

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

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 41I 30115516 BY MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE</b>
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On January 12, 2018, the Montana Department of Fish, Wildlife, and Parks (Applicant) submitted Application to Change Water Right No. 41A 30115516 to change Water Right Claim Nos. 41I 37797-00, 41I 37798-00, and 41I 37799-00, 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 July 11, 2018. The Applicant responded with information dated July 13, 2018. The Application was determined to be correct and complete as of November 24, 2021. An Environmental Assessment for this Application was completed on November 26, 2021.

**INFORMATION**

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

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606
- Form 606-IFA Instream Flow Addendum
- Form 606-PA Change in Purpose Addendum
- Form 606-TCA Temporary Change Addendum
- Aerial Photo of Historic POD/POU

Information Received after Application Filed:

- E-mail dated July 10, 2018 addressing errors in application materials
- Deficiency Response from Applicant dated July 13, 2018, received by DNRC July 16, 2018
- E-mail from Applicant representative Andy Brummond dated December 16, 2021

### Information within the Department's Possession/Knowledge

- Aerial Photo AZT-1FF-151, dated 7/23/1965
- Department Technical Report
- Return Flow Report by Attila Felnagy, Department Groundwater Hydrologist, dated October 7, 2021
- List of water rights considered for legal demands between the Toston Gage and Greyson Creek

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.

- DNRC Return Flow Memo dated April 1, 2016
- DNRC Consumptive Use and Irrecoverable Loss Memo, dated April 15, 2013
- DNRC Historic Diverted Volume Standard Methods Memo, dated September 13, 2012
- DNRC Consumptive Use Methodology Policy Memo, dated March 17, 2010

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 RIGHTS TO BE CHANGED**

#### FINDINGS OF FACT

1. Applicant proposes to change the three flood irrigation water right claims shown in Table 1 below, with a historical headgate diversion and ditch located on Deep Creek in Broadwater County, to instream flow protection for fisheries between the historic diversion point and the confluence with the Missouri River in the NENWSE of Section 7, Township (T) 6 North (N), Range (R) 2 East (E), Broadwater County. The place of use for these water rights is 100 % supplemental.

Table 1 Water Rights Proposed for Change

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date	Acres
411 37797	Irrigation	2.75 CFS	N/A	5/1 – 10/24	NENESW Sec 2 and SWSWSE Sec 3, 6N, 2E, Broadwater Co	SWSW Sec 10, W2W2 Sec 15, NE, E2NW, N2SE Sec 16, 6N, 2E, Broadwater Co	5/1/1868	476
411 37798	Irrigation	1.88 CFS	N/A	5/1 – 10/24	NENESW Sec 2 and SWSWSE Sec 3, 6N, 2E, Broadwater Co	SWSW Sec 10, W2W2 Sec 15, NE, E2NW, N2SE Sec 16, 6N, 2E, Broadwater Co	5/1/1868	476
411 37799	Irrigation	3.0 CFS	N/A	5/1 – 10/24	NENESW Sec 2 and SWSWSE Sec 3, 6N, 2E, Broadwater Co	SWSW Sec 10, W2W2 Sec 15, NE, E2NW, N2SE Sec 16, 6N, 2E, Broadwater Co	3/1/1870	476

Under the terms of a pending settlement with the Water Court (Water Court Certification Case WC-2016-06), the maximum flow rates for the above claims will be reduced as follows:

Table 2 Settled Flow Rates

Water Right	Flow Rate CFS
411 37797	2.06
411 37798	1.41
411 37799	2.25

**CHANGE PROPOSAL**

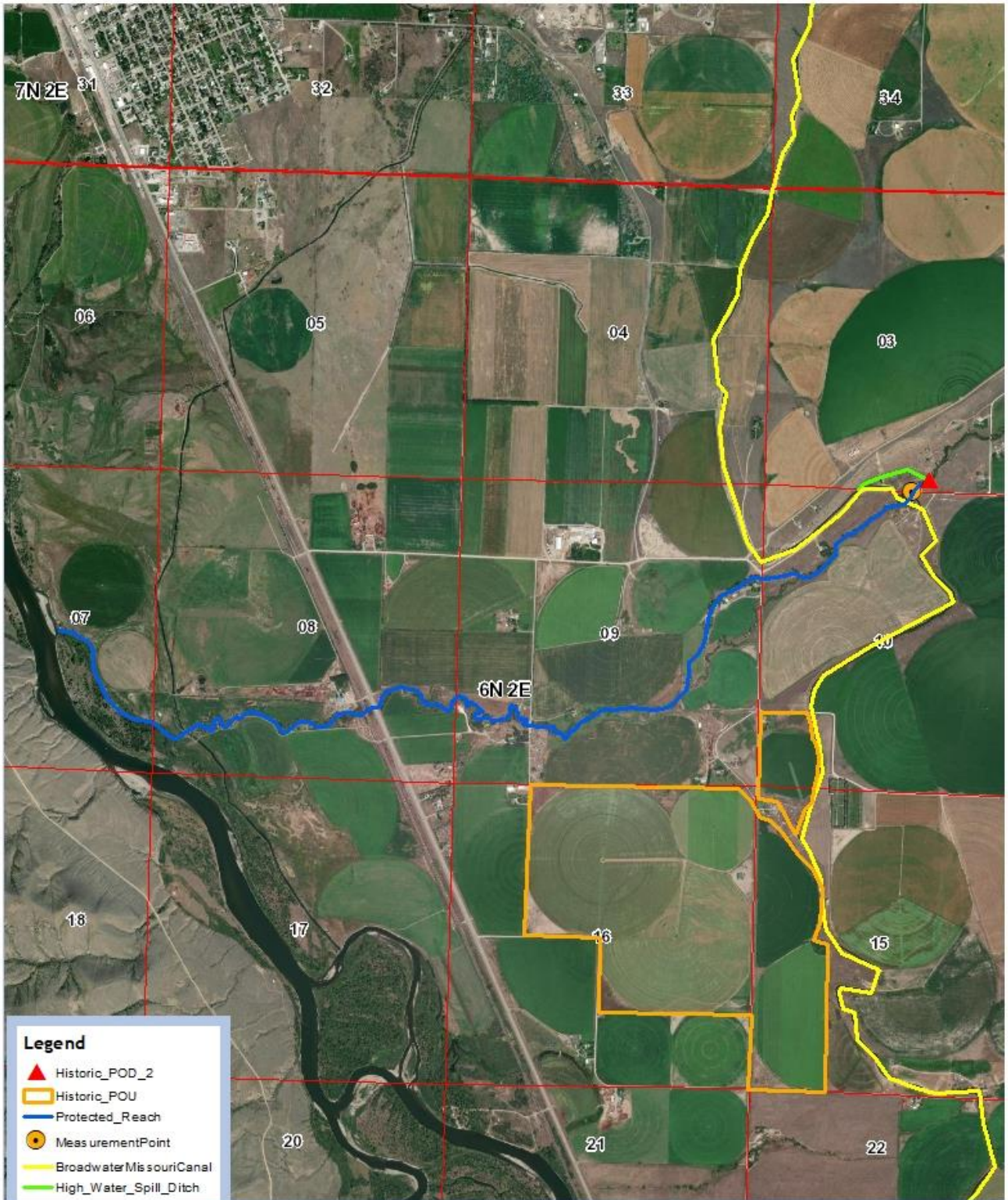
**FINDINGS OF FACT**

2. Applicant proposes to cease flood irrigation of 476 acres from Deep Creek. 4.15 CFS of the claimed historic diverted flow rate up to 1186.7 acre-feet in volume is proposed to be protected instream for Fisheries from the historic diversion in the SWSWSE of Section 3, T6N, R2E, Broadwater County for 4.5 miles to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County. The proposed period of diversion is May 3 through September 23. The proposed change is temporary for a 10 year period.

3. The Applicant originally proposed two separate protected reaches with a lower flow rate for the lower reach based on the assumption that return flows partially accreted to Deep Creek. Based on the Department's findings in the Return Flow Analysis that return flows accreted entirely to the Missouri River and therefore the historic diverted volume was consumed from Deep Creek, the Applicant requested that the flow rate of 4.15 CFS be protected from the historic diversion in the SWSWSE of Section 3 to the confluence with the Missouri River resulting in one protected reach. (E-mail from Andy Brummond dated December 16, 2021)

4. Return flows from irrigation of the historic place of use accrued entirely in the Missouri River and are considered to be consumed from the source (Deep Creek). The protected reach of Deep Creek is adjacent to the historic place of use. Applicant will measure stream flows in the protected reach approximately 400 feet below the historic POD and submit the measurement records annually to DNRC. If approved, this temporary change will last for 10 years from the date of completion at which point the Applicant may file for a renewal.

5. The Applicant will lease the water rights proposed for change from owners Cory and Nancy Davis, who will continue to irrigate the historic place of use with contract water purchased from the Broadwater-Missouri Water Users Association. Water for the Association is provided under Water Right 41I 119460-00 which authorizes the sale of water for irrigation.



**Legend**

- ▲ Historic\_POD\_2
- Historic\_POU
- Protected\_Reach
- MeasurementPoint
- BroadwaterMissouriCanal
- High\_Water\_Spill\_Ditch



1:26,000

Map Created: 12/29/2021



Service Layer Credits: Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

## **CHANGE CRITERIA**

6. The Department is authorized to approve a temporary change if the applicant meets its burden to prove the applicable § 85-2-402, and 436, 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 probable 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.

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

7. In addition to the §85-2-402(2)(a) and (c), MCA<sup>1</sup>, criteria, an application by FWP for a temporary change authorization for instream flow must comply with the requirements and conditions set forth in § 85-2-436, MCA. Section 85-2-436, MCA provides in part:

(2) The change in purpose of use or place of use must meet all of the criteria and process outlined in [85-2-307](#) through [85-2-309](#), [85-2-401](#), and [85-2-402](#) and the additional criteria and process described in subsection (3) of this section to protect the rights of other appropriators from adverse impacts.

(3) (a) The department of fish, wildlife, and parks, with the consent of the commission, may lease existing rights for the purpose of protecting, maintaining, or enhancing streamflows to benefit the fishery resource.

(b) The department may not approve a change in appropriation right until all objections are resolved.

(c) The application for a change in appropriation right authorization must

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<sup>1</sup>Pursuant to §85-2-402 (2)(b) and -402(2)(d), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate and is not required to prove possessory interest in the place of use because this application involves a temporary change in appropriation right for instream flow pursuant to § 85-2-436 MCA.

include specific information on the length and location of the stream reach in which the streamflow is to be protected, maintained, or enhanced and must provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow must be measured.

(d) The maximum quantity of water that may be changed to instream flow is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the change in appropriation right authorization, may be used to protect, maintain, or enhance streamflows below the point of diversion that existed prior to the change in appropriation right.

These criteria are designed to protect other water users from potential adverse effects and ensure the proposal will benefit the fishery resource. § 85-2-436(2), MCA. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process and conditions only address 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.

## **HISTORIC USE AND ADVERSE EFFECT**

### *FINDINGS OF FACT - Historic Use*

8. The Applicant states that the water rights proposed for change in this application historically irrigated the same 476 acre place of use in the SWSW Sec 10, W2W2 Sec 15, and the NE, E2NW, N2SE Sec 16, 6N, 2E, Broadwater Co. Aerial Photo AZT-1FF-151, dated 7/23/1965, supports the irrigation of these acres. Water was applied to the place of use consistently throughout the period of use by rotating irrigated acres to allow for harvesting. Prior to the construction of the Broadwater-Missouri (B-M) Canal all three water rights utilized two diversions from Deep Creek. With the construction of the canal in the 1940's, the Heuer-Ridgeway-Prosser (HRP) Ditch and the associated point of diversion (POD ID 1) in the NENESW of Section 2, 6N, 2E, were no longer able to serve the place of use. After the construction of the canal, water to irrigate the 476 acre place of use was diverted directly from the B-M Canal upstream from where the canal crosses Deep Creek. The High Spill Ditch diversion (POD ID 2) was then used to divert the authorized amount of water from Deep Creek and carry it

approximately 1,340 ft. into the B-M Canal just downstream of the crossing with Deep Creek to replace the water diverted from the canal upstream for irrigation.

9. Applicant chose to use the methodology set forth in ARM 36.12.1902 for the Historic Use analysis and values.

10. The Department finds the following historic use as detailed in the Technical Report:

Table 3 Historic Consumptive Use

Historic Consumptive Volume (HCV) Flood	Broadwater County Flood Irrigation Water Requirements (inches)	Historic Management Factor (Percent)	Historic Acres	HCV Acre-Feet (AF)	On-farm Efficiency	Field Application AF	Historic Irrecoverable Losses (IL) Flood 5%:	HCV AF (Including IL)
411 37797 411 37798 411 37799	19.42	69.2	476.0	533.1	45%	1184.6	59.2	<b>592.3</b>

Table 4 Historic Diverted Volume

Historic Diverted Volume (HDV)	HCV AF (minus IL)	On-farm Efficiency Contour Ditch	Seasonal Conveyance Loss Volume (seepage loss + vegetation loss + ditch evaporation)	Total HDV AF		Proportional Ditch Loss
	533.1	45%	30.1	<b>1214.8</b>		
<i>Seepage Loss (All Users):</i>	Ditch Wetted Perimeter (Feet)	Ditch Length (Feet)	Ditch Loss Rate (ft <sup>3</sup> /ft <sup>2</sup> /day)	Days Irrigated	Seepage Loss (/43560)	
	9.66	1340	1.5	144	64.2	27.3
<i>Vegetation Loss (All Users):</i>	% loss/mile	Est. Flow Rate (CFS)=	Days Irrigated	ditch length (miles)	Vegetation Loss (*2)	
	0.75	10	144	0.25	5.4	2.3
<i>Ditch Evaporation: (All Users):</i>	Ditch Width (Feet)	Ditch Length (Feet)	Evaporation (from applicant, ft/day)	Ditch Evaporation (AF)		
	8	1340	0.03587	1.3		0.5

Applicant provided dimensions for the High Water Spill Ditch based on a flow of 10 CFS for all users as indicated by the water line in the measuring device for the ditch. Applicant asserts that



a seasonal average for the three water rights proposed for change is 4.25 CFS, or 42.5% of the typical ditch flow, therefore the claimed ditch loss has been reduced proportionally from the calculations in the table below as indicated in the far right column. Based on supplied photos of the high water mark in the flume, the Department finds this estimate for the Applicant’s ditch loss acceptable.

The Applicant provided the following information in Table 5 below summarizing the individual historic flow rates and volumes for each right based on historic irrigation practices. The Department will use this information to determine individual volumes rather than the estimated individual breakdown found in the Technical Report as it more closely represents actual historic practices. The total Historic Diverted Volume and total Historic Consumptive Volume are the same as the values calculated by the Department and as those found in the Technical Report.

Table 5 Historic Use Summary

Period	Days	Diversion	411 37797	411 37798	411 37799	Total
5/3 – 6/30	59	CFS	1.125	0.96	2.16	4.25
		AF	132.3	112.2	253.3	497
7/1 – 9/23	85	CFS	1.89	1.41	0.95	4.25
		AF	318.4	238.3	160.3	716
Total	144	AF	450.7	350.5	413.6	1214.8

The Department calculated the individual consumptive volumes found in Table 6 below based on the individual diverted volumes as a percentage of the total diverted volume.

Table 6 Historic Diverted and Consumptive Volumes

Water Right	Historic Diverted Volume	% of Total	Historic Consumptive Volume
41I 37797	450.7	37.1	219.7
41I 37798	350.5	28.9	171.2
41I 37799	413.6	34.0	201.4
	1214.8	100.0	592.3

*FINDINGS OF FACT – Adverse Effect*

11. As a result of the proposed change, water formerly diverted for irrigation will remain instream from the historic diversion in the SWSWSE of Section 3, T6N, R2E, Broadwater County to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County. The proposed period of diversion is May 3 through September 23 and the historic period of diversion is May 1 to October 24. Applicant states the historic place of use has been irrigated every year through 2015.

12. The proposed change will result in the historic consumptive volume of 592.3 AF and a historic diverted volume of 1214.8 AF being left instream in Deep Creek.

13. The Return Flow Report generated by the Department indicates that historic return flows from the place of use accreted entirely to the Missouri River and were therefore consumed from the source and not available to downstream users on Deep Creek. The proposed change of 1186.7 AF of the historic diverted volume to Instream Flow will not adversely affect existing water rights on Deep Creek.

14. Return flows began accreting in the Missouri River below Greyson Creek in the SENW of Section 21, T6N, R2E, Broadwater County and above the confluence with Deep Creek. Water historically diverted for irrigation from Deep Creek will be left instream and available to other users on the Missouri River below the confluence with Deep Creek.

15. Legally available flows on the Missouri River at the confluence of Greyson Creek, which is the point at which historic return flows historically began to accrete, were evaluated by

determining the median of the monthly mean flows at the Toston USGS Gaging station upstream and subtracting legal demands between Toston and the confluence of the Missouri River and Greyson Creek. (See file for list of water rights considered for legal demands between the Toston Gage and Grayson Creek) Legally available flows were estimated by subtracting the largest instream flow right in this reach for each month and the predicted depletions due to loss of return flows. Depleted flow rates were determined by calculating the flow in CFS to reach the depleted volumes for each month. A detailed table of calculated values can be found in Table 6 below. The only month where flows were not determined to be legally available in the affected reach of the Missouri River was August with an estimated legally available flow rate of – 211.4 CFS. The most junior water rights in this reach are two Montana Department of Fish, Wildlife, and Parks Instream Flow Reservations (41I 190871- and 41I 190872-00) with flow rates of 2400 CFS each. While the proposed change will result in an estimated reduction in the flow rate for this reach in August of 0.77 CFS, the Department’s Return Flow Report estimates an increase of 118.7 AF below Deep Creek for the month of August. The reduction in flow of 0.77 CFS in a small portion of the overall reach covered by the Instream Flow Reservation will not adversely affect the reservation as a whole.

Table 6 Legal Availability Analysis

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Med. Monthly Flow at Toston CFS	3316.0	3686.0	3926.0	5234.0	8641.5	12050.0	4445.0	2305.5	3152.0	4149.0	4344.5	3686.5
Diversions CFS	0.0	9.1	9.1	46.6	116.0	116.1	116.1	116.1	116.1	116.0	16.6	9.1
Physically Available CFS	3316.0	3676.9	3916.9	5187.4	8525.5	11933.9	4328.9	2189.4	3035.9	4033.0	4327.9	3677.4
Instream Flow CFS	2400.0	2400.0	2400.0	2400.0	4000.0	4000.0	3816.0	2400.0	2400.0	2400.0	2400.0	2400.0
Depletions	0.83	0.92	0.83	0.85	0.81	0.82	0.78	0.77	0.80	0.78	0.82	0.81
Legally Available CFS	915.2	1276.0	1516.1	2786.6	4524.7	7933.1	512.1	-211.4	635.1	1632.2	1927.1	1276.6

16. The Department has determined that there will be no enlargement of the water rights in question as a result of the proposed change. Leaving water instream will benefit downstream users and will not result in adverse effect.

17. 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.

18. Applicant will continue to irrigate the historic place of use with contract water from the Broadwater-Missouri Canal. Continued irrigation with contract water will result in similar return flows to those seen under historical practices, reducing adverse effect to existing water rights.

19. The proposed period of diversion for instream flow protection is from May 3 to September 23, which falls within the historic period of diversion.

20. The proposed protected reach extends for approximately 4.5 miles from the historic diversion in the SWSWSE of Section 3, T6N, R2E, Broadwater County to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County.

21. The proposed protected volume and flow rate will be measured approximately 400 feet downstream from the High Water Spill Ditch diversion at the Lower Deep Creek Road bridge.

22. The Applicant will develop a stage-discharge rating for the staff gage approximately 400 feet downstream of the historic POD and monitor stream flows monthly through the period of diversion. An average flow for each month during the period of diversion will be sent to the Department at the end of the season. The following condition will be added:

FLOW WILL BE PROTECTED INSTREAM UP TO 1186.7 AF. THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS OF DEEP CREEK AT THE STAFF GAGE BELOW THE HISTORICAL POD. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE FOR INSTREAM FLOW USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR DURING THE TEMPORARY CHANGE AUTHORIZATION. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE.

### **BENEFICIAL USE/FISHERY RESOURCE**

### FINDINGS OF FACT

23. Applicant proposes to use water for Instream Flow. Applicant (Montana Department of Fish, Wildlife, and Parks) has determined that minimum flows of 5 CFS in Deep Creek are necessary to prevent the dewatering of fish redds and survival of fry, and that flows below 3 CFS result in loss of movement between pools. Flow monitoring has shown that the 3 and 5 CFS objectives are routinely not met in August and September, and occasionally in July.

24. Applicant proposes to protect 4.15 CFS up to 1186.7 AF/year diverted volume from May 3 to September 23 in a 4.5 mile reach. This amount is supported by the need to protect fisheries habitat in Deep Creek.

### **ADEQUATE DIVERSION**

#### FINDINGS OF FACT

25. The proposed change to claims 41I 37797-00, 41I 37798-00, and 41I 37799-00, is to maintain and enhance streamflows to benefit the fishery resource in Deep Creek and does not require a means of diversion or conveyance. 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.

### **POSSESSORY INTEREST**

#### FINDINGS OF FACT

26. 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 § 85-2-436, MCA.

### **CONCLUSIONS OF LAW**

#### HISTORIC USE AND ADVERSE EFFECT

27. 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); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied).

28. 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.<sup>2</sup>

29. 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, ¶ 10 (recognizing that the Department's obligation to ensure that change will not adversely affect other

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<sup>2</sup> 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).

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 potential for adverse effect.<sup>3</sup> 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.

30. 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 tenant 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. 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 ¶¶ 42-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731.

31. 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. 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.

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<sup>3</sup>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

Admin.R.M. 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. Admin.R.M. 36.12.1901 and 1903.

32. 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. Admin. R. M. 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 Admin. R.M. 36.12.1902. (FOF No. 8).

33. In order to prove lack of adverse effect, for an FWP instream flow change in use, the applicant must demonstrate that the operation of the instream flow change will not adversely affect other water users. This requires consideration of the protected reach, the location and timing of historic return flows, and measurement plan in order to insure the applicant's plan for operation of its change will not adversely affect other water users. §§ 85-2-402(2)(a) and -436(2) and (3), MCA. An instream flow change may be authorized to protect the full historic diverted flow rate and volume to the historic point of diversion. The amount protected instream below the historic point of diversion depends upon the potential for adverse effect to other water users. The Department has the discretion under appropriate circumstances to limit or reduce that portion suitable for instream flow from the amount historically diverted to the amount historically consumed, or a smaller amount and to approve the change under such conditions as the Department considers necessary. §§ 85-2-402(2)(a) and - 436(2) and (3)(d), MCA; Hohenlohe, ¶¶ 37, 39, 42, 67 - 70.

34. 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. 411 37797-00 for 450.7 AF diverted volume at a 2.06 CFS flow rate with a consumptive use of 219.7 AF. (FOF Nos. 8-10).

35. 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. 411 37798-00 for 350.5 AF diverted volume at a 1.41 CFS flow rate with a consumptive use of 171.2 AF. (FOF Nos. 8-10).



36. 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. 411 37799-00 for 413.6 AF diverted volume at a 2.25 CFS flow rate with a consumptive use of 201.4 AF. (FOF Nos. 8-10).

37. The Applicant established that the change authorization will be operated in a manner that ensures the amount of water protected instream does not exceed the maximum volume and flow rate during the period of use for the change authorization. Furthermore, the Applicant identified the reach in which instream flows will be protected and provided a detailed measurement plan to ensure that, as conditioned, the change authorization is operated in compliance with § 85-2-408(1) and (8) and - 436(3)(c), MCA. (FOF Nos. 11-22).

38. The Department concludes that the Applicant's plan for operation and measurement of instream flow protection of 4.15 CFS up to 1186.7 acre-feet from the historical POD in the SWSWSE of Section 3, T6N, R2E, Broadwater County for 4.5 miles to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County from May 3 through September 23, is sufficient as proposed to ensure that 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 will not be adversely affected. Sections 85-2-402(2)(a) and -408(3)(a), MCA. (FOF Nos. 11-22).

#### BENEFICIAL USE/FISHERY RESOURCE

39. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 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. Admin.R.M. 36.12.1801. Where the proposed beneficial use is instream flow to enhance the fishery resource, an applicant must prove that that amount of water proposed for change is needed to maintain or enhance instream flows to benefit the fishery resource. Section 85-2-408(3)(b), MCA.

40. The Applicant proposes to use water for instream flow to benefit the fishery in Deep Creek which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that instream flow protection of 1186.7 AF of diverted volume and 4.15 CFS flow rate of water requested is the amount needed to maintain and enhance the fishery resource and sustain the beneficial use. (FOF Nos. 23-24).

Protected Reach/Measurement Plan

41. The Department has determined that the Applicant may protect 4.15 CFS flow rate up to 1186.7 AF of the historic diverted volume, from May 3 to September 23, from the historical POD in the SWSWSE of Section 3, T6N, R2E, Broadwater County for 4.5 miles to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County. 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 requirements of 85-2-408(1), MCA.

**PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41130115516 should be granted subject to the following:

A temporary change of irrigation water rights 411 37797-00, 411 37798-00, and 411 37799-00 to instream flow for Fisheries. Under the proposed change, the Applicant will discontinue the diversion of 4.25 CFS from a headgate in the SWSWSE of Section 3, T6N, R2E, Broadwater County, and discontinue the irrigation with water from Deep Creek of 476 acres in the SWSW Section 10, W2W2 Section 15, and the NE, E2NW, N2SE Section 16, 6N, 2E, Broadwater Co. 4.15 CFS no longer diverted for irrigation will be used for instream flow in Deep Creek from the historical headgate the SWSWSE of Section 3, T6N, R2E, Broadwater County for 4.5 miles to the confluence with the Missouri River in the NENWSE of Section 7, T6N, R2E, Broadwater County. The Applicant will protect 4.15 CFS flow rate up to 1186.7 AF volume from May 3 to September 23. This change authorization will be subject to the following condition and will expire 10 years from the date of completion with the option to renew:

FLOW WILL BE PROTECTED INSTREAM UP TO 1186.7 AF. THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS OF DEEP CREEK AT THE STAFF GAGE BELOW THE HISTORICAL POD. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE FOR INSTREAM FLOW USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR DURING THE TEMPORARY CHANGE AUTHORIZATION. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE

## **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 30<sup>th</sup> day of December 2021.

/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 30<sup>th</sup> day of December 2021, by first class United States mail.

STATE OF MONTANA, DEPT OF FISH, WILDLIFE, AND PARKS  
ATTN: ANDY BRUMMOND  
PO BOX 938  
LEWISTOWN, MT 59457-0938

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Helena Regional Office, (406) 444-6999