

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

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| APPLICATION TO CHANGE WATER RIGHT NO 76LJ 30102909 BY MONTANA LLC |))) | PRELIMINARY DETERMINATION TO GRANT CHANGE |
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On August 26, 2015 Montana LLC (Applicant) submitted Application to Change Water Right No. 76LJ 30102909 to change Provisional Permit 76LJ 76499-00 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. A deficiency letter was sent January 7, 2016. The deficiency response was received January 25, 2016. The Application was determined to be correct and complete as of March 11, 2016. The Applicant amended their application on April 1, 2016. An Environmental Assessment for this Application was completed on April 13, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application to Change an Existing Irrigation Water Right; Form 606
- Attachments to Application
 - Historical Water Use Addendum and attachments
 - Department Verification Abstract
 - Maps of the historic place of use, new place of use and point of diversion
 - Pump curves
 - Irrigation Diversion Map

Information Received after Application Filed:

- E-mail from Applicant’s consultant titled “Deficiency Letter – 76LJ 30102909” dated January 18, 2016

- Response to Deficiency Letter from Applicant’s consultant WGM Group to DNRC received January 25, 2016
- Letter from Applicant’s consultant titled “Amendment to Change Application No. 76LJ 30102909” dated March 29, 2016 received April 1, 2016.
- E-mail from Applicant’s consultant clarifying proposed point of diversion dated/received April 6, 2016.

Information within the Department’s Possession/Knowledge

- Original Provisional Permit file 76LJ 76499-00.
- USDA NAIP Aerial Photo dated 2005; used to document historic irrigated acres.
- Legal demands assessment, information gathered from the DNRC Water Right Query System.
- Irrigation Water Requirement Program (NRCS, 2003) Net Irrigation Output; used to calculate new crop consumptive use values.
- USGS flow records for the Flathead River at Columbia Falls gage # 12363000. USGS Flathead River near Polson gage (#12372000)

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 Applicant seeks to change the point of diversion of Provisional Permit 76LJ 76499-00 with a priority date of November 27, 1990. This permit is for 1.3 CFS up to 240 AF from the Flathead River for irrigation from May 1st to November 1st. The historic place of use is 80 acres in the N2SE of Section 5, Township 27N, Range 20W, Flathead County, Montana which is approximately 0.4 miles west of the Flathead River (Figure 1). The historic point of diversion is in the NENENW of Section 9, Township 27N, Range 20W, Flathead County, Montana (Figure 1). Table 1 below summarizes the right that is proposed in the change.

Table 1: Water Right Proposed for Change

| WR Number | Purpose | Flow Rate | Volume | Period of Use | Point of Diversion | Place of Use | Priority Date | Acres |
|------------|------------|-------------------|--------|--|---|---|-------------------|-------|
| 76LJ 76499 | Irrigation | 570 GPM (1.3 CFS) | 240 AF | May 1 st - November 1 st | NENENW Sec 9 Twp 27N Rge 20W Flathead, County | N2SE Sec 5 Twp 27N Rge 20W Flathead, County | November 27, 1990 | 80 |

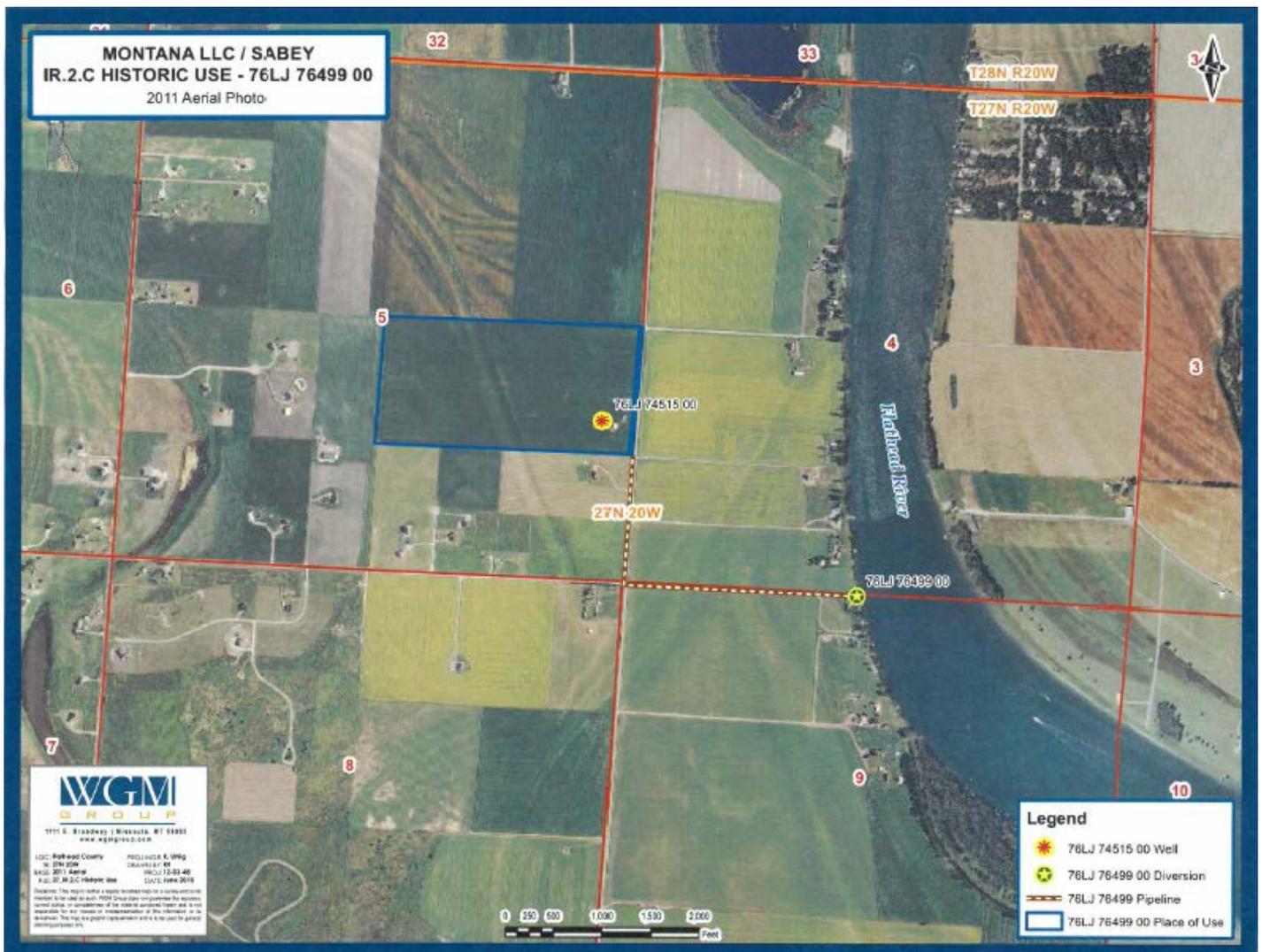


Figure 1: Map identifying the historic place of use and point of diversion associated with Provisional Permit 76LJ 76499-00

2. The historic point of diversion is associated with Provisional Permit 76LJ 7537; they shared the same point of diversion. Pending this change authorization 76LJ 7537 is only allowed to divert water at a rate of 1.6 CFS up to 360 AF.

3. The historic place of use is not irrigated with any other supplemental water rights. Pending this change authorization, 76LJ 76499 will be associated with Provisional Permit 76LJ 30067603, they share the same point of diversion.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant seeks authorization to change the point of diversion associated with Provisional Permit 76LJ 76499-00 from a pump site located in NENENW of Section 9, Township 27N, Range 20W, Flathead County, Montana to a pump site located in the NENESW of Section 4, Township 27N, Range 20W, Flathead County, Montana. The point of diversion will be moved upstream, approximately half a mile directly north of the historic point of diversion and be placed along the west bank of the Flathead River. This point of diversion is currently being used by the Applicant to irrigate 151 acres under Provisional Permit 76LJ 30067603. Water will be diverted from the Flathead River with a pump and sent through a 14 inch pipeline. The mainline will run to the west approximately 4,100 feet and then send water to the north (76LJ 30067603) and to the south (76LJ 76499) via a control valve. Half of a center pivot with a swing arm and end gun will apply water to 77.68 of the original 80 acres.

5. The new point of diversion will be shared between permits 76LJ 30067603 and 76LJ 76499 pending change authorization 76LJ 30102909. The pump will be sized so that both water rights can be exercised at the same time or individually. The maximum flow rate and volume of water diverted under water rights 76LJ 30067603 and 76LJ 76499 cannot exceed 3.8 CFS up to 470 AF (279.4 AF + 190.6 AF).

6. The purpose of use will not change. No storage will be added.

7. A water-usage measuring and reporting condition will be required as a condition of this change. The Applicant will measure to ensure annual usage between the two rights does not exceed 470 AF.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED WATER USE MEASURING DEVICE AT A POINT APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

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

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

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

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow

to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

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

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

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

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

10. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶ 43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company*

(DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

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

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

....

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

(italics added).

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

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.

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

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

[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

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).

historically put to beneficial use... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops. Carriage losses are usually added to the amount consumed by the crops."); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

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

13. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior

appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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

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

14. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Hohenlohe ¶ 43; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo., 1999); City of Bozeman (DNRC), *supra* (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors.”) As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

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

16. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District

Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision adopted by Final Order (2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003) . An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

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

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

Engineers usually make these estimates.

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

....

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

....

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

2 Water and Water Rights at § 14.04(c)(1); *see also*, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under

the existing use, and the historic amount of return flow must be considered.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

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

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

Historic Use:

FINDINGS OF FACT

19. The Notice of Completion of Permitted Water Development 76LJ 76499 was received November, 1992. The Department adjusted the flow rate during the verification process from 690 GPM to 570 GPM (1.3 CFS).

20. According to the 1992 Notice of Completion and Applicant, two hand lines and one wheel line were used to irrigate 80 acres of mint. The sprinklers required an operating pressure of 45 psi. 99 sprinklers were used; the nozzle diameter was 11/64 inches. Average nozzle output was calculated from 4 nozzle measurements. The average output of each nozzle (5.76 GPM) was multiplied by the total number of nozzles (99); the total output of the irrigation system equaled 570 GPM (5.76 GPM × 99 nozzles = 570 GPM) or 1.3 CFS. The Department verified a flow rate of 1.3 CFS. 76LJ 76499 and 76LJ 7537 were associated because they shared a point of diversion. Between the two rights flow could not exceed 2.9 CFS. Under 76LJ 7537 a total of 144 acres could be irrigated with 700 GPM (1.6 CFS). Provisional Permit 76LJ 76499-00 was perfected at 1.3 CFS.

21. The 2005 US Department of Agriculture (USDA) aerial photo showed 80 acres being irrigated. The 1992 Notice of Completion documented 80 acres.
22. To quantify historic consumptive use the Applicant submitted a historical use addendum, a Washington State University (WSU) Extension Publication quantifying mint irrigation water requirements (34 inches) and an effective precipitation (6.88 inches) value based on the Bigfork 13S weather station (period of record 1971-2000). The consumptive use for mint from the WSU publication more accurately estimated actual historical use than the Departments' consumptive use rules which are based on alfalfa. Based on this information the net irrigation requirement for one acre of mint is 27.12 inches (34"- 6.88"). 80 acres were historically irrigated; therefore total consumption equals 180.8 AF (27.12 inches ÷ 12 inches/foot × 80 acres).
23. On the 1992 Notice of Completion form the annual diverted volume (239 AF) was quantified using a Department provided equation. The flow rate (1.3 CFS) of the system was multiplied by the total number of irrigation days (95) and divided by 226.67 (unit of conversion to acre-feet).
24. Based on Applicant supplied data total consumption for 80 acres of mint equals 180.8 AF. Using a system efficiency of 70% for wheel lines/hand lines the total diverted volume is 258.3 AF (180.8 AF ÷ 0.70). This value is greater than what was allowed under Provisional Permit 76LJ 76499-00. This change is limited to 240 AF.
25. The Applicant supplied a typical irrigation schedule (Table 2) showing how 1.3 CFS was used to spread 240 AF of water annually.

| Period of Use | Days | Avg. Hours/Day | Days | Flow Rate (gpm) | Diverted Volume (AF) |
|------------------|------------|----------------|-------------|-----------------|----------------------|
| May | 31 | 8 | 10.3 | 570 | 26.0 |
| June | 30 | 15 | 18.8 | 570 | 47.2 |
| July | 31 | 16 | 20.7 | 570 | 52.1 |
| Harvest Aug. 1-5 | 5 | 0 | 0.0 | 570 | 0.0 |
| Aug. 6-31 | 26 | 16 | 17.3 | 570 | 43.7 |
| September | 30 | 14 | 17.5 | 570 | 44.1 |
| October | 31 | 8 | 10.3 | 570 | 26.0 |
| Nov. 1 | 1 | 8 | 0.3 | 570 | 0.8 |
| Total | 185 | | 95.3 | | 239.9 |

Table 2: Typical Historic Irrigation Schedule

26. In summary the Department found the following historic use (Table 3):

| WR Number | Purpose | Flow Rate | Volume | Period of Use | Point of Diversion | Place of Use | Priority Date | Acres |
|---------------|------------|----------------------------|--------|--|--|--|----------------------|-------|
| 76LJ 76499 | Irrigation | 570 GPM (1.3 CFS) | 240 AF | May 1 st - November 1 st | NENENW Sec 9 Twp 27N Rge 20W Flathead, County | N2SE Sec 5 Twp 27N Rge 20W Flathead, County | November 27, 1990 | 80 |

CONCLUSIONS OF LAW

27. 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. 1339988-40A, 1339989-40A, 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).

28. 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).

29. 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.

30. 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).

31. 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)

32. 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”).

33. 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)).

34. “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.

35. 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.

36. Applicant 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 Applicant has elected not to proceed under ARM 36.12.1902. (Finding of Fact (FOF) No. 23)

37. The Applicant has proven by a preponderance of the evidence the historic use of Water Right 76LJ 76499 with a diverted volume of 240 AF, a flow rate of 1.3 CFS and a consumptive use of 180.8 AF (FOF No. 19-26).

Adverse Effect:

FINDINGS OF FACT

38. The period of diversion/use will not change for Provisional Permit 76LJ 76499-00. The Applicant is requesting to move a point of diversion a half mile upstream and reduce their place of use by 2.32 acres. The method of irrigating will change from wheel line/hand line to half of a center pivot with a swing arm and end gun. The Applicant proposes to grow alfalfa verses mint.

39. The Applicant proposes to irrigate 77.68 acres of alfalfa. The Irrigation Water Requirement Program (IWR) was used to calculate consumption. 77.68 acres of alfalfa will

consume 133.4 AF. Based on a system efficiency of 70% 190.6 AF of water will be diverted; both are less than historic consumed and diverted volumes.

40. Historically, 59.2 AF of water was not consumed and eventually returned to the source and/or Flathead River (240 AF diverted – 180.8 consumed = 59.2 AF). With the proposed change 57.2 AF of water will return to the source and/or Flathead River (190.6 AF – 133.4 AF). The reduction in returns flows was not found to adversely affect any downstream water users on the Flathead River because the quantity of water flowing every month is greater than current legal demands.

41. There are seven intervening water rights between the historic and proposed point of diversion (Table 4).

| Water Right Number | Period of Diversion | Purpose | Flow (CFS) |
|---------------------------|----------------------------|--------------------------|-------------------|
| 76LJ 146940-00 | 1.1-12.31 | Stock direct from source | 0.06 |
| 76LJ 396-00 | 4.15-10.15 | Irrigation | 0.38 |
| 76LJ 7537-00 | 5.1-10.1 | Irrigation | 1.56 |
| 76LJ 147036-00 | 4.16-4.30 | Fish & Wildlife | 6,650 |
| 76LJ 147037-00 | 8.1-4.15 | Fish & Wildlife | 3,500 |
| 76LJ 147038-00 | 7.16-7.31 | Fish & Wildlife | 5,402 |
| 76LJ 147039-00 | 5.1-7.15 | Fish & Wildlife | 8,125 |

Moving the point of diversion upstream will not adversely affect the seven water rights between the old and new point of diversion or any other legal demands downstream. The quantity of water in the source each month is greater than the flow rate and volume required by all legal demands on the Flathead River between the USGS Flathead River at Columbia Falls gage (#12363000) and inlet into Flathead Lake (Table 5). USGS Flathead River near Polson gage (#12372000) also verifies that an adequate supply of water exists downstream of the point of diversion and that between the two gages the system is gaining (Table 6).

Table 5: USGS Flathead River at Columbia Falls gage (#12363000) Minus Existing Legal Demands to Inlet of Flathead Lake

| Month | Water Physically Available (CFS) | Existing Legal Demands (CFS) | Physically Available Water minus Legal Demands (CFS) | Legally Available Water (AF) |
|-----------|----------------------------------|------------------------------|--|------------------------------|
| January | 5,714.0 | 3,506.6 | 2,207.4 | 135,491.4 |
| February | 4,887.0 | 3,506.6 | 1,380.4 | 76,530.5 |
| March | 4,805.0 | 3,506.6 | 1,298.4 | 79,697.0 |
| April | 10,680.0 | 6,772.3 | 3,907.7 | 232,114.4 |
| May | 22,630.0 | 8,247.3 | 14,382.7 | 882,807.1 |
| June | 24,720.0 | 8,247.3 | 16,472.7 | 978,475.4 |
| July | 11,450.0 | 5,524.3 | 5,925.7 | 363,716.4 |
| August | 5,705.0 | 3,622.3 | 2,082.7 | 127,833.1 |
| September | 4,953.0 | 3,622.3 | 1,330.7 | 79,040.6 |
| October | 5,133.0 | 3,622.3 | 1,510.7 | 92,723.7 |
| November | 4,565.0 | 3,506.6 | 1,058.4 | 62,870.1 |
| December | 5,995.0 | 3,506.6 | 2,488.4 | 152,739.2 |

Table 6: USGS Flathead River near Polson gage (#12372000) Minus Existing Legal Demands on Flathead Lake to gage

| Month | Water Physically Available (CFS) | Existing Legal Demands (CFS) | Physically Available Water minus Legal Demands (CFS) | Legally Available Water (AF) |
|-----------|----------------------------------|------------------------------|--|------------------------------|
| January | 10,380.0 | 104.7 | 10,275.3 | 630,699.9 |
| February | 9,234.0 | 104.7 | 9,129.3 | 506,130.2 |
| March | 7,778.0 | 104.7 | 7,673.3 | 470,989.1 |
| April | 9,223.0 | 172.1 | 9,050.9 | 537,621.3 |
| May | 18,570.0 | 172.1 | 18,397.9 | 1,129,260.9 |
| June | 25,720.0 | 172.1 | 25,547.9 | 1,517,543.1 |
| July | 13,570.0 | 172.1 | 13,397.9 | 822,360.9 |
| August | 6,312.0 | 172.1 | 6,139.9 | 376,864.9 |
| September | 6,076.0 | 172.1 | 5,903.9 | 350,689.5 |
| October | 7,369.0 | 172.1 | 7,196.9 | 441,743.5 |
| November | 8,838.0 | 104.7 | 8,733.3 | 518,759.9 |
| December | 10,070.0 | 104.7 | 9,965.3 | 611,672.1 |

42. The Applicant has a plan that demonstrates the use of water can be controlled so that water rights of prior appropriators will be satisfied. During times of extreme water shortage or if call should be made, the Applicant proposes to reduce and then cease using water by turning off the pump.

CONCLUSIONS OF LAW

43. 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).

44. 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).

45. 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.

46. 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).

47. 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.

48. 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.

49. The Applicant has proven that 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. §85-2-402(2)(b), MCA.(FOF Nos. 38-42)

Beneficial Use

FINDINGS OF FACT

50. The Applicant seeks authorization to change the point of diversion associated with Provisional Permit 76LJ 76499-00 from a pump site located in NENENW of Section 9, Township 27N, Range 20W, Flathead County, Montana to a pump site located in the NENESE of Section 4, Township 27N, Range 20W, Flathead County, Montana. The point of diversion will be moved upstream, approximately half a mile directly north of the historic point of diversion and be placed along the west bank of the Flathead River. This point of diversion is currently being used by the Applicant to irrigate 151 acres under Provisional Permit 76LJ 30067603. The flow rate from the proposed point of diversion will not exceed 3.8 CFS (1.3 CFS + 2.5 CFS); both rights may be exercised at the same time. The maximum volume of water diverted under both water rights cannot exceed 470 AF (279.4 AF + 190.6 AF).

51. Water will be diverted from the Flathead River via a pump and sent through an 14 inch mainline. Based on the pump curve the pump has the capacity to pump 3.8 CFS. The mainline will run to the west approximately 4,100 feet and then send water to the north (76LJ 30067603) and to the south (76LJ 76499) via a control valve. Half of a Reinke center pivot with a swing arm and end gun will apply water to 77.68 of the original 80 acres. The system is designed to apply 1.3 CFS. The Applicant will measure and supply flow records to the Department.

52. A total of 77.68 acres will be irrigated; 58.27 acres under the main pivot, 17.64 under the swing arm and 1.77 acres under the end gun. The Irrigation Water Requirements (IWR) Program (USDA NRCS, 2003) was utilized to estimate new consumptive use volumes. The following parameters were used (see table 7 below). The IWR annual crop consumption rate for an acre of alfalfa is 1.72 AF/acre. Assuming a system efficiency of 70%, 133.4 AF of water would be consumed and 190.6 AF diverted. These values are less than historic consumed and diverted volume limits. Irrigation is considered to be a beneficial use under § 85.2.102(4)(a), MCA

| | |
|--|--|
| Base Climate Data: | 1971-2000 |
| Weather Station: | Flathead County, Bigfork 13S; Elevation 2,910 feet |
| Crop: | Alfalfa Hay |
| Irrigation Type and Net Irrigation Application: | Center Pivot, 1 inch |
| Growth Dates: | 5/6 – 10/28 |

Table 7: Summary table of parameters used to quantify the proposed use

CONCLUSIONS OF LAW

53. 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.

54. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), affirmed on other grounds, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90

P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

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

MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

55. 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).

56. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 190.6 acre-feet of diverted volume and 1.3 CFS of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos 50-52)

Adequate Diversion

FINDINGS OF FACT

57. The Applicant seeks to change the historic point of diversion and in the process change the method of irrigation from hand lines/wheel lines to half of a center pivot with a swing arm and end gun. A total of 77.68 acres will be irrigated of the historic 80 acres. A 14 inch buried pipe will carry water from the point of diversion west. After 4,100 yards the mainline splits and a control valve will direct water to the north (76LJ 30067603) to irrigate 151 acres and/or to the south (76LJ 76499) to irrigate 77.68 acres. A Robbco Pump 12FHE will divert water from the Flathead River. The system is designed so 228.7 acres can be irrigated simultaneously (76LJ 76499, 76LJ 30067603) or separately. The irrigation system can apply water at a rate of 1.3 CFS.

58. An inline flow meter will record water usage for both permits. 76LJ 76499 will be conditioned to require the Applicant to measure and report usage to the Department regularly. This condition will ensure the total usage does not exceed the permitted amounts.

59. Water rights 76LJ 30067603 and 76LJ 76499 will be exercised at the same time. The maximum volume of water diverted from the proposed point of diversion cannot exceed 3.8 CFS up to 470 AF.

CONCLUSIONS OF LAW

60. 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.

61. 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).

Adequate diversions can include the requirement to bypass flows to senior appropriators. *E.g., In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

62. 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 57-59).

Possessory Interest

FINDINGS OF FACT

63. The Applicant signed and had the affidavit on the application form notarized affirming the Applicant 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. (Department file)

CONCLUSIONS OF LAW

64. Pursuant to §85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

65. 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.

66. 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. §85-2-402(2)(d), MCA. (FOF No. 65)

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76LJ 30102909 should be granted subject to the following.

The Applicant may change the point of diversion associated with Provisional Permit 76LJ 76499-00 from a pump site located in NENENW of Section 9, Township 27N, Range 20W, Flathead County, Montana to a pump site located in the NENESW of Section 4, Township 27N, Range 20W, Flathead County, Montana. Water will be diverted from the Flathead River and will irrigate 151 acres associated with Provisional Permit 76LJ 30067603 and 77.68 acres associated with Provisional Permit 76LJ 76499. 1.3 CFS is the maximum flow rate to be applied to the 77.68 acres associated with the change. Total volume from the new point of diversion cannot exceed 470 AF.

The Application will be subject to the following conditions, limitations or restrictions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED WATER USE MEASURING DEVICE AT A POINT APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

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 13th day of April, 2016.

/Original signed by Kathy Olsen/
Kathy Olsen, Deputy Regional Manager
Kalispell Regional Office
Department of Natural Resources
and Conservation