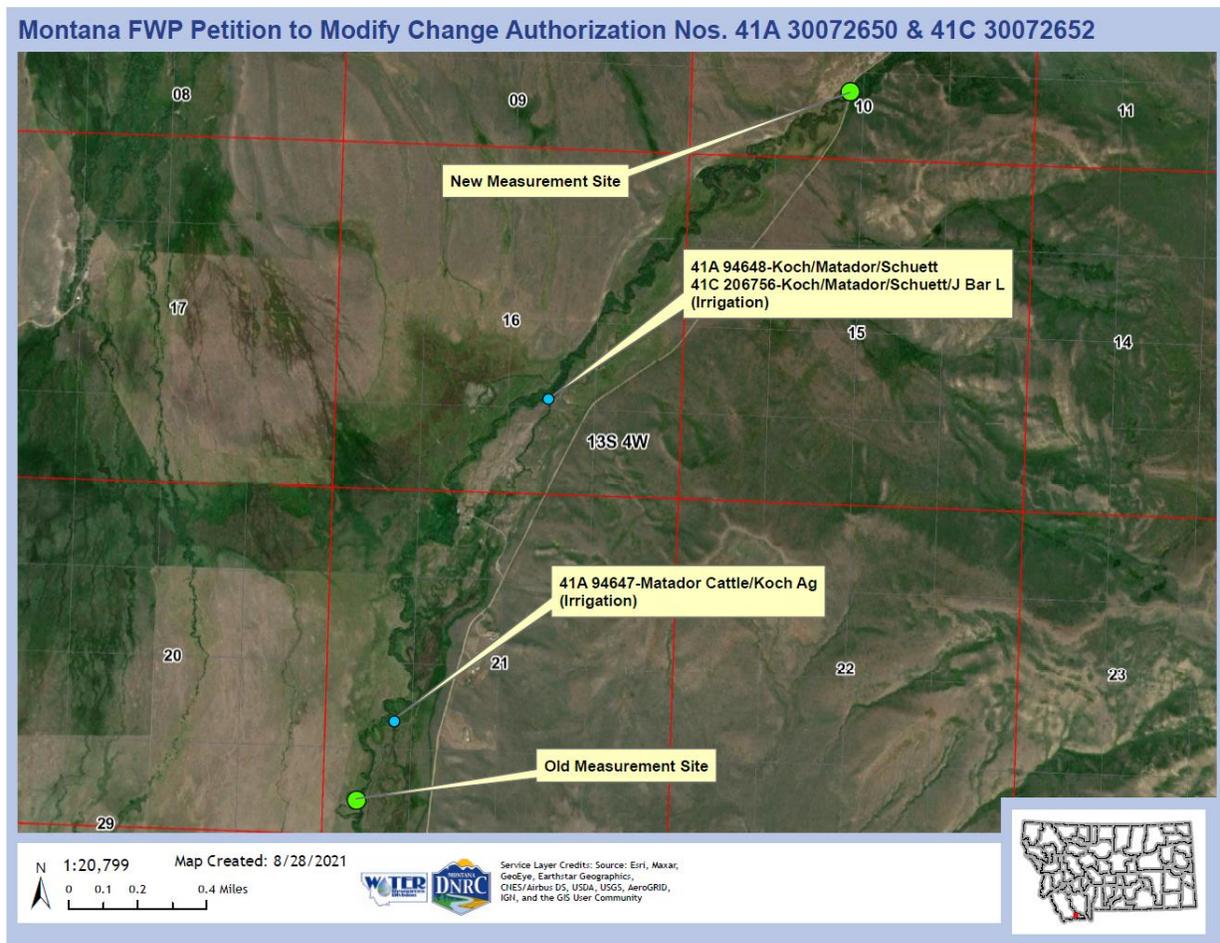
5. The proposed modification to the measurement condition only affects the adverse effect statutory criteria. § 85-2-402(2)(a), MCA

6. This Petition to Modify is one of two petitions submitted simultaneously by the Applicant (DFWP). The underlying water rights associated with each Petition were part of a bundle of

¹ The authorized measuring point is surrounded by private property and not always accessible by vehicle due to wet ground conditions.

water rights authorized for change in 2016, and they both rely on the same measuring points for the tracking of instream flow appropriations. The other Petition (Petition to Modify No. 41A 30072650) proposes to move to and from the same measuring stations as proposed in this Petition. Both Petitions are being processed simultaneously because they are part of the same collective project.

Following is a map reflecting the location of the old and new gauges, and the two intervening irrigation diversions.



**§ 85-2-314, MCA, REVOCATION OR MODIFICATION OF PERMIT OR CHANGE IN
APPROPRIATION RIGHT**

7. Section 85-2-314, MCA, provides in relevant part:
- (2) (a) A permittee or holder of a change in appropriation right may petition the department to modify or remove a condition of approval or reduce the amount of the permit or change authorization.
- (b) The petition must be submitted on a form designated by the department, is subject to the criteria of 85-2-311 and 85-2-402, and must be processed in the same manner as an application made pursuant to 85-2-302, 85-2-307 through 85-2-309, and 85-2-310(1) through (5) except that:
- (i) the department may waive the public notice of a preliminary determination to grant the petition if the department finds, on the basis of information reasonably available to it, that the petition as proposed in the application will not adversely affect the rights of other appropriators;
 - (ii) if the department issues a preliminary determination to grant the petition and waives public notice, the determination becomes final;
 - (iii) the department may condition a preliminary determination to grant the petition in order to meet the criteria under 85-2-311 and 85-2-402; and
 - (iv) a preliminary determination to deny a petition is final. Denial of a petition does not affect the permit or change authorization.

GENERAL CONCLUSIONS OF LAW

8. Section 85-2-402, MCA provides in relevant part:

85-2-402. Changes in appropriation rights. (1) (a) The right to make a change in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in [85-2-410](#) and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(c) The applicant is not required to prove a lack of adverse effect for any water right identified on a written consent to approval filed pursuant to subsection (19) in connection with an application.]

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsections (1)(c) and] (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. For purposes of this section, adverse effects analysis is specific to the proposed change in appropriation right and a determination that water is not legally available pursuant to [85-2-311](#) does not necessarily mean that an adverse effect will occur.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for:

- (i) a change in appropriation right for instream flow pursuant to [85-2-320](#) or [85-2-436](#);
- (ii) a temporary change in appropriation right for instream flow pursuant to [85-2-408](#); or
- (iii) a change in appropriation right pursuant to [85-2-420](#) for mitigation or marketing for mitigation.

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

(d) 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. This subsection (2)(d) does not apply to:

- (i) a change in appropriation right for instream flow pursuant to [85-2-320](#) or [85-2-436](#);
 - (ii) a temporary change in appropriation right for instream flow pursuant to [85-2-408](#); or
 - (iii) a change in appropriation right pursuant to [85-2-420](#) for mitigation or marketing for mitigation.
- (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.
- (f) The water quality of an appropriator will not be adversely affected.
- (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

9. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension of the time stated in the permit, if the water is not being applied to the beneficial use contemplated in the permit or change in appropriation right, or if the permit or change in appropriation right is otherwise not being followed, the department may, after notice, require the permittee or the holder of the change in appropriation right to show cause why the permit or change in appropriation right should not be modified or revoked. If the permittee or holder of the change in appropriation right fails to show sufficient cause, the department may modify or revoke the permit or change in appropriation right. §85-2-314, MCA.

10. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

11. The Department may issue a change authorization subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in §85-2-402, MCA. 85-2-312, MCA.

12. The criteria at issue with the modification proposed in the Petition is § 85-2-402(2)(a), MCA, adverse effect. A measuring plan is also required in § 85-2-436(3)(c), MCA

Adverse Effect

FINDINGS OF FACT

13. During the 2016 change proceeding the Applicant (same applicant as in this matter) proposed the measuring plan that was imposed in the Change Authorization, including the location of stream measurement. File for Change Authorization No. 41C 30072652.

14. The Department applied the condition to satisfy the adverse effect statutory criteria and for compliance with § 85-2-436(3)(c), MCA. No objections to the proposed change were filed during the 2016 proceeding. File for Change Authorization No. 41C 30072652.

15. Applicant now proposes to change the measuring point on Long Creek to a point 2.5 miles upstream of the existing location (the existing measuring station is at the point where return flows from irrigation practices historically entered Long Creek, or the SENWSW Section 21, T13S, R4W).² The proposed new point is in the NESESW Section 10, T13S, R4W. The location change is for two reasons: 1) the stream reach of Long Creek where the measuring point is currently located is the subject of extensive beaver activity, resulting in recurring stream level modifications and disruption in acquiring accurate measurement/discharge data; and 2) an existing and stable measuring station on Long Creek, 2.5 miles upstream, will allow all existing water users on the source to access the point by a public road crossing. Petition.

16. There are two intervening diversions (irrigation ditches) on Long Creek between the existing and proposed measuring points that are required to be accounted for. Applicant

² Per § 85-2-436(3)(d), MCA, the maximum quantity of water that may be changed to instream flow is the amount historically diverted, and this amount may be protected in the stream reach above the point where return flows historically entered the source. Below the point where return flows entered the source, only the amount of water consumed by the historic purpose (i.e. irrigation operation) may be used to protect, maintain or enhance stream flows.

proposes that appropriations into the two diversions be measured with flumes that are already situated in the ditches to account for the diverted flow between the two monitoring points. Those appropriations will be included in calculations to determine stream discharge at the point where return flows from historical irrigation practices entered the source. Petition.

17. According to field data collected by the Applicant in 2012 and 2020 (two sets of stream discharge measurements during each year, for a total of four measurements), the 2.5-mile reach of Long Creek between the existing and proposed measuring stations is neither a gaining nor losing reach. Three of the discharge measurements showed a flow variation of just 3-4 percent between the two points, which is less than the standard measurement error associated with such method. Applicant's fourth discharge measurement varied 25% between the two points, but Applicant provided evidence that the reason for the higher variation was due to rapidly changing stream conditions. Petition.

18. Due to the consistent flow conditions between the existing and proposed measuring points, showing the reach is neither gaining or losing, the Applicant's plan to change the measurement location and account for intervening irrigation appropriations is reasonable. The Applicant can monitor stream conditions and diversions itself, or upon mutual agreement with the intervening water users, communicate with those intervening water users for identification of their appropriations, and those appropriations can be subtracted from the discharge data at the proposed measuring site to account for flows downstream. Additionally, intervening water users, or others, can easily monitor flows at an accessible point, and adjust their appropriations if necessary. The Department finds that moving the measurement point will not change the burden on existing water users nor create any adverse effect.

19. Accordingly, the Department preliminarily determines that Condition 1 in Change Authorization No. 41C 30072652 be replaced with the following (changes are reflected in part 1.B below, and parts 1.A and 1.C remain the same as previously authorized):

WATER MEASUREMENT RECORDS REQUIRED:

1. THE APPROPRIATOR SHALL MEASURE WATER IN THE FOLLOWING LOCATIONS:

- A. APPROPRIATIONS FROM DIVIDE CREEK IN THE DITCH THAT CONVEYS WATER FROM DIVIDE CREEK TO THE JONES CREEK/LONG CREEK DRAINAGE.
- B. IN LONG CREEK IN THE NESESW SECTION 10, T13S, R4W, AT A POINT WHERE THE RUBY DIVIDE ROAD CROSSES LONG CREEK. THE APPROPRIATOR SHALL MEASURE AND DOCUMENT STREAM DISCHARGE AT THIS POINT DURING ITS AUTHORIZED PERIOD OF APPROPRIATION FOR INSTREAM FLOW PURPOSES. APPROPRIATIONS OF WATER BY DOWNSTREAM WATER RIGHT HOLDERS SHALL BE SUBTRACTED FROM THE STREAM DISCHARGE MEASURED AT THE RUBY DIVIDE ROAD TO CALCULATE STREAM FLOWS AT A POINT JUST UPSTREAM OF THE LOCATION WHERE RETURN FLOWS FROM IRRIGATION OF THE PLACES OF USE OF 41C 110701 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.
- C. 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 FROM SEPTEMBER 1 THROUGH SEPTEMBER 15.
- D. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF ALL FLOWS MEASURED AT ALL OF THE POINTS NOTED ABOVE, INCLUDING THE PERIOD OF TIME.

20. The Department finds that modification of Condition 1.B will not result in adverse effect to other water rights.

CONCLUSIONS OF LAW

21. Pursuant to § 85-2-402(2)(a) MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

22. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected if its Petition to shift locations of water measurement is granted. § 85-2-402(2)(a), MCA. (FOF 13-20)

23.

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that Petition to Modify Change Authorization No. 41C 30072652 should be GRANTED. The Department preliminarily determines the new condition shall be applied as noted in Finding of Fact No. 19 in this Order.

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 no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the Application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the application, the department will grant the application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 9th day of September 2021.

/Original signed by Scott Irwin/
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 GRANTING PETITION TO MODIFY was served upon all parties listed below on this 9th day of September 2021 by first class United States mail.

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

NAME

DATE