

- 1949 Wheatland County Water Resources Survey and associated filed notes and maps.
- District Court Decree – Fourteenth Judicial District, Wheatland County, Case No. 997, March 12, 1925.
- Water right records.
- Wheatland County water commissioner records.
- Pre-Application meeting notes.
- Statute and administrative rules.
- Irrigation Change Application Technical Report.
- Verbal communication with Department Groundwater Hydrologist Russell Levens on June 2, 2016, regarding the effectiveness of Applicant’s mitigation plan.

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

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The underlying water rights proposed to be changed are Statements of Claim filed in Montana’s general stream adjudication. The following table displays elements of the water rights *as claimed*. Water right records.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
40A 199382	Irrigation	Careless Creek	3.75 Cubic Feet per Second (CFS)	Apr 1 – Oct 31	Two diversion points located in Sections 20 and 21, T10N, R18W	SE Sec. 17 and E2 Sec. 20, T10N, R18E	May 6, 1893	194
40A 199383	Irrigation	Careless Creek	2.5 Cubic Feet per Second (CFS)	Apr 1 – Oct 31	Two diversion points located in Sections 20 and 21, T10N, R18W	SE Sec. 17 and E2 Sec. 20, T10N, R18E	July 12, 1882	194

40A 199384	Irrigation	Careless Creek	5.0 Cubic Feet per Second (CFS)	Apr 1 – Oct 31	Two diversion points located in Sections 20 and 21, T10N, R18W	SE Sec. 17 and E2 Sec. 20, T10N, R18E	May 28, 1884	194
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CHANGE PROPOSAL

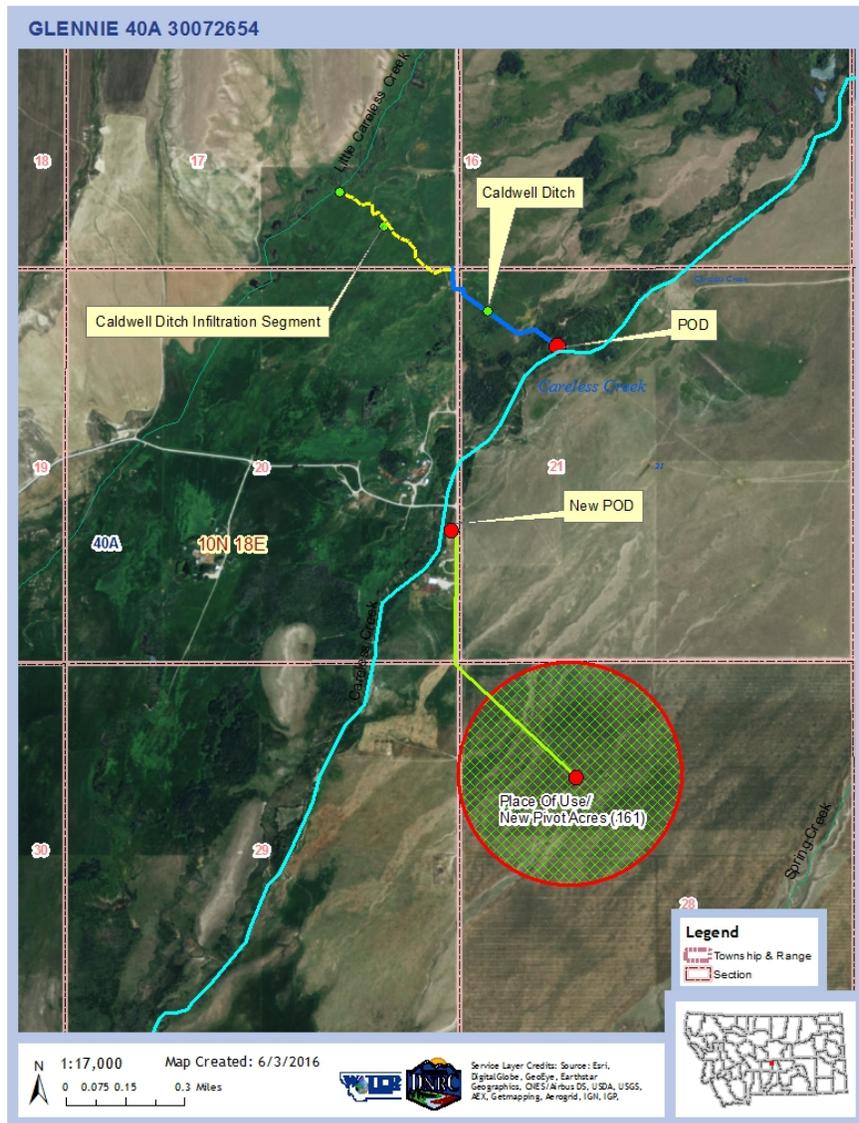
FINDINGS OF FACT

2. Applicant proposes to eliminate one of two historic points of diversion, add a point of diversion, change the place of use of three supplemental/overlapping irrigation water rights, and add a purpose of Mitigation (the Mitigation purpose is proposed to prevent adverse effects to other water users). The proposal includes a change from 189 acres of flood irrigation to 161 acres of center pivot sprinkler irrigation. The historic flood irrigation system appropriated water from Careless Creek via the Caldwell and Bouchard-Ross Ditches. Neither ditch will be used for irrigation purposes under the change, and the 189 acres will be permanently retired. A new point of diversion will consist of a pump located in the SENESE Section 20, T10N, R18E, and the new place of use will be 161 acres generally located in the NW Section 28, T10N, R18E. The flow rate diverted for the new irrigation system will be 2.5 cubic feet per second (CFS), and the diverted volume will be 122.5 acre-feet (AF). Application.

3. In this proposal a conversion from flood irrigation to a center pivot sprinkler system is proposed. As such, the timing, location and amount of return flows will be impacted, including the elimination of return flows in Little Careless Creek. Applicant has provided a plan to mitigate the elimination of return flows in the Little Careless Creek drainage. Generally, the plan proposes to replace return flows in an amount equal to that historically experienced under flood irrigation practices. Appropriations in the range of approximately 11 – 100 gallons per minute (GPM) up to 36.8 AF from Careless Creek will be diverted into the Caldwell Ditch and infiltrated into the soil, with the water eventually returning to Little Careless Creek, in an effort to replace return flows eliminated from the irrigation conversion. The replacement or mitigation plan is intended to prevent adverse effects to other water users and is discussed in detail, along with other effects, in the Adverse Effect section of this document. Applicant’s mitigation plan.

4. The application materials indicate a flow meter will be installed to measure appropriations. Additionally, Applicant proposes measurement of water under its mitigation plan. Therefore, the Department imposes measurement conditions on the Authorization so that water use can be monitored and to ensure compliance with the terms of the mitigation plan. See the Conditions section for specific language of the conditions. Application.

5. A map of the proposed change follows:



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

6. 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.

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

8. 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).

9. 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).

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).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy

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

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

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

10. 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*).

11. 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](#).

12. 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).

13. 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.

14. 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.

15. 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).

16. 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

General

17. Water Commissioner records between 1993 and 2009, acquired from the Wheatland County Courthouse, show that each of the three water rights proposed to be changed, 40A

199382, 40A 199383, and 40A 199384, have been historically used. Water Commissioners have admeasured and administered water for each water right. Records.

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

18. The source of water for Statement of Claim Nos. 40A 199382, 40A 199383, and 40A 199384 is Careless Creek. Water is diverted from the source into the Caldwell and Bouchard-Ross Ditches in two locations: 1) NENESE Section 20, and 2) SENWNW Section 21, both in T10N, R18E, Wheatland County. The diversion points and ditch systems are evident on aerial photo resources, the Wheatland County Water Resources Survey, and were observed by Department staff during a October 13, 2015 field visit. Topographic map review confirms the physical ability to convey water from the point of diversion to the places of use.

19. The claimed period of appropriation for adjudication purposes is April 1 through October 31. Statements of Claim. The Application indicates May 15 is the start date for appropriations, with irrigation occurring into the “fall.” Applicant’s deficiency letter indicates variability in the period throughout the years, but Applicant believes a period of April 20 through October 10 is reasonable, which conforms to the standard period of diversion/use noted in administrative rules for Climatic Area IV. ARM 36.12.112. Water commissioner records between the years 1993-2009 show that the greatest range of irrigation on the source, between all appropriators and when enforced by the District Court, is from May into September. However, when water commissioners have been placed on the source, it has likely been when water supplies are tight due to drier conditions. The Department finds the period of diversion to be equivalent to the standard period found in administrative rules, April 20 through October 10.

20. The flow rates claimed to be historically used are 2.5 CFS, 3.75 CFS and 5.0 CFS, for a sum total of 11.25 CFS, and all are claimed to be used interchangeably between the two diversion points. Each of the three water rights were decreed in Case No. 997, which was adjudicated by the Fourteenth Judicial District Court on March 12, 1925, at the claimed flow rates. Water Commissioner records support the claimed flow rate for each right as being admeasured and administered on the stream. Additionally, Applicant supplied ditch dimension and capacity estimates for the Ross-Bouchard and Caldwell Ditches that show each of the structures are capable of conveying the combined flow rate of the water rights. The Department

finds the flow rates for Statement of Claim Nos. 40A 199382, 40A 199383, and 40A 199384 to be 3.75 CFS, 2.5 CFS and 5.0 CFS, respectively. Department Technical Report.

Place of Use

21. The original claimed place of use for each of the water rights was 194 acres generally located in the SE Section 17 and E2 Section 20, T10N, R18E. Statements of Claim. In a Masters Report issued by the Montana Water Court on June 22, 1990, based on an affidavit by the then-owner of the water rights, Thomas N. Glennie, the place of use was reduced to 189 acres for each claim. Files for Statements of Claim.

22. Seven other water rights are claimed to overlap with a 6-acre parcel that is part of the place of use of the three water rights proposed to be changed. Applicant asserts that the 6-acre parcel has not been irrigated by the seven other water rights, and that the parcel is claimed in error under the seven associated water rights. Department records; Application.

23. The 1949 Wheatland County Water Resources Survey supports 84 of the 189 acres as being historically irrigated. Department Technical Report.

24. The Department's interpretation of a 1979 aerial photo supports all 189.0 acres as being irrigated. The ditch systems that supply water to the places of use do not appear to have been changed since the verification of 84 acres by the Water Resources Survey staff. Department Technical Report; Water Resources Survey.

25. The Department's interpretation of a 2013 aerial photo supports all 189.0 acres as being irrigated. Department Technical Report.

26. The Department finds that 189.0 acres were historically irrigated by each of the three water rights proposed to be changed in this matter. The places of use are generally located in the SE Section 17, and E2 Section 20, T10N, R18E. See map in the Department's Technical Report for a detailed explanation of acres irrigated.

Volume of Water Historically Consumed and Diverted

27. Water usage on the 189 historically-irrigated acres occurred under a combination of three rights, all appropriating water from Careless Creek. The amount of water appropriated under each individual water right varies from year-to-year, based on stream runoff patterns, precipitation events, priority status of the water right on the stream, etc. Information supplied in

the application and Applicant’s deficiency response reflect the historic variability of appropriations.

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

29. The combined, historic consumptive volume for all three water rights is calculated to be 110.3 AF, including estimates for crop consumption and irrecoverable losses associated with 189.0 acres of irrigation. Department Technical Report.

30. The combined, historic diverted volume for all three water rights is calculated to be 218.7 AF, including consideration of irrigation system efficiency, seasonal conveyance losses, and ditch evaporation losses. Department Technical Report.

31. Applicant supplied information on the *typical* historic pattern of irrigation for each of its water rights. In general, the two most junior water rights (junior in priority date) have been used during the spring runoff period, with the most senior water right used after higher spring flows subsided. The typical irrigation season begins in May and ends in August, extending beyond August if/when water is available. The following table reflects the amounts of water associated with each of the water rights in a typical irrigation season. Applicant’s deficiency letter; Department Technical Report.

TABLE 2: AMOUNTS OF WATER TYPICALLY ASSOCIATED WITH WATER RIGHTS.

WR Number	Purpose	Source	Flow Rate	Priority date	Diverted Volume (AF)	Consumed Volume (AF)
40A 199382	Irr	Careless Creek	3.75 CFS	5/6/1893	72.9	36.8
40A 199383	Irr	Careless Creek	2.5 CFS	7/12/1882	48.6	24.5
40A 199384	Irr	Careless Creek	5 CFS	5/28/1884	97.2	49.0

32. Depending on the range of stream conditions from year-to-year, the volume of water diverted and consumed under each water right varies. In years of low water availability, the

senior water right (40A 199383) has been used to supply all water beyond high spring flows, and in abundant water years the junior water right(s) has carried irrigation deeper into the season.

The Department proceeds in this matter with the recognition that stream conditions and appropriations are variable, and as such the volumes listed in Table 2 do not reflect maximum water use for each individual water right. However, the sum total volume for the combination of water rights is 110.3 AF, which is considered to be the maximum amount consumed.

Applicant’s deficiency response; FOF 31.

33. The Department finds the combined flow rate for the three water rights to be 11.25 CFS, the diverted volume to be 218.7 AF, and the consumed volume to be 110.3 AF.

Historic Use

34. The Department’s findings for historic use for Statement of Claim Nos. 40A 199382, 40A 199383, and 40A 199384 are summarized in the table below. The amounts of water shown are reflective of a typical irrigation season.

Table 3: Historic Use

W.R. NO.	FLOW RATE (CFS)	DIVERTED VOLUME	CONSUMED VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	PRIORITY DATE	SOURCE
40A 199382	3.75	72.9	36.8	Irrigation	Apr 20 – Oct 10	189 Acres	May 6, 1893	Careless Creek
40A 199383	2.5	48.6	24.5	Irrigation	Apr 20 – Oct 10	189 Acres	July 12, 1882	Careless Creek
40A 199384	5.0	97.2	49.0	Irrigation	Apr 20 – Oct 10	189 Acres	May 28, 1884	Careless Creek

Combined Total	11.25	218.7	110.3	Irrigation	Apr 20 – Oct 10	189.0 Acres	Variable	Careless Creek
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CONCLUSIONS OF LAW

35. 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).

36. 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).

37. 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.

38. 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).

39. 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)

40. 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”).

41. 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)).

42. “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.

43. 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.

44. 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.

45. Evidence of historic use for Statement of Claim Nos. 40A 199382, 40A 199383 and 40A 199384 has been proven by a preponderance of the evidence as set forth in these findings, and as summarized in the narrative and table in Finding of Fact Nos. 33-34.

Adverse Effect

FINDINGS OF FACT

46. Applicant proposes to eliminate one of two historic points of diversion, add a point of diversion, change the place of use of three supplemental/overlapping irrigation water rights, and add a purpose of Mitigation in order to prevent adverse effects to other water users. The changes have been proposed to facilitate a conversion from flood to sprinkler irrigation (from contour ditch to center pivot sprinkler irrigation). One point of diversion will be changed from the Bouchard-Ross Ditch to a location approximately 300 yards downstream of the historic headgate/ditch. The new diversion will be a pump and water will no longer be appropriated by the Bouchard-Ross Ditch. The place of use will be changed to a location lying 0.5-1.0 miles southeast of the historic places of use. The period of diversion and use will remain the same as historically. Application.

47. In this proceeding a change from flood to sprinkler irrigation is proposed. The historic flood system encompassed 189 acres, diverted an estimated 218.7 AF, and consumed 110.3 AF. The proposed center pivot sprinkler system will irrigate 161 acres, divert an estimated 122.5 AF, and consume 110.3 AF. The change will result in a reduction of acres irrigated and water diverted, and the same amount of water consumed as historically (volume). Department Technical Report.

48. The timing and amount of return flows will change as a result of the conversion from flood to sprinkler irrigation in both the Careless Creek and Little Careless Creek drainages. Historically, under the flood irrigation system, water was diverted from Careless Creek and applied to 189 acres straddling the two drainages. As a result, an estimated 73.5 AF in return flows from the old inefficient flood system migrated to Careless Creek and Little Careless Creek (36.8 AF to each source, as estimated by the Department). Under the proposed conversion to a more efficient irrigation system, return flows will be reduced to an estimated 12.3 AF, all returning to Careless Creek. A reduction in return flows will result in Careless Creek because of the system efficiency increase, and return flows will be entirely eliminated in the Little Careless Creek drainage because of the relocation of the place of use. Department Technical Report; Department Return Flow Report.

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 this Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that will be left instream after the change is available during the period of diversion either below the

point of diversion or where return flows returned to the source. Department Policy Memorandum on Return Flows, April 1, 2016.

51. In this instance, both criteria are met for Careless Creek. Return flows under the proposed change will enter back into Careless Creek prior to the next appropriator, and non-consumed water that was historically diverted will now be left instream and be available for other appropriators during the period of diversion below the point where return flows accrued. This will help ensure downstream water users in Careless Creek have similar or greater opportunity to appropriate water than they historically did, during the period of diversion. For purposes of Careless Creek, the policy directs no further detailed analysis to be undertaken by the Department prior to objections, provided there will be no enlargement of the amounts of water historically diverted or consumed. That has been determined to be the case here - there will be no enlargement of the water rights. Finding of Fact No. 47. If any other water right holder believes they will be adversely affected by a change in the timing and amount of return flows in Careless Creek, they may file an objection to the proposed project and further analysis will occur. Department Policy Memorandum on Return Flows, April 1, 2016.

52. Neither criteria in the Department's return flow policy are met in respect to Little Careless Creek. Historically, water was diverted from Careless Creek and applied to irrigated acres lying between it and Little Careless Creek. The return flows from the applied water migrated, in part, to Little Careless Creek (an estimated 36.8 AF). Under the changes to irrigation no return flows will enter back into Little Careless Creek, and none of the water left instream after the conversion will be available in Little Careless Creek. The historically-diverted water that is not being used under the new center pivot will be left entirely in Careless Creek, therefore the positive benefits (increased stream flow) from the conversion will all be realized in Careless Creek. According to the return flow policy, when neither of the previously-noted criteria are met, the Department must further analyze the change to return flows for adverse effects. Department Policy Memorandum on Return Flows, April 1, 2016.

53. In recognition of the elimination of return flows in Little Careless Creek, the Applicant proffered a mitigation plan to prevent potential adverse effects to downstream water users. The plan includes replacement of water that formerly returned to the source, by diverting additional water in the Caldwell Ditch (Careless Creek water), and infiltrating it in an amount that will

provide effective mitigation in Little Careless Creek. More specifically, water from Careless Creek will be diverted into the Caldwell Ditch and conveyed by a pipe to an infiltration basin located within the ditch (a segment constructed of a perforated pipe overlaying a layer of coarse, washed gravel, with gravel and topsoil placed over the perforated pipe). Water conveyed to the infiltration basin will seep into the subsurface and migrate to Little Careless Creek with the intent of mimicing return flows that were historically available to downstream appropriators. The volume of water diverted for the Mitigation purpose will be 36.8 AF (the same amount as is estimated to have historically returned to Little Careless Creek), distributed throughout the months of June, July, August and September. The flow rate will vary between 11.1 GPM and 99.7 GPM, with an average flow rate of 68 GPM (the flow rate necessary to achieve the required volume of 36.8 AF). The place of use for Mitigation purposes is considered to be the infiltration basin located in the SE Section 17, T10N, R18E. Applicant’s mitigation plan.

54. The following table reflects the water rights as proposed to be used under the change.

Table 4: Combined Proposed Water Use for Statement of Claim Nos. 40A 199382, 40A 199383, and 40A 199384.

* FLOW RATE AND PERIOD OF DIVERSION/USE FOR SPRINKLER IRR AT PUMP	DIVERTED VOLUME FOR SPRINKLER IRR AT PUMP	FLOW RATE FOR MITIGATION AT CALDWELL DITCH	DIVERTED VOLUME FOR MITIGATION AT CALDWELL DITCH	SOURCE
Up to 2.5 CFS APR 20 - OCT 10	122.5 AF	70.3 GPM Jun 99.7 GPM Jul 89.8 GPM Aug 11.1 GPM Sep	36.8 AF JUN 1 – SEP 30	Careless Creek

*The maximum flow rate that can be diverted by the irrigation pumping system is 2.5 CFS. This flow rate can be achieved by any combination of the three water rights being changed. However, at any time that Statement of Claim No. 40A 199383 (senior water right) is the sole water right being used for both purposes of Irrigation and Mitigation, the combined flow rate that can be diverted between the two purposes is 2.5 CFS. At no time shall the flow rate between the two points of diversion exceed 2.5 CFS for 40A 199383. The Appropriator shall keep records of diversions for both purposes, including the period of time, and distinguish the amounts of water diverted for each water right.

55. The mitigation plan proffered by the Applicant has been reviewed by Department Groundwater Hydrologist Russell Levens. Mr. Levens agrees that the plan will effectively replace return flows that historically accrued to Little Careless Creek in amount, timing and location. Verbal communication with Russell Levens on June 2, 2016. Therefore, the Department finds the Applicant's proposed mitigation plan is reasonable and will effectively replace return flows in Little Careless Creek.

56. Under the conditions imposed in this determination, and in consideration of the Applicant's plan to mitigate potential adverse effects due to the elimination of return flows in Little Careless Creek, the Department finds the proposed change will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

CONCLUSIONS OF LAW

57. 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).

58. 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).

59. 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.

60. 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).

61. 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*.

62. 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.

63. The Applicant has proven the proposed change in appropriation right will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued, provided conditions and a mitigation plan are complied with. §85-2-402(2)(b), MCA.(FOF Nos. 51, 55 and 56)

Beneficial Use

FINDINGS OF FACT

64. The proposed beneficial uses are Irrigation of agricultural crops and Mitigation. The Mitigation purpose is proposed to provide water to replace return flows that were formerly

available to downstream water users in Little Careless Creek. Irrigation and Mitigation are identified as beneficial uses of water in § 85-2-102(4)(a) and (e), MCA.

65. The flow rate for the new irrigation diversion structure (pump) is 2.5 CFS. The total acreage to be irrigated is 161 acres via a center pivot sprinkler system. At 161 acres, the per-acre allocation for flow rate is approximately 7 gallons per minute, which is commonly within irrigation design standards for center pivots in Montana. The Department finds the proposed flow rate for irrigation purposes to be a beneficial use of water.

66. The proposed volume for irrigation is 122.5 AF to be applied across 161 acres, or roughly 0.76 AF per acre. Applicant intends on growing alfalfa as a crop. The irrigation water requirement for alfalfa in the location of the project is about 1.4 AF per acre, which means the proposed irrigation system will operate under deficit irrigation conditions. The crop will receive a little more than half the water that is required to maximize production. However, the partial-service irrigation will provide greater crop production than dryland farming. The Department finds the proposed volume to be a beneficial use, irrespective of whether a full-duty of water can be applied to the crop. The appropriation will be beneficial to the Applicant. ARM 36.12.1902 (16).

67. The proposed amounts of water for the mitigation purpose are a flow rate range of approximately 11-100 GPM and a volume of 36.8 AF. The mitigation water will replace return flows in Little Careless Creek that will be eliminated due to the change in irrigation methods and place of use. The amount of water diverted for mitigation is the amount necessary to fully replace the return flows historically accruing from the old irrigation system and provide downstream water users with substantially similar opportunity to appropriate water in quantities they have been accustomed to. The mitigation plan has been reviewed and approved by Department Groundwater Hydrologist Russell Levens. The Department finds the proposed purpose of Mitigation, including the amounts requested, to be beneficial.

CONCLUSIONS OF LAW

68. 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.

69. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District,

Nunc Pro Tunc Order on Petition for Judicial Review (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

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

70. 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).

71. Applicant proposes to use water for Irrigation and Mitigation purposes. Both purposes are supported as beneficial uses of water in §85-2-102(4)(a) and (e), MCA. Applicant has proven by a preponderance of the evidence that Irrigation and Mitigation are beneficial uses and that the flow rates and volumes of water indicated in Finding of Fact Nos. 64-67 are beneficial.

Adequate Diversion

FINDINGS OF FACT

72. Water will be appropriated from Careless Creek for irrigation purposes by a pumping station located in the SENESE Section 20, T10N, R18E, Wheatland County. An 18-inch diameter culvert will convey water by gravity flow from the source to an adjacent natural pool or depression, where the pump will be placed. The method of irrigation will be by center pivot with a place of use of 161 acres. The diversion means consists of a 40-horsepower Cornell centrifugal pump capable of pumping 1,120 gallons per minute (2.5 CFS). A 12-inch plastic pipe will deliver water from the pump to the center pivot. Montana Valley Irrigation, an irrigation equipment dealer, provided the Applicant with system designs and specifications. File.

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

74. The Caldwell Ditch, with a headgate located in the SENWNW Section 21, T10N, R18E, will be used for mitigation purposes only. The ditch has been used for irrigation appropriations for many decades, although no further appropriations will occur from the ditch for irrigation after the change. Earlier in this Preliminary Determination the Department found the Caldwell Ditch to have a capacity to hold at least 11.25 CFS. The proposed flow rate for mitigation is 11-100 GPM. The Department finds the Caldwell Ditch diversion to be adequate for mitigation purposes in the amounts requested.

CONCLUSIONS OF LAW

75. Pursuant to §85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1) (a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order

1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

76. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. §85-2-402 (2)(b), MCA. (FOF Nos. 73 and 74).

Possessory Interest

FINDINGS OF FACT

77. The Applicant signed and had the affidavit on the application form notarized affirming it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

78. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

79. Pursuant to ARM 36.12.1802:

- (1) An applicant or a representative shall sign the application affidavit to affirm the following:
 - (a) the statements on the application and all information submitted with the application are true and correct and
 - (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
- (2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
- (3) The department may require a copy of the written consent of the person having the possessory interest.

80. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 77)

Salvage Water

This Application does not involve salvage water.

CONDITIONS

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 40A 30072654
THE DEPARTMENT FINDS THE FOLLOWING CONDITIONS ARE NECESSARY TO
MEET THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT
§ 85-2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

****WATER MEASUREMENT AND RECORDS REQUIRED**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED IN-LINE
FLOW METER IN THE SUPPLY LINE FOR THE CENTER PIVOT. THE LOCATION OF THE
FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE
DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND
OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY
RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED TO THE CENTER
PIVOT, INCLUDING THE PERIOD OF TIME.

THE APPROPRIATOR SHALL ALSO INSTALL A DEPARTMENT-APPROVED MEASURING DEVICE IN THE CALDWELL DITCH/CONVEYANCE SYSTEM TO MEASURE APPROPRIATIONS FOR MITIGATION PURPOSES. THE LOCATION OF THE DEVICE MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED FOR THE PURPOSE OF MITIGATION, INCLUDING THE PERIOD OF TIME.

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

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

IMPORTANT INFORMATION

THE MAXIMUM FLOW RATE THAT CAN BE DIVERTED BY THE IRRIGATION PUMPING SYSTEM IS 2.5 CFS. THIS FLOW RATE CAN BE ACHIEVED BY ANY COMBINATION OF THE THREE WATER RIGHTS BEING CHANGED. HOWEVER, AT ANY TIME THAT STATEMENT OF CLAIM NO. 40A 199383 (SENIOR WATER RIGHT) IS THE SOLE WATER RIGHT BEING USED FOR BOTH PURPOSES OF IRRIGATION AND MITIGATION, THE COMBINED FLOW RATE THAT CAN BE DIVERTED BETWEEN THE TWO PURPOSES AND DIVERSION POINTS IS 2.5 CFS. AT NO TIME SHALL THE FLOW RATE BETWEEN THE TWO POINTS OF DIVERSION EXCEED 2.5 CFS FOR 40A 199383. THE APPROPRIATOR SHALL KEEP RECORDS OF DIVERSIONS FOR BOTH PURPOSES, INCLUDING THE PERIOD OF TIME, AND DISTINGUISH THE AMOUNTS OF WATER DIVERTED FOR EACH WATER RIGHT. THE RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR, AND UPON REQUEST AT OTHER TIMES DURING THE YEAR, TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE.

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 40A 30072654 should be **GRANTED**. Applicant is authorized to add a point of diversion and change the place of use for irrigation purposes for Statement of Claim Nos. 40A 199382, 40A 199383, and 40A 199384. The means and point of diversion for Irrigation shall be a pump located in the SENESE

Section 20, T10N, R18E, and the method and place of use shall be a center pivot irrigating 161 acres generally located in the NE Section 28, T10N, R18E. Applicant is also authorized to add a purpose of Mitigation. The Mitigation water will be appropriated at the existing headgate (point of diversion) for the Caldwell Ditch, located in the SENWNW Section 21, T10N, R18E. The place of use for Mitigation shall be located in the SE Section 17, T10N, R18E.

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

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 9th day of June, 2016.

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