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

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APPLICATION TO CHANGE WATER RIGHT NO. 41A 30126471 AND 41A 30154943 BY GRAYLING CENTENNIAL LLC

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On August 13, 2019, Grayling Centennial LLC (Applicant) submitted Applications to Change Water Right Nos. 41A 30126471 and 41A 30154943 to change Water Right Claim No. 41A 133546-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 7, 2020. The Applicant responded with information dated March 3, 2020. The Application was determined to be correct and complete as of February 16, 2022. An Environmental Assessment for this Application was completed on June 10, 2022.

The Department created Application to Temporarily Change Water Right No. 41A 30154943 and version 3 of the water right proposed for change after the initial application was submitted by the Applicant. Due to the temporary status of the Instream Flow portion of the proposed change, this new application number was created to allow for the separation of the permanent and temporary portions of the proposed project. If Temporary Change Authorization No. 41A 30154943 is not renewed, the active version of the water right being changed will immediately revert to the version reflecting the permanent changes proposed in Application 41A 30126471 only.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Applications as filed:
• Applications to Change Water Right, Form 606
• Attachments
• Maps: Aerial photo depicting project overview, aerial photo depicting historic use, aerial photo depicting proposed use, aerial photo depicting proposed reservoir, aerial photo depicting instream and return flow
• Change in Purpose Addendum (Form 606-PA)
• MT DFWP streamflow reports for Corral Creek
• Place of Storage Addendum (Form 606-PSA)
• Change to Instream Flow Addendum (Form 606-IFA)
• Temporary Change Addendum (Form 606-TCA)
• Montana Sage Grouse Habitat Conservation Program letter dated April 1, 2019

Information Received after Applications Filed

• Deficiency response e-mail dated March 3, 2020, from Eric August (Consultant)
• Additional deficiency response e-mail dated March 11, 2020, from Eric August
• E-mail from Applicant and consultant accepting corrections to Technical Report proposed irrigation use calculations dated March 28, 2022
• E-mail from consultant describing flow-through outlet for pond dated April 15, 2022

Information within the Department’s Possession/Knowledge

• Water Resource Survey, Beaverhead County, dated September 28, 1972
• Department Technical Report. An error in the Management Factor used to determine the proposed irrigation consumptive volume was discovered after the Technical Report was issued. The calculations found in this Preliminary Determination reflect the corrected values for proposed consumptive and diverted volumes.
• The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.
  o Return Flow Memo dated April 1, 2016
  o Consumptive Use Methodology Memo dated March 17, 2010
Historic Diverted Volume Memo dated September 13, 2012

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The water right proposed for change historically irrigated 192 acres with water diverted from three headgate and ditch diversions on Corral Creek, tributary to the Red Rock River in Beaverhead County. The elements of this water right are listed in Table 1.

Table 1: Water Right Proposed for Change

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Purpose</th>
<th>Flow Rate</th>
<th>Volume</th>
<th>Period of Use</th>
<th>Points of diversion</th>
<th>Place of use</th>
<th>Priority date</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>41A 133546</td>
<td>Irrigation</td>
<td>6.25 CFS</td>
<td>N/A</td>
<td>5/1 – 10/1</td>
<td>NESWNE, NESPNE, NENWS, Sec. 22, T14S, R1E, Beaverhead County</td>
<td>Sec 15, 22, T14S, R1E</td>
<td>10/27/1895</td>
<td>192</td>
</tr>
</tbody>
</table>

2. Statement of Claim 41A 133546-00 has a place of use of 192 acres and supplemental water rights 41A 133547 from Hellroaring Creek and 41A 133548 from an unnamed tributary of Hellroaring Creek both share the same 209 acre place of use. The three water rights overlap to supplementally irrigate 122 acres, or 63.5% of the place of use proposed for change in this application. The supplemental rights are not proposed for change in this application.
Table 2: Supplemental Water Rights

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Purpose</th>
<th>Flow Rate</th>
<th>Volume</th>
<th>Period of Use</th>
<th>Point of diversion</th>
<th>Place of use</th>
<th>Priority date</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>41A 133547</td>
<td>Irrigation</td>
<td>5.0 CFS</td>
<td>N/A</td>
<td>5/1 – 10/1</td>
<td>SWSWSW Sec 24, T14S, R1E, Beaverhead County</td>
<td>Sec 15, 22, 23 T14S, R1E</td>
<td>07/13/1906</td>
<td>209</td>
</tr>
<tr>
<td>41A 133548</td>
<td>Irrigation</td>
<td>1.25 CFS</td>
<td>N/A</td>
<td>5/1 – 10/1</td>
<td>SENWSE Sec 23, T14S, R1E, Beaverhead County</td>
<td>Sec 15, 22, 23 T14S, R1E</td>
<td>07/13/1906</td>
<td>209</td>
</tr>
</tbody>
</table>

CHANGE PROPOSAL

FINDINGS OF FACT

3. Applicant proposes to permanently retire 187 acres located within the historical 192-acre flood irrigated historical place of use listed on Claim 41A 133546-00. A volume of 150 AF of irrigation water formerly diverted at Point of Diversion (POD) 3 from Corral Creek will be permanently changed to the purpose of fishery to supply an 18.7 AF capacity off-stream pond located within the historic place of use in the NWNE Section 22, T14S, R1E. This pond will be filled with water conveyed along the historic POD 3 ditch from May 1 through October 1. The remaining 5 acres of historic irrigation will be left in service using an existing pipeline from POD 2. The proposed period of use for the fishery and irrigation purposes is May 1 to October 1. POD 1 will be abandoned and Corral Creek at that point will be restored to natural conditions.

4. The Applicant also proposes to temporarily change a portion of Claim 41A 133546-00 for a period of 10 years with the option to renew. The proposed temporary purpose and place of use for this water right will be instream flow in a 2.9 mile stretch of Corral Creek extending from POD 2 to the confluence of Corral Creek and the Red Rock River. The proposed instream flow rate
and volume is 0.37 CFS up to a maximum volume of 112 AF, and the proposed temporary period of use is May 1 to October 1. Map 1 below shows the elements of both the proposed permanent and temporary changes. The legal land description listed for POD 2 in the DNRC records is the NESWNE Section 22, T14S, R1E. Based on information provided by the Applicant the actual historic location is the SESWNE Section 22, T14S, R1E, which will be used in this determination.
Preliminary Determination to Grant Application to Change Water Right No. 41A 30126471 and 41A 30154943
CHANGE CRITERIA

5. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant’s burden to prove change criteria by a preponderance of evidence is “more probably than not.”); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. 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), (16), and (18) 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) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-
320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

6. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., Hohenlohe, at ¶ 29-31; Town of Manhattan, at ¶8; In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

7. In addition to the § 85-2-402(2), MCA, an applicant for a temporary change authorization for instream flow must comply with the requirements and conditions set forth in §§ 85-2-407 and -408, MCA.

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

8. The Applicant submitted Beaverhead County Water Resources Survey (WRS) field notes dated September 28, 1972, indicating active irrigation of the claimed place of use utilizing 250 Miners Inches (6.25 CFS) from Horse Camp Creek, which was later renamed to Corral Creek. The Beaverhead County WRS Survey was not completed or published, and WRS aerial photos for this area were taken late in the year when irrigation was likely to be limited. The Applicant submitted aerial photo CXM-2FF-5 dated July 31, 1965, showing active irrigation within the claimed place of use. Aerial photo J-51 11-23, dated July 12, 1947, shows water in the claimed diversion ditches and the secondary ditches supplying the claimed place of use. While distinct field boundaries are not visible, the Department finds that the evidence of water in the ditches in these aerial photos and WRS Field Notes which support active irrigation in the place of use at the claimed flow rate corroborate the historical irrigation of 192 acres with Claim 41A 133546.00.

9. The Applicant elected to use the methodology set forth in ARM 36.12.1902 for the Historic Use analysis. Historic Consumptive Volume (HCV) for the 192 acres proposed for change:
Table 3: Historic Consumptive Volume (HCV)

<table>
<thead>
<tr>
<th>Lakeview Flood</th>
<th>Beaverhead County Historic Management Factor (Percent)</th>
<th>Historic Acres</th>
<th>HCV Acre-Feet (AF)</th>
<th>On-farm Efficiency - Wild Flood</th>
<th>Field Application AF</th>
<th>Historic Irrecoverable Losses (IL) Flood 5%:</th>
<th>HCV AF (Including IL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.39</td>
<td>63.7</td>
<td>192</td>
<td>85.5</td>
<td>25%</td>
<td>342.0</td>
<td>17.1</td>
<td>102.6</td>
</tr>
</tbody>
</table>

10. Water right 41A 133546-00 has a place of use of 192 acres and supplemental water rights 41A 133547-00 from Hellroaring Creek and 41A 133548-00 from an unnamed tributary of Hellroaring Creek both share the same 209 acre place of use. The three water rights overlap to supplementally irrigate 122 acres, or 63.5% of the place of use proposed for change in this application. Based on the Applicant’s description of how these supplemental rights were historically used, Claim 41A 133546-00 provided all of the irrigation water for the 192-acre historic place of use from May 1 to July 15, or the first half of the season, for a total of 51.3 AF of the Historic Consumptive Volume (HCV) during this period. For the second half of the season from July 16 to October 1, the two supplemental rights provide half of the HCV for the supplemental place of use and 41A 133546-00 provided the other half, with Claim 41A 133456-00 provided all of the HCV for the remaining 36.5% of the non-supplemental acreage. Calculations for the portion of HCV associated with the water right being changed in these applications are detailed in Table 4 below.

Table 4: Supplemental HCV Calculations

<table>
<thead>
<tr>
<th>Acres</th>
<th>Percent of HCV for Period</th>
<th>41A 133546-00 HCV (AF)</th>
<th>41A 133547-00 &amp; 41A 133548-00 Supplemental HCV (AF)</th>
</tr>
</thead>
<tbody>
<tr>
<td>192 Acres</td>
<td>100</td>
<td>51.3</td>
<td>0</td>
</tr>
</tbody>
</table>
86.3 AF of historical consumption calculated for Claim 41A 133546-00 represents 84% of the total HCV found for the Applicant’s historical place of use involved in this change, therefore 84% of the total Irrecoverable Losses will also be attributed to the water right proposed for change.

Total HVC for the water right proposed for change (without corresponding 84% of total Irrecoverable Losses): $86.3 - (17.1 \times .84) = 71.9 \text{ AF}$

Historic Consumptive Volumes for supplemental rights 41A 133547-00 and 41A 133548-00 for the overlapping 122 acres are provided below:

Total HCV (with Irrecoverable Losses): 16.3 AF

Distributed proportionally between the two supplemental rights based on flow rate, Table 5 indicates the individual HCV for the supplemental rights:

**Table 5: Supplemental Right HCV**

<table>
<thead>
<tr>
<th>Water Right</th>
<th>Flow rate</th>
<th>% of total Flow Rate</th>
<th>Total HCV</th>
<th>Individual HCV</th>
</tr>
</thead>
<tbody>
<tr>
<td>41A 133547-00</td>
<td>5.0 CFS</td>
<td>80</td>
<td>16.3 AF</td>
<td>13.0 AF</td>
</tr>
<tr>
<td>41A 133548-00</td>
<td>1.25 CFS</td>
<td>20</td>
<td>16.3 AF</td>
<td>3.3 AF</td>
</tr>
</tbody>
</table>
11. Conveyance loss calculations for the diversions proposed for change are found in Tables 6 and 7 below. POD 2 utilizes a pipeline therefore no conveyance losses are associated with this diversion. Conveyance losses and diverted volumes were not calculated for the supplemental rights as they are not proposed to be changed and are diverted from sources other than the source involved in this change.

Table 6: POD 1 Conveyance Losses

<table>
<thead>
<tr>
<th>Seepage Loss</th>
<th>Ditch Wetted Perimeter (Feet)</th>
<th>Ditch Length (Feet)</th>
<th>Ditch Loss Rate (ft^3/ft^2/day)</th>
<th>Days Irrigated</th>
<th>Seepage Loss (/43560)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>5.42</td>
<td>2022</td>
<td>1.2</td>
<td>152</td>
<td>45.9</td>
</tr>
<tr>
<td>Vegetation Loss (All Users):</td>
<td></td>
<td>Est. Flow Rate (CFS)=</td>
<td>Days Irrigated</td>
<td>Ditch length (miles)</td>
<td>Vegetation Loss (*2)</td>
</tr>
<tr>
<td></td>
<td>0.75</td>
<td>3</td>
<td>152</td>
<td>.38</td>
<td>2.6</td>
</tr>
<tr>
<td>Ditch Evaporation: (All Users):</td>
<td></td>
<td>Ditch Width (Feet)</td>
<td>Ditch Length (Feet)</td>
<td>Evaporation (Potts)</td>
<td>Ditch Evaporation (/43560)</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>2022</td>
<td>3.15</td>
<td>.73</td>
<td></td>
</tr>
</tbody>
</table>
Table 7: POD 3 Conveyance Losses

<table>
<thead>
<tr>
<th>Seepage Loss</th>
<th>Ditch Wetted Perimeter (Feet)</th>
<th>Ditch Length (Feet)</th>
<th>Ditch Loss Rate (ft³/ft²/day)</th>
<th>Days Irrigated</th>
<th>Seepage Loss (/43560)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3.42</td>
<td>561</td>
<td>1.2</td>
<td>152</td>
<td>8.0</td>
</tr>
<tr>
<td>Vegetation Loss (All Users):</td>
<td>% loss/mile</td>
<td>Est. Flow Rate (CFS)=</td>
<td>Days Irrigated</td>
<td>ditch length (miles)</td>
<td>Vegetation Loss (*2)</td>
</tr>
<tr>
<td></td>
<td>0.75</td>
<td>6</td>
<td>152</td>
<td>.11</td>
<td>1.5</td>
</tr>
<tr>
<td>Ditch Evaporation (All Users):</td>
<td>Ditch Width (Feet)</td>
<td>Ditch Length (Feet)</td>
<td>Evaporation (Potts)</td>
<td>Ditch Evaporation (/43560)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>561</td>
<td>3.15</td>
<td>.1</td>
<td></td>
</tr>
</tbody>
</table>

Table 8: Total Diverted Volume Including both ditches

<table>
<thead>
<tr>
<th>Historic Diverted Volume (HDV)</th>
<th>HCV AF (minus IL)</th>
<th>On-farm Efficiency</th>
<th>Wild Flood</th>
<th>Seasonal Conveyance Loss Volume (seepage loss + vegetation loss + ditch evaporation)</th>
<th>Total HDV AF</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>71.9</td>
<td>25%</td>
<td>58.8</td>
<td>346.4</td>
<td></td>
</tr>
</tbody>
</table>

12. Based on the information presented in FOF Nos. 8 – 12, the Department finds a historically consumed volume of 86.3 AF and a historically diverted volume of 346.4 AF for Claim 41A 133546-00.

FINDINGS OF FACT – Adverse Effect

13. As a result of the proposed permanent change, 187 acres of irrigation from Corral Creek will be retired to provide water for the fishery purpose and proposed off-stream pond. The
Applicant proposes to continue irrigating the remaining 5 acres with water diverted at a flow rate of up to 0.04 CFS from Corral Creek at historic POD 2 from May 1 to October 1.

14. Applicant proposes a diverted flow rate of 0.5 CFS and volume of 150 AF from POD 3 from May 1 to October 1 for the 18.7 AF capacity pond, including the consumptive volume of 30.7 AF to fill the pond and account for evaporation, plus a flow through volume of 119.3 AF to support the fishery purpose. Total proposed consumptive volume for the project also includes 5% of the applied volume for irrigation attributed to irrecoverable losses as calculated in Table 9 below. Diverted volume for irrigation is the same as applied volume as the proposed means of conveyance for this purpose is a pipeline with no conveyance losses.

15. The Applicant also proposes to protect a flow rate of 0.37 CFS up to a volume of 112 AF instream in Corral Creek from POD 2 to the confluence with Red Rock Creek from May 1 to October 1.

16. Consumptive volumes are calculated as follows:

Table 9: Proposed Irrigation Consumptive Volume

<table>
<thead>
<tr>
<th>Water Right</th>
<th>Lakeview Flood Water Right Requirements (inches)</th>
<th>Management Factor (Percent)</th>
<th>Acres</th>
<th>CV Acre-Feet (AF)</th>
<th>On-farm Efficiency – Wild Flood</th>
<th>Field Application (AF)</th>
<th>Irrecoverable Losses (IL) Flood 5%:</th>
<th>CV AF (Including IL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>41A 133546</td>
<td>8.39</td>
<td>63.7</td>
<td>5</td>
<td>2.2</td>
<td>25%</td>
<td>8.8</td>
<td>0.4</td>
<td>2.6</td>
</tr>
</tbody>
</table>

Table 9 and associated calculations utilize a corrected Management Factor from the calculations in the Technical Report. Applicant accepted the amendments to the values and related calculations.

Proposed irrigation consumptive use: 2.6 AF

Proposed pond consumptive volume: 30.7 AF

Applicant proposes to construct an 18.7 AF capacity pond with a surface area of 5.7 acres and an annual evaporation of 12.0 AF, for a total of 30.7 AF consumptive volume associated with the pond. Evaporation was calculated using the Lima weather station and the Potts evaporation estimation method resulting in an annual evaporation rate of 3.15 AF/acre. Average annual
precipitation at the Lima weather station is 1.05 ft. Net evaporation for the proposed pond: 3.15 – 1.05 = 2.10 AF/acre

17. The Department finds the total consumptive volume under the proposed permanent change is 33.3 AF, resulting in a decrease of 53.0 AF consumed volume from historic practices. The proposed temporary instream appropriation of 112 AF is considered non-consumptive.

**FINDINGS OF FACT - Return Flows**

18. According to a report completed by DNRC Groundwater Hydrologist Melissa Schaar dated May 3, 2021, return flows historically accumulated entirely in Corral Creek beginning at the upstream extent of the historic POU and increasing to the total relative amounts at the downstream extent of the historic POU. Return flow values calculated by the Department were based on the Applicant’s values for consumed and diverted volumes. The assumption is made that water applied to a place of use for irrigation that is not consumed by a crop does not run off but rather infiltrates into the ground and becomes return flow. Calculations below are based on the consumed and diverted volumes found above.

Historic return flows equal the diverted volume less the consumed volume, or 346.4 – 86.3 = 260.1 AF

Water returning to Corral Creek as irrigation return flows and pond flow through under proposed use: 158.8 DV – 33.3 CV = 125.5 AF

19. The proposed pond is within the historic place of use for irrigation and flow-through water diverted to the pond but not consumed will return to the same section of Corral Creek as the historic return flows from irrigation. A screened outlet and 1 foot diameter pipe will allow flow through water to return to Corral Creek northwest of the pond via a 350 foot long natural channel.

20. The proposed change does not involve a change in location of diversion or place of use and does not increase the availability of water to the Applicant. The proposed period of diversion is the same as the historic period of diversion.

21. The Montana Department of Fish, Wildlife, and Parks (MT DFWP) is the only other user within or below the reach where historical return flows returned to Corral Creek. The protection
of historically diverted water by the Applicant will not adversely affect the MT DFWP instream flow right.

22. The following water rights listed in Table 10 have diversions within the proposed instream flow reach of Corral Creek in addition to the water right proposed for change.

Table 10: Water Rights Within Instream Flow Reach

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Owner</th>
<th>Priority Date</th>
<th>Purpose</th>
<th>POD</th>
</tr>
</thead>
<tbody>
<tr>
<td>41A 30017438</td>
<td>MT DFWP</td>
<td>6/30/1985</td>
<td>Instream Fishery</td>
<td>All Corral Creek</td>
</tr>
<tr>
<td>41A 133549</td>
<td>Grayling Centennial LLC</td>
<td>11/26/1895</td>
<td>Stock</td>
<td>NE and SE Sec 22</td>
</tr>
</tbody>
</table>

The proposed change will leave more water instream than under historical practices and will not affect the Applicant’s ability to exercise their additional senior existing right listed in Table 10. Leaving additional water instream will not affect MT DFWP’s ability to exercise their existing instream fishery right, and will not result in adverse effect to any users located downstream of the end of the proposed instream place of use.

23. Applicant proposes to measure monthly diversions during the period of diversion at each diversion and in Corral Creek at South Valley Road in the SWNWNE, Sec. 22, T14S, R1E.

24. In following standard guidelines, the Department will evaluate and review return flow conditions to determine whether historically diverted but unconsumed water is left in the source of supply under a limited adverse effect analysis absent a valid objection. For the purposes of this Preliminary Determination, a limited return flow analysis was performed for Corral Creek to assess whether return flows entered back into the creek prior to or at the location of the next appropriator (see Department Policy Memorandum on Return flows, dated April 1, 2016). This policy directs that no further return flow analysis will be undertaken in the source of supply by the Department unless a valid objection is received, provided there will be no enlargement of the amounts of water historically diverted or consumed. In this instance, the Department has determined that there will be no enlargement of Claim 41A 133546-00 as a result of the proposed changes since historically irrigated acres are being retired, the new instream appropriation is non-consumptive, and a lower flow rate of water is being diverted. As there are no intervening users other than the MT DFWP
right addressed above within the proposed instream reach, the maximum volume of water that will be left instream from the beginning to the end of the instream place of use in Corral Creek equals 112 AF.

25. The Department may approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not adversely affect the use of existing perfected uses of water pursuant to § 85-2-402(2)(a). If any water right holder believes they will be adversely affected by a change in the timing and amount of return flows resulting from this proposal, they may file an objection to the proposed project pursuant to §§ 85-2-307(3), and -308, MCA. Based on its analysis and guidance provided by policy, the Department preliminarily finds that the changes to return flows resulting from the proposed change will not cause an adverse effect to other water users.

26. The Department finds that there will be no adverse effect to other users as a result of the proposed changes.

**BENEFICIAL USE**

**FINDINGS OF FACT**

27. The Applicant proposes to divert up to 8.8 AF at a flow rate of up to 0.04 CFS (17.95 gallons per minute (GPM)) from POD 2 for the irrigation of 5 acres located in the SWNE Section 22, T14S, R1E. This amount is supported by DNRC ARM 36.12.1902 for the irrigation of 5 acres. The proposed period of use for irrigation is May 1 to October 1.

28. The Applicant proposes to add a fishery purpose to this water right and proposes to divert 150 AF at a flow rate of 0.50 CFS to fill an 18.7 AF capacity pond from POD 3. The capacity and flow-through volume proposed are necessary to support oxygenation in the deeper portion of the reservoir to sustain a healthy fishery habitat based on references cited by the Applicant in the Change in Purpose Addendum PA.3.A.

29. The Applicant also proposes to temporarily appropriate 112 AF/year at a flow rate of 0.37 CFS from May 1 to October 1 instream in a 2.9-mile reach of Corral Creek beginning in the SESWNE Section 22, T14S, R1E and ending at the confluence of Corral Creek and the Red Rock River. MT DFWP flow monitoring reports for Corral Creek submitted by the Applicant support the
need for additional flows instream to meet target flows established by the Centennial Valley Candidate Conservation Agreement with Assurances (CCAA).

30. After the permanent change the Applicant will appropriate a total flow rate of 0.54 CFS up to a volume of 158.8 AF for irrigation and fishery purposes. During the term of the temporary change, the Applicant will appropriate a maximum flow rate 0.37 CFS up to a total volume of 112 AF for instream purposes, as well as what is proposed for appropriation in the permanent change. Table 11 summarizes the Applicant's proposed permanent and temporary appropriations.

Table 11: Proposed Consumed and Diverted Volumes and Flow Rates:

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Volume (AF)</th>
<th>Flow Rate (CFS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Irrigation</td>
<td>8.8</td>
<td>0.04</td>
</tr>
<tr>
<td>Fishery</td>
<td>150</td>
<td>0.50</td>
</tr>
<tr>
<td>Instream Flow (temp)</td>
<td>112</td>
<td>0.37</td>
</tr>
</tbody>
</table>

31. Per § 85-2-105(5)(d), MCA, the use of a water right through a temporary change or lease to enhance instream flows for the benefit of a fishery resource in accordance with § 85-2-408, MCA, is considered a beneficial use of water. The Department finds the proposed temporary and permanent appropriations to be beneficial uses of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

32. The proposed diversion for the remaining 5 acres of irrigation is the existing 3 inch pipeline for POD 2 with a capacity of 0.3 CFS. This diversion is adequate to supply the proposed 0.04 CFS flow rate.

33. The proposed diversion for the pond is the existing ditch for POD 3, with a capacity based on Manning’s equation of 3 CFS. This diversion is adequate to provide the proposed 0.50 CFS flow rate.
34. Based on the irrigation system and pond specifications and information provided by the Applicant, the Department finds that the proposed infrastructure are adequate to accommodate the proposed permanent change per § 85-2-402(b), MCA.

35. As per § 85-2-402(2)(b)(ii), MCA, a temporary change in appropriation right for instream flow pursuant to § 85-2-436, MCA, is an exception to the adequacy of diversion criteria, therefore no findings have been made for the purpose of Instream Flow.

**POSSESSORY INTEREST**

**FINDINGS OF FACT**

36. The Applicant signed the affidavit on the application form 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.

37. Pursuant to § 85-2-402(2)(d)(ii), MCA, the Applicant is not required to prove 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 because this application involves a temporary change in appropriation right for instream flow per § 85-2-408, MCA.

**TEMPORARY CHANGE TO INSTREAM FLOW/MEASUREMENT PLAN**

**FINDINGS OF FACT**

38. The Applicant is proposing to temporarily change a portion of the purpose and place of use of Claim 41A 133546-00 to instream flow for the benefit of the fishery resource in Corral Creek, tributary to the Red Rock River for a period of 10 years with the option to renew (Temporary Change Application No. 41A 30154943). The proposed instream place of use will extend from POD 2 in the SESWNE Section 22, T14S, R1E and end at the confluence of Corral Creek and the Red Rock River. The proposed period of use for the instream flow purpose is May 1 to October 1. The flow rate and volume that will be left instream is 0.37 CFS and 112 AF.

39. The Applicant proposes to measure diverted flow rates at POD 2 and POD 3 monthly during the period of diversion, and flows in Corral Creek at South Valley Road monthly during the
proposed instream flow period of use. Flow measurements will be submitted to DNRC at the end of each year.

40. The Department finds the Applicant has met the additional requirements for a temporary change in appropriation right to maintain or enhance instream flow to benefit a fishery resource under the provisions of §85-2-408, MCA.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

41. Montana’s change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator’s right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, Pg. 9 (2011)(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); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co. LLC, DNRC Proposal For Decision and Final Order (2004).¹

42. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

43. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or


² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(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, 38 Mont. 302, 100 P. 222 (1909)(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); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).
potential for adverse effect. A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, at ¶44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, 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); *Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).

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3 A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

4 Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 959 (Colo. 1986)(“[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.”); *Santa Fe Trail Ranches Property Owners Ass’n v. Simpson*, 990 P.2d 46, 55 -57 (Colo.,1999); *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
An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenet of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (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.); 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.)
right and is subject to appropriation by subsequent water users).\(^5\)

45. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

46. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

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. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable,

\(^5\) The Montana Supreme Court 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).
however, proscribes this tenet. 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.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

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, at ¶¶ 42-45 (internal citations omitted).

47. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. (ARM) 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

48. 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 with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:
The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.


50. 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., DNRC Proposal for Decision adopted by Final Order (2005). 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. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).
51. 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). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No.9).

52. 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., supra; 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”).

53. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41A 133546 of 346.4 AF diverted volume and 6.25 CFS flow rate with a consumptive use of 86.3 AF acre-feet. (FOF Nos. 8 - 12)

54. Based upon the Applicant’s comparative analysis of historic water use and return flows to water use and return flows under the proposed change, 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. 13 - 26)

**BENEFICIAL USE**

55. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been
the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. 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. ARM 36.12.1801. The amount of water that may be authorized for change 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, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, Pg. 3 (2011)(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); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

56. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 8.8 AF of diverted volume and 0.04 CFS flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule ARM 36.12.1902. § 85-2-402(2)(c), MCA (FOF Nos. 27 - 31)

57. Applicant proposes to use water for a fishery pond which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that a fishery pond is a beneficial use and that 150 AF of diverted volume and 0.5 CFS flow rate of water requested is the amount needed to sustain the beneficial use. § 85-2-402(2)(c), MCA (FOF Nos. 27 - 31)
58. Applicant proposes to use water for instream flow which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence instream flow is a beneficial use and that 112 AF of protected volume and 0.37 CFS flow rate of water requested is the amount needed to maintain and enhance the fishery resource and sustain the beneficial use. § 85-2-402(2)(c), MCA (FOF Nos. 27 - 31)

ADEQUATE MEANS OF DIVERSION

59. Pursuant to § 85-2-402 (2)(b), 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. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); 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).

60. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves a temporary change in appropriation right for instream flow pursuant to 85-2-408.

61. Pursuant to § 85-2-402 (2)(b), 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. (FOF Nos. 32 - 35)

POSSESSORY INTEREST

62. Pursuant to § 85-2-402(2)(d), 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. See also ARM 36.12.1802
63. 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. (FOF Nos. 36 - 37)

**TEMPORARY INSTREAM FLOW/MEASUREMENT PLAN**

64. For a change in appropriation right to maintain or enhance instream flow to benefit the fishery resource, an applicant must “(a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and. . . (b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.” § 85-2-408(1), MCA.

65. The Department concludes the length and location of the stream reach in which instream flows will be maintained and enhanced along with the measurement plan satisfy the additional requirements of § 85-2-408(1), MCA. (FOF Nos. 38 - 40)

**PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right Nos. 41A 30126471 and 41A 30154943 should be GRANTED subject to the following:

The Department authorizes a temporary change to water right 41A 133546-00 for a period of 10 years with the option to renew to allow the Applicant to appropriate a flow rate of 0.37 CFS up to a volume of 112 AF instream in a 2.9 mile reach of Corral Creek from the historic point of diversion 2 in the SESWNE, Section 22, T14S, R1E, to the confluence with Red Rock Creek in the W2, Section 16, T14S, R1E. The temporary instream flow period of use will be May 1 to October 1.

The Applicant is authorized to permanently change water right 41A 133546-00 to divert a flow rate of 0.5 CFS up to a volume of 150 AF from the historic POD 3 in the NESWNE, Section 22, T14S, R1E, to an 18.7 AF capacity pond in the NWNE, Section 22, T14S, R1E. The period
of diversion will be May 1 to October 1. The Applicant is also authorized to permanently divert a flow rate of 0.04 CFS up to a volume of 8.8 AF from the historic POD 2 in the SESWNE, Sec. 22, T14S, R1E, for the irrigation of 5 acres in the SWNE, Section 22, T14S, R1E. After this permanent change a total of 187 acres within the historical place of use will be retired from irrigation. The period of diversion will be May 1 to October 1. In aggregate the maximum flow rate and volume of water that may be diverted after this permanent change cannot exceed 0.54 CFS and 158.8 AF.

These applications will be subject to the following conditions:

**MEASUREMENT CONDITION** (Temporary Change)

BETWEEN MAY 1 AND OCTOBER 1, THE APPLICANT WILL LEAVE 0.37 CFS INSTREAM WITH CLAIM 41A 133546-00 FOR THE BENEFIT OF THE FISHERY RESOURCE IN CORRAL CREEK. THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS IN CORRAL CREEK AT SOUTH VALLEY ROAD. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR UNTIL PROJECT COMPLETION AND UPON REQUEST AFTER PROJECT COMPLETION DURING THE TERM OF THE TEMPORARY CHANGE AUTHORIZATION. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE.

**IMPORTANT INFORMATION** (Both Changes)

THE APPLICANT WILL NOT IRRIGATE THE 187 ACRES BEING RETIRED WITH WATER FROM 41A 133546-00 OR SUPPLEMENTAL RIGHTS 41A 133547-00 AND 41A 133548-00 AS A RESULT OF THE AUTHORIZED CHANGES.

**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 15th day of June 2022.

/Original signed by Jennifer Daly/

Jennifer Daly, Deputy Regional Manager
Helena Regional Office
Department of Natural Resources
and Conservation
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 15th day of June 2022, by first class United States mail.

GRAYLING CENTENNIAL LLC
41600 S VALLEY RD
LIMA, MT  59739-9736

INTERMOUNTAIN AQUATICS
ATTN: ERIC AUGUST
PO BOX 1115
DRIGGS, ID  83422

Helena Regional Office, (406) 444-6999