



- USDA Web Soil Survey
- Pre-Application meeting
- Statute and administrative rules
- U.S. Geological Survey Stream Gauging Records for the Missouri River
- Irrigation Change Application Technical Report

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

### **WATER RIGHTS TO BE CHANGED**

#### FINDING OF FACT

1. Applicants propose to change the following Statements of Claim from Instream Fishery purposes to Irrigation. The elements displayed in Table 1 are listed as authorized by the Department in a 2009 Change Authorization (41QJ 30042730). Subsequent to the 2009 Change Authorization, the Water Court further adjusted some elements of the water right through its post-decree adjudication process. The Water Court post-decree adjustments of select elements are noted below the table and marked with an asterisk.

TABLE 1 - 2009 CHANGE AUTHORIZATION VERSION OF WATER RIGHTS PROPOSED FOR CHANGE

<b>WR Number</b>	<b>Source</b>	<b>Purpose</b>	<b>*Flow Rate</b>	<b>Diverted Volume</b>	<b>Consumed Volume</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>**Priority Date</b>
41QJ 209518-00	Missouri River	Instream Fishery	6.85 Cubic Feet per Second (CFS)	227.2 Acre Feet (AF)	90.9 Acre Feet (AF)	Apr 15 – Oct 1	SWNE Sec. 17, T17N, R1W	Sections 16 and 17, T17N, R1W	June 1, 1915
41QJ 209520-00	Missouri River	Instream Fishery	6.10 Cubic Feet per Second (CFS)	79.8 Acre Feet (AF)	31.9 Acre Feet (AF)	Apr 15 – Oct 1	SWNE Sec. 17, T17N, R1W	Sections 16 and 17, T17N, R1W	June 1, 1915

- After the 2009 change authorization process, and during post-decree adjudication proceedings, the Water Court reduced the flow rate appurtenant to Statement of Claim No. 41QJ 209518 from 6.85 CFS to 3.56 CFS.
- \*\* After the 2009 change authorization process, and during post-decree adjudication proceedings, the Water Court adjusted the priority date of Statement of Claim No. 41QJ 209518 from June 1, 1915 to April 1, 1955.

The existing places of use for Instream Fishery purposes are summarized as a reach of the Missouri River from a point in the SWNE Section 17, T17N, R1W, downstream for approximately 1.8 miles into the NE quarter of Section 16, T17N, R1W.

## **GENERAL**

### **FINDINGS OF FACT**

2. In 2009 the Department granted Change Authorization No. 41QJ 30042730 to change the purpose of use of the two water rights noted in Table 1 above, from Irrigation to Instream Fishery. The 2009 Authorization was assigned an expiration date of November 10, 2019 (a temporary period of 10 years). Upon expiration of the Authorization, the two water rights would have automatically reverted back (without Department approval) to their historic use under flood irrigation. 85-2-407(6), MCA. However, Applicants have filed an application to change the use of water back to irrigation purposes before the end of the expiration period, requiring authorization from the Department. Applicants are proposing the change in order to facilitate plans to irrigate under center pivot and hand line sprinkler systems.

3. Applicants propose to change the point of diversion, place of use and purpose of use of Statement of Claim Nos. 41QJ 209518-00 and 41QJ 209520-00. The requested purpose is Irrigation. The proposed point of diversion is located in the SWNE Section 17, T17N, R1W (one pump will supply three center pivots and two handline sprinkler irrigation systems). The place of use will consist of a combined 119.3 acres located in Sections 9, 16, and 17, T17N, R1W (see map in Finding of Fact No. 6). Application.

4. After the two Statements of Claim were authorized to be changed in 2009, the Claimant at the time, FCM, LLC, proposed amendments to each water right, and the Montana Water Court issued an Order relative to the amendments on July 31, 2014. Order Adopting Masters Report, July 31, 2014. The Water Court approved modification of the water rights as follows in Table 2.

**TABLE 2 - 2014 WATER COURT ORDER ON SELECT ELEMENTS OF THE WATER RIGHTS AS MODIFIED AFTER AMENDMENTS**

<b>WR Number</b>	<b>Source</b>	<b>Flow Rate (CFS)</b>	<b>Period of Use</b>	<b>Place of Use</b>	<b>Priority Date</b>
41QJ 209518	Missouri River	3.56 CFS	Apr 15 – Oct 1	94.0 Acres in Sections 16 and 17, T17N, R1W	June 1, 1955
41QJ 209520	Missouri River	6.10 CFS	Apr 15 – Oct 1	129.0 Acres in Sections 16 and 17, T17N, R1W	June 1, 1915

5. The 2014 Water Court Order approved modifications to Statement of Claim No. 41QJ 209518 as it was decreed in the Basin 41QJ Temporary Preliminary Decree. The modifications included a reduction in flow rate and acres irrigated, and a more junior priority date.

6. The 2014 Water Court Order approved modifications to Statement of Claim No. 41QJ 209520 as it was decreed in the Basin 41QJ Temporary Preliminary Decree. The modifications included an increase in flow rate and acres irrigated.

7. The proposed, combined amount of water to be changed for the two Statements of Claim is 2.23 CFS, a diverted volume of 147.4 AF, and a consumed volume of 122.8 AF. The consumed volume was found by the Department in the 2009 change proceeding to be the amount historically consumed. In 2009, the Department found distinct amounts of water that were appurtenant to each water right, the total sum of which was equal to the aforementioned consumed amount. See Table 1 for the appropriation appurtenant to each water right.

Application.

8. A map of the proposed change follows:



**§85-2-402, MCA, CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

....

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

(italics added).

12. Montana’s change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

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

[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

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<sup>1</sup> 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).

reduced to a lesser quantity because of the relatively limited actual historic use of the right.

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

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

may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

14. The Montana Supreme Court recently explained:

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

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

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

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

MCA. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

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

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

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

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

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

....

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

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be

harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

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

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

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

### Historic Use

#### FINDINGS OF FACT

##### Water Use Prior to 2009

20. Prior to 2009 the two Statements of Claim in this matter (41QJ 209518 and 41QJ 209520) were used for irrigation purposes. The Department analyzed and made findings on historic use in the change process that took place in 2009. Change Authorization No. 41QJ 30042730. Historically, the source of water was the Missouri River and multiple diversion points appropriated water in Sections 9, 16 and 17, T17N, R1W. Water was used on a combined 129 irrigated acres in Sections 16 and 17, T17N, R1W. The amount of water determined to be

associated with 41QJ 209518 in 2009 was a flow rate of 6.85 CFS, a diverted volume of 227.2 AF, and a consumptive volume of 90.9 AF. The amount of water associated with 41QJ 209520 was a flow rate of 6.10 CFS, a diverted volume of 79.8 AF, and a consumptive volume of 31.9 AF. Water right records.

21. Subsequent to the 2009 change process, in 2014 the Montana Water Court issued a Masters Report, and Order Adopting Masters Report, which amended certain elements of the water rights. Notably, the Water Court reduced the flow rate for 41QJ 209518 to 3.56 CFS, and adjusted the priority date from June 1, 1915 to April 1, 1955. The Water Court also found the historic place of use to be 94.0 acres, which is the same number of acres found to be irrigated by the Department in the 2009 change proceeding. In the same Order the Water Court changed elements of 41QJ 209520. Those changed elements included increasing the flow rate from 1.33 CFS to 6.10 CFS (which is what the Department found as the historic flow rate in the 2009 change proceeding), and an increase in acres irrigated from 35 to 129 acres. These select changes to the water rights are summarized in Table 2 under Finding of Fact No. 4 in this Preliminary Determination. Water right records.

22. As noted above, the Water Court approved an amendment to the place of use of 41QJ 209520 from 35 acres to 129 acres, an increase of 94 acres over that found by the Department in 2009. While a map was not generated by the Water Court to display the additional 94 acres, the legal land descriptions contained in the Court's Master's Report reflect the same historic 94 acres that were found by the Department in 2009 for 41QJ 209518. Based on the identical legal land descriptions and acreage identified in the two water rights, the Department assumes the Water Court intended the 94 acres to be overlapping and supplemental to one another for the two water rights. Therefore, the combined place of use of 129 acres found by the Department in 2009 to be historically irrigated, reconciles with the combined acreage found by the Water Court in 2014.

23. The Department finds that the modifications made to the two Statements of Claim by the Water Court in 2014, do not change its 2009 findings for the combined, historic volume used (the combined volume was calculated based on the combined place of use of 129 acres). The Department therefore confirms its 2009 decision for historic diverted and consumed volume for each of the two water rights.

24. The Water Court’s 2014 reduction in flow rate for 41QJ 209518 to 3.56 CFS will be recognized by the Department in this decision as the historic flow rate.

25. The Department finds the amounts of water associated with historic irrigation practices, including after the 2014 Water Court modifications to the existing water rights, to be the following:

TABLE 3 – HISTORIC APPROPRIATION OF WATER

<b>WR Number</b>	<b>Source</b>	<b>Flow Rate (CFS)</b>	<b>Diverted Volume (AF)</b>	<b>Consumed Volume</b>
41QJ 209518	Missouri River	3.56 CFS	227.2 AF	90.9 AF
41QJ 209520	Missouri River	6.10 CFS	79.8 AF	31.9 AF

Water Use After 2009

26. For purposes of this present proceeding the use of the water rights as changed in 2009 will be considered as the historic use.

27. In 2009 the two water rights were authorized to be changed to the purpose of Instream Fishery, and the elements approved for change and/or modified by the Water Court are identified in Finding of Fact No. 25. File for Change Authorization No. 41QJ 30042730; Finding of Fact No. 25 (Table 3).

28. Since the water rights have been left in the Missouri River for the last 7 years to benefit the fishery, and there has been no manmade diversion of water, the Department considers the rights to have been beneficially used for Instream Fishery purposes. A review of U.S. Geological Survey stream gauging records reveals that during the period 2009-2015, the lowest

recorded monthly mean discharge in the Missouri River near Ulm, Montana was 3,006 CFS. USGS Stream Gauging Records.

29. The Department finds the water rights as reflected in Table 3, Finding of Fact No. 25, have been beneficially used.

### CONCLUSIONS OF LAW

30. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. §85-2-402(1), MCA; Royston, *supra*; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; *cf.* General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. *E.g.*, Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. *E.g.*, McDonald, *supra*; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions, *citing* Featherman v. Hennessy, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); *see also* In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

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

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

33. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

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

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

36. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

37. “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision ( 2003) (proposed decision

denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), supra; In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra.

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

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

Hohenlohe ¶ 71.

39. 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.

40. Evidence of historic use for of Statement of Claim Nos. 41QJ 209518 and 41QJ 209520 has been proven by a preponderance of the evidence as set forth Table 3, Finding of Fact No. 25.

### **Adverse Effect**

#### **FINDINGS OF FACT**

41. Applicants propose to change the point of diversion, place of use and purpose of use of Statement of Claim Nos. 41QJ 209518-00 and 41QJ 209520-00. The requested change includes the reversion of water use from its current purpose, Instream Fishery, to its historic use, Irrigation. Per the Authorization issued in 2009, water use for Instream Fishery purposes was set to expire and revert back to Irrigation in 2019. However, Applicants desired to change the purpose back to Irrigation before the temporary period expires, and therefore authorization from the Department is necessary.

42. The proposed point of diversion is located in the NWSWNE Section 17, T17N, R1W (one pump will supply all sprinkler irrigation systems). The place of use will consist of 119.3 acres located in Sections 9, 16, and 17, T17N, R1W (see map in Finding of Fact No. 6). The period of diversion and use will remain the same as historically. Application.

43. The proposed amount of water to be changed for Statement of Claim No. 41QJ 209518 is 2.23 CFS, a diverted volume of 109.1 AF, and a consumed volume of 90.9 AF. The amount of

water to be changed for Statement of Claim No. 41QJ 209520 is 2.23 CFS, a diverted volume of 38.3 AF, and a consumed volume of 31.9 AF. These are the amounts of water necessary to supply the combination of proposed sprinkler irrigation systems. Department Technical Report.

44. Under the proposed change the Applicants shall not exceed the amounts of water that were historically diverted/consumed prior to the most recent change authorization, dated Nov. 10, 2009 (Change Authorization No. 41QJ 30042730). The Department finds the flow rate and diverted volume proposed for change, for each water right, are less than that historically used, and the consumed volume is the same.

45. Applicants indicate that a measuring device (inline flow meter) will be placed in the conveyance pipe between the diversion and place of use. The device will track all appropriations of water that supply the irrigation systems. In order to comply with the terms of this authorization, and prevent adverse effects, a measurement condition is imposed in this Preliminary Determination to ensure that the authorized amount of water is not exceeded (see Conditions section).

46. The Department finds the Applicants have 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. Measuring water and reporting to the Department will prevent the authorized appropriation from being exceeded and prevent adverse effects to other water users. To meet this Finding, Applicants must comply with the conditions imposed in this Order.

#### CONCLUSIONS OF LAW

47. 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).

48. 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).

49. 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.

50. 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).

51. 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*.

52. 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.

53. The Applicants have proven that the proposed change in appropriation right will not adversely affect the use of existing water rights of other persons or other perfected or planned

uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. FOF No. 46.

### **Beneficial Use**

#### **FINDINGS OF FACT**

54. The proposed beneficial use is irrigation of agricultural crops. The place of use to be irrigated is 119.3 acres (92.6 acres under center pivot irrigation, and 26.7 acres under handline irrigation). The amounts of water proposed to be used by the combination of water rights are 2.23 CFS and a diverted volume of 147.4 AF. The estimated consumed volume is 122.8 AF, equal to the volume historically consumed. Application; Department Technical Report.

55. The per-acre allocation of flow rate is 8.4 gallons per minute per acre, within the standard range for sprinkler irrigation systems in Montana. The irrigation systems will operate under deficit irrigation conditions because the Applicants are limited to using only that amount of water historically consumed. However, 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 Applicants. ARM 36.12.1902 (16).

56. The Department finds the proposed amounts of water to be changed to irrigation purposes are beneficial. FOF No. 54.

#### **CONCLUSIONS OF LAW**

57. 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.

58. 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.

59. 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).

60. Applicants propose to use water for Irrigation purposes. Irrigation is supported as a beneficial use of water in §85-2-102(4)(a), MCA. Applicants have proven by a preponderance of the evidence that Irrigation is a beneficial use and that the flow rates and volumes of water indicated in Finding of Fact No. 54 are beneficial.

### **Adequate Diversion**

#### **FINDINGS OF FACT**

61. Water will be appropriated from the Missouri River for irrigation purposes by a single pumping station located in the SWNE Section 17, T17N, R1W, Cascade County. A Cornell pump capable of appropriating 2.23 CFS will divert water to a combination of three center pivot sprinkler irrigation systems and two handline sprinkler systems. A pump curve containing diversion works specifications and a diagram of the irrigation systems was supplied by the Applicant. Application.

62. An inline flow meter will measure all appropriations of water, and a separate accounting of appropriations will occur for each water right.

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

#### **CONCLUSIONS OF LAW**

64. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate 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 case 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. 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 No. 63).

### **Possessory Interest**

#### **FINDINGS OF FACT**

65. The Applicants signed the affidavit on the application form affirming they have 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. File.

#### **CONCLUSIONS OF LAW**

66. 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.

67. 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.

68. The Applicants have proven by a preponderance of the evidence that they have 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 No. 65)

**Salvage Water**

This Application does not involve salvage water.

**CONDITIONS**

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41QJ 30104531 THE DEPARTMENT FINDS THE FOLLOWING CONDITION IS 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 IRRIGATION SYSTEMS. 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 IRRIGATION SYSTEMS, INCLUDING THE PERIOD OF TIME.

RECORDS OF APPROPRIATIONS FOR EACH WATER RIGHT 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 DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES 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

### **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. 41QJ 30104531 should be **GRANTED**. The Appropriators are authorized to change the point of diversion, place of use and purpose of use of Statement of Claim Nos. 41QJ 209518 and 41QJ 209520. The means and point of diversion for Irrigation shall be a pump located in the SWNE Section 17, T17N, R1W. The method and place of use shall be three center pivot and two handline sprinkler irrigation systems. The places of use consist of 119.3 acres and are generally located in S2 Section 9; N2 Section 16; and the NE Section 17, all in T17N, R1W (see map in file for specific location of the point of diversion and places of use).

The Appropriators 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 17<sup>th</sup> day of August, 2016.

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

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 17<sup>th</sup> day of August, 2016, by first class United States mail.

DANIEL FIEHRER AND EDDY CROWLEY  
PO BOX 811  
HELENA, MT 59624

JOHN MURPHY  
4115 CASSTOWN-SIDNEY RD  
TROY, OH 45373

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Lewistown Regional Office  
(406) 538-7459