

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

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<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 41A 30160010 by Grayling Centennial ) LLC )</b>	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On March 15, 2023, Grayling Centennial LLC (Applicant) submitted Application to Change Water Right No. 41A 30160010 to change Statement of Claim (Claim) No. 41A 133547-00 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 the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated August 31, 2023. The Applicant responded with information dated September 7, 2023. The Application was determined to be correct and complete as of December 8, 2023. An Environmental Assessment for this Application was completed on February 27, 2024.

**INFORMATION**

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

**Application as filed:**

- Application to Change Water Right, Form 606
- Attachments
- December 14, 2011, Memo from DNRC Water Resources Specialist John Beyrau regarding the mapping of Claim 41A 133547-00
- January 11, 2008, Water Court Stipulation Agreement
- Change in Purpose Addendum Form 606-PA
- Change in Place of Storage Addendum Form 606-PSA
- Montana Sage Grouse Habitat Conservation Program Letter
- Maps:
  - 1947, 1954, 1999, 2009, 2011, and 2013 aerial photos depicting historical use
  - Recent aerial photo depicting proposed use

**Information Received after Application Filed**

- Deficiency Response dated September 7, 2023

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

- Water Resources Survey field notes
- Aerial photo CXM-2FF05 dated July 31, 1965
- Aerial photo J-51 11-23 dated July 12, 1947
- Previous Change Application 41A 30126471 by the Applicant
- Surface Water Change Report by Evan Norman, DNRC Groundwater Hydrologist, dated August 2, 2023
- Department Technical Report by Russ Gates, DNRC Hydrologist/Water Resource Specialist, dated December 8, 2023
- USGS Streamstats Streamflow Estimation Application
- 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 Methodology 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 RIGHT TO BE CHANGED**

#### **FINDINGS OF FACT**

1. The Applicant seeks to change Claim No. 41A 133547-00 for 5 CFS flow rate from Hellroaring Creek for the purpose of flood irrigation with a priority date of July 13, 1906. The period of use and period of diversion are May 1 to October 1. Water was diverted by a headgate in the SWSWSW of Section 24, Township (T) 14 South (S), Range (R) 1 East (E), Beaverhead County. Diverted water was carried approximately 1.5 miles in a ditch to the place of use in Sec 15, 22, 23, T14S, R1E, Beaverhead County.

IR.2.C Historic Use Maps

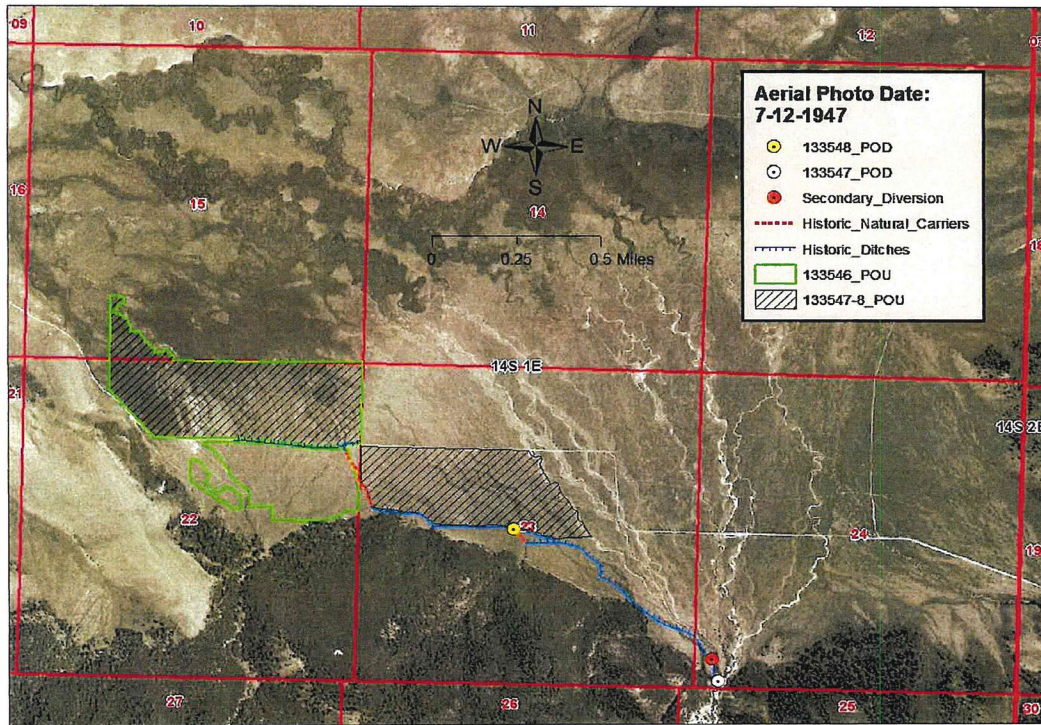


Figure 1. Historic Use Map

2. The place of use for Claim 41A 133547-00 is 100% supplemental with Claim 41A 133548-00, proposed for change in concurrent Change Application 41A 30159714. Claims 41A 133547-00 and 41A 133548-00 are historically partially supplemental to Claim 41A 133546-00, changed from Irrigation to Fishery and Instream Flow through previous Change Application 41A 30126471. Table 1 below lists the two claims supplemental to 41A 133547-00.

**Table 1: Supplemental Water Rights**

<b>Statement of Claim Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Volume</b>	<b>Period of Use/Diversion</b>	<b>Source</b>	<b>Place of use</b>	<b>Priority date</b>	<b>Acres</b>
41A 133546-00	Irrigation	6.25 CFS	N/A	5/1 – 10/1	Corral Creek	Sec 15, 22, T14S, R1E	10/27/1895	192
41A 133548-00	Irrigation	1.25 CFS	N/A	5/1 – 10/1	UT Hellroaring Creek	Sec 15, 22, 23 T14S, R1E	07/13/1906	209

**CHANGE PROPOSAL****FINDINGS OF FACT**

3. Applicant proposes to retire 209 acres of flood irrigated land and change 229.4 AF diverted volume up to 5 CFS flow rate to supply a fishery pond in the NWNE of Sec 22, T14S, R1E, Beaverhead County. Applicant will continue to utilize the historic Hellroaring Creek diversion and ditch to convey water to the proposed place of use via an extension ditch from the historic place of use to the ditch that feeds the pond from Corral Creek. This change application and concurrent Change Application No. 41A 30159714 for Claim 41A 133548-00 from an Unnamed Tributary to Hellroaring Creek will supplement water to the fishery pond in years when Claim 41A 133546-00 is unable to fully satisfy the 150 AF authorized under previous permanent Change Application 41A 30126471. Under the previous authorization, 0.5 CFS and 150 AF were authorized to be diverted from Corral Creek to supply the 18.7 AF capacity pond, 12.0 AF of evaporation, and 119.3 AF flow through volume to maintain the fishery habitat.

IR.2.E Proposed Use Map

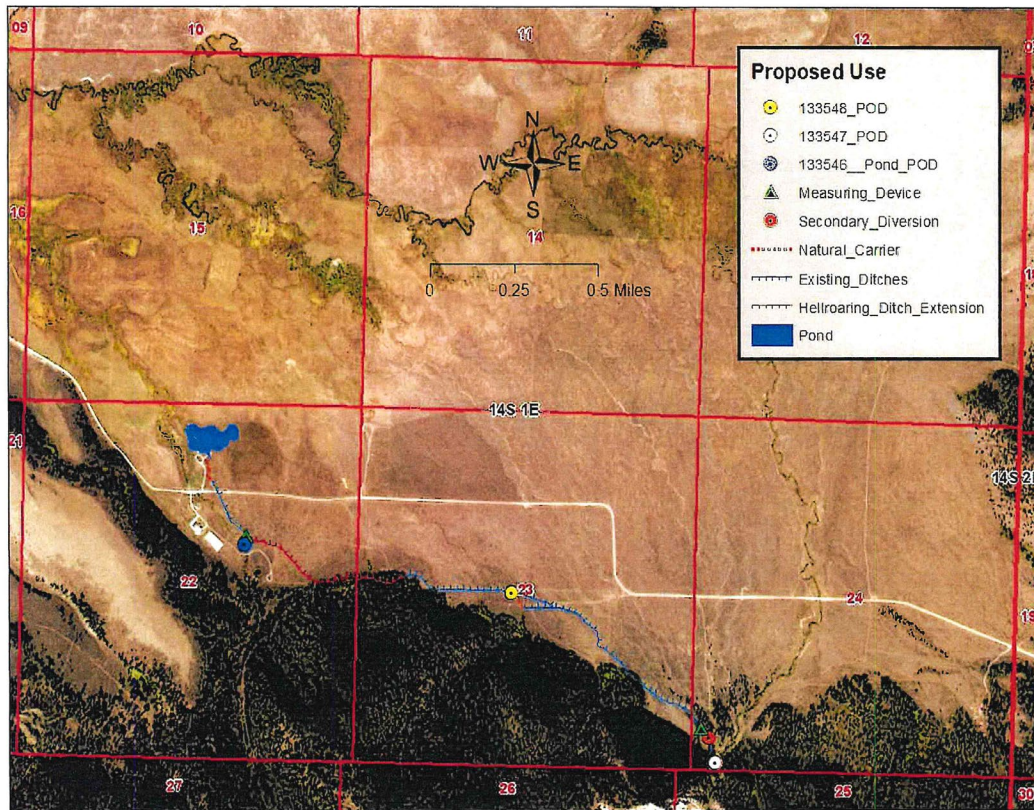


Figure 2. Proposed Use Map

4. Applicant proposes to limit the flow of water supplying the pond to a maximum of 150 AF per year between all rights authorized for this use by measuring the flow in the ditch supplying the pond.

5. If approved, the proposed change will be subject to the following conditions:

THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS IN THE HELLROARING DITCH BELOW THE HEADGATE. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE UNTIL PROJECT COMPLETION USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE.



THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS IN THE DITCH SUPPLYING THE POND TO ENSURE THE DELIVERED VOLUME DOES NOT EXCEED 150 AF. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE UNTIL PROJECT COMPLETION USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE.

## **CHANGE CRITERIA**

6. 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.

7. 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).

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

8. The water right being changed claims 209 irrigated acres in sections 15, 22, and 23 in T14S R1E, Beaverhead County. The Applicant attests that the full 209 acres were historically flood irrigated on the claimed place of use. The Beaverhead County WRS Survey was not completed or published, and WRS aerial photos for this area were taken late in the year when clear field boundaries from irrigation are not likely to be visible. The Applicant submitted aerial photos from July 12, 1947 and August 31, 1954, in which water can be seen in lateral ditches and channels spreading across the claimed historic 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 supports the claimed irrigated acres.

9. The Applicant describes a rock dam diversion in Hellroaring Creek in the SWSWSW of Section 24, T14S, R1E, Beaverhead County, that diverts water into a 400 ft. channel leading to a secondary headgate diversion where the full flow rate of the water right is diverted into the Hellroaring Ditch, and excess water returns to Hellroaring Creek. Current photos of both diversions are included in the application materials. From the secondary diversion, the ditch conveys water approximately 3945 ft. to an Unnamed Tributary of Hellroaring Creek at the point of diversion for Claim 41A 133548-00. The historic diversion on the unnamed tributary consisted of boards in the creek to back water into a culvert to the Hellroaring Ditch that conveyed water approximately 2350 ft along the place of use in Section 23 to a natural channel which was then used to convey water to the place of use in Sections 15 and 22. Photos of the diversion structures in the unnamed tributary were included in the application materials.

10. The Applicant describes a historical period of diversion as early as May 1 and as late as October 1 depending on conditions. Irrigation likely occurred for as little as 23 days at the full flow rate or as long as 154 days if lower flow rates were diverted.

11. The Applicant asserts that supplemental Claim 41A 133548-00 was likely only available during the May 1 to June 15 period due to limited flows in the unnamed tributary. They state that from May 1 to June 15, Claim 41A 133457-00 supplied 80% of the historic consumptive use for the historic place of use, and Claim 41A 133548-00 supplied 20%. From June 16 to October 1, Claim 41A 133547-00 supplied 100% of the historic consumptive use.

12. The Applicant submitted ditch measurements and capacity estimates based on Manning's Equation for Hellroaring Ditch at a point approximately 4000 ft. from the headgate and just below the diversion for Claim 41A 133548-00 to support a capacity of over 5 CFS, demonstrating the ability of the Hellroaring Ditch to accommodate the claimed flow rates of both Claims 41A 133547-00 and 41A 133548-00. These estimation techniques match the methodology used by the Department. The conveyance loss calculations shown in Table 7 indicate that the Hellroaring Ditch loses 35% of the diverted volume from the headgate to the point where the capacity estimates were taken. Assuming the 5 CFS diverted flow rate from Hellroaring Creek is also reduced by 35% at this point, the ditch needs to be capable of carrying 4.5 CFS (65% of the flow from Claim 41A 133547-00, or 3.25 CFS, plus the additional 1.25 CFS from Claim 41A 133548-00). There are no other users on this ditch.

13. The USGS Streamstats calculations for Hellroaring Creek at the historic point of diversion show estimated average monthly flows from May through September in excess of the claimed 5 CFS diverted flow rate.

#### Supplemental Water Rights

14. This application proposes to change all of Claim 41A 133547-00. This right is 100% supplemental with Claim 41A 133548-00, which is also being changed concurrently through Application No. 41A 30159714. Both Claims 41A 133548-00 and 41A 133547-00 had findings made in a previous change (41A 30126471) regarding 122 acres that are supplemental to the right that was changed in that application (41A 133546-00). The Historic Consumptive Use



findings from the previous application regarding the 122 supplemental acres will be used for those same acres in this application.

15. Previous Change Application 41A 30126471 found a combined Historic Consumptive Volume (HCV) of 16.3 AF for Claims 41A 133547-00 and 41A 133548-00 for the 122 supplemental acres also irrigated by Claim 41A 133546-00. In this previous change the total HCV of 16.3 AF for these two rights was apportioned based on their respective flow rates resulting in the following individual HCV:

**Table 2: Supplemental Right Apportionment for the 122 Acres Supplemental to 41A 133546-00**

Statement of Claim	Flow rate	% of total Flow Rate	Total HCV	Individual HCV
41A 133547-00	5.0 CFS	80	16.3 AF	13.0 AF
41A 133548-00	1.25 CFS	20	16.3 AF	3.3 AF

#### Historic Consumptive Use Calculations

16. The Applicant elected to use the Historic Consumptive Use methodology found in ARM 36.12.1902.

**Table 3: Historic Consumptive Use (volume) for the 87 Acre Place of Use not Supplemental to 41A 133546-00**

Statement of Claim	Lakeview Flood Irrigation Water Requirements (inches)	Historic Management Factor (Percent)	Historic Acres	HCV Acre-Feet (AF)	On-farm Efficiency (Wild Flood)	Field Application AF	Historic Irrecoverable Losses (IL) Flood 5%:	HCV AF (Including IL)
41A 133547-00 41A 133548-00	8.39	63.7	87	38.8	25%	155.2	7.8	<b>46.6</b>

Applicant indicates that supplemental Claim 41A 133548-00 typically only provides water to the remaining 87-acre place of use from 5/1 – 6/15, or 46 days. Claim 41A 133547-00 provides water

for the entire period of use of 5/1 to 10/1, or 154 days. The early time period represents 30% of the total period of use, or 30% of the total 46.6 AF HCV for a total HCV from 5/1 -6/15 of 14.0 AF. The second time period from 6/16 – 10/1 represents 70% of the total period of use, or 70% of the total 46.6 AF HCV for a total HCV from 6/16 – 10/1 of 32.6 AF. Based on the 80/20 apportionment between the two rights, the individual HCV for the 87 acres not supplemental to Claim 41A 133546-00 would be:

**Table 4: Individual HCV for 5/1 - 6/15**

Statement of Claim	Percent of 14.0 AF	HCV for 5/1 – 6/15 (AF)
41A 133547-00	80	11.2
41A 133548-00	20	2.8

**Table 5: Individual HCV for 6/16 - 10/1**

Statement of Claim	Percent of 32.6 AF	HCV for 6/16 – 10/1 (AF)
41A 133547-00	100	32.6
41A 133548-00	0	0

**Table 6: Total Individual HCV**

Statement of Claim	HCV (AF) calculated in Change Application No. 41A 30126471 (122 acres)	HCV (AF) calculated in this Change (87 acres)	Total HCV (AF) (209 acres)
41A 133547-00	13.0	43.8	56.8
41A 133548-00	3.3	2.8	6.1

#### Historic Diverted Volume Calculations

17. The Applicant submitted historic diverted volume calculations for the 87 acres not supplemental with the acreage from Claim 41A 133546-00. The calculations below are based on the entire place of use for Claim 41A 133547-00.

18. Claims 41A 133547-00 and 41A 133548-00 share the same conveyance from the point of diversion for 41A 133548-00 to the place of use. The Technical Report by the Department

incorrectly included this section of ditch in the conveyance loss calculations; conveyance losses can only be included until the conveyance reaches the place of use, therefore only the section of Hellroaring Ditch from the diversion on Hellroaring Creek to the diversion on the Unnamed Tributary of Hellroaring Creek are included in this determination. Table 7 below correctly calculates the conveyance losses for Claim 41A 133547-00 from the diversion on Hellroaring Creek to the Unnamed Tributary of Hellroaring Creek for the full period of diversion.

**Table 7: 5/1 – 10/1 Conveyance Losses from Hellroaring Creek to UT Hellroaring Creek**

<i>Seepage Loss</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)
	6.66	3945	1.2	<b>154</b>	111.5
<i>Vegetation Loss (All Users):</i>	% loss/mile	Est. Flow Rate (CFS)=	Days Irrigated	ditch length (miles)	Vegetation Loss (*2)
	0.75	5	154	0.75	8.7
<i>Ditch Evaporation: (All Users):</i>	Ditch Width (Feet)	Ditch Length (Feet)	Evaporation (Potts)	Ditch Evaporation (/43560)	
	5.76	3945	3.15	1.6	

19. Conveyance losses equal seepage loss plus vegetation loss plus ditch evaporation. The total historic conveyance losses for Claim 41A 133547-00 are 121.8 AF.

**Table 8: Total Historic Diverted Volume for 41A 133547-00**

<b>Statement of Claim</b>	HCV AF (minus IL)	On-farm Efficiency Wild Flood	Field Application AF	Seasonal Conveyance Loss Volume (seepage loss + vegetation loss + ditch evaporation) (AF)	<b>Total HDV AF</b> (Field Application + Conveyance Losses)
41A 133547-00	56.8	25%	227.2	121.8	<b>349.0</b>

20. The Department finds the following historic use for Claim 41A 133547-00:

**Table 9: Historic use for 41A 133547-00**

Statement of Claim #	Priority Date	Diverted Volume AF	Flow Rate CFS	Purpose (Total Acres)	Consump. Use AF	Place of Use	Point of Diversion
41A 133547-00	7/13/19 06	349.0	5.0	Irrigation 209 acres	56.8	Sec 15, 22, 23, T14S, R1E	SWSWSW, Sec 24, T14S, R1E

**FINDINGS OF FACT – Adverse Effect**

21. The Applicant proposes to fully retire 209 acres of flood irrigation from Hellroaring Creek in Sec 15, 22, 23, T14S, R1E, Beaverhead County, to provide up to 5 CFS diverted flow rate and up to 229.4 AF diverted volume to supply supplemental water to a fishery pond in the NWNE of Section 22, T 14 S, R 1 E, Beaverhead County. Applicant will continue to utilize the historic Hellroaring Creek diversion and ditch to convey water to the proposed place of use via an extension ditch from the historic place of use to the ditch that currently feeds the pond from Corral Creek. This change application and concurrent Change Application 41A 30159714 for Claim 41A 133548-00 from an Unnamed Tributary to Hellroaring Creek will supplement water to the fishery pond in years when Claim 41A 133546-00 is unable to fully satisfy the 150 AF for the fishery purpose authorized under previous Change 41A 30126471. Under the previous authorization, 0.5 CFS and 150 AF were authorized to be diverted from Corral Creek to supply the 18.7 AF capacity pond, 12.0 AF of evaporation, and 119.3 AF flow through volume to maintain the fishery habitat.

22. Claim 41A 133547-00 was last used in 2013 or 2014. No new surface water rights have been issued on Hellroaring Creek since this right was last used, therefore the resumption of use will not adversely affect any new users. The proposed diverted volume from Hellroaring Creek is less than the historic diverted volume, therefore existing users on Hellroaring Creek will not experience a decrease in availability of water as a result of the proposed change.

**Proposed Consumptive Use**

23. Applicant proposes divert 229.4 AF of water to fill 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 in previous Change Application 41A 30126471 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 is  $3.15 - 1.05 = 2.10$  AF/acre.

24. Based on the 80/20 apportionment described above under historic use, Claim 41A 133547-00 will contribute 80% of the proposed consumptive volume, and Claim 41A 133548-00 will contribute the remaining 20% through concurrent Change Application 41A 30159714.

25. The total proposed consumptive volume for Claim 41A 133547-00 would be 80% of 30.7 AF, or 24.6 AF.

26. The proposed consumptive use of 24.6 AF is 32.2 AF less than the historic consumptive use of 56.8 AF.

#### Proposed Diverted Volume

27. The proposed diverted volume for Claim 41A 133547-00 is 229.4 AF. The Applicant supplied calculations for conveyance losses based on the Department's methodology. The proposed conveyance structures include 6290 ft. of the historic Hellroaring Ditch, 2770 ft. of a new extension ditch to connect the Hellroaring Ditch to the ditch that connects Corral Creek to the pond, and the third section is the 1070 ft. ditch from Corral Creek to the pond. The Applicant calculated conveyance losses for each of these sections based on the Department's conveyance loss methodology for a total proposed conveyance loss for 41A 133547-00 of 107.7 AF. The proposed diverted volume of 229.4 AF less 107.7 AF conveyance losses results in a maximum delivered volume under Claim 41A 133547-00 of 121.7 AF.

28. The proposed diverted volume of 229.4 AF is 119.6 AF less than the historic diverted volume of 349.0 AF.

29. Diverted volume that is not utilized to fill the pond or account for evaporation will flow through the pond to Corral Creek.

#### Return Flows

30. Surface Water Change Report dated August 2, 2023, by Evan Norman, DNRC Groundwater Hydrologist, identified the location of historical return flows as Corral Creek

downstream of the NENENW of Sec 22, T14S, R1W, Beaverhead County. Total historic return flows for the 209-acre place of use would be the applied volume minus the consumed volume for a total return flow volume of 260.6 AF as shown in Table 10 below:

**Table 10: Total Return Flow Calculations**

Acres	IWR inches	IWR Feet	Historic Management Factor	Consumptive Volume (AF)	Field Efficiency (%)	Applied Volume (AF)	Irrecoverable Losses (5%) (AF)	Total HCV (AF)	Return Flows (AF)
209	8.39	0.70	0.637	93.08	0.25	372.3	18.62	111.7	260.6

31. 260.6 AF of return flows for 209 acres = 1.25 AF/acre. Apportionment of return flows for the 122 acres that are supplemental with previous Change 41A 30126471 and for the 87 acres not supplemental with the previous change is based on corresponding historic consumptive volumes. Claims 41A 133547-00 and 41A 133548-00 contributed 16.3 out of the total consumed 65.2 AF, or 25%, therefore contributed 25% of the return flows for the 122 supplemental acres. These rights contributed all of the return flows for the remaining 87 acres as shown in Table 11 below:

**Table 11: Apportionment of Historic Return Flows for both Claims 41A 133547-00 and 41A 133548-00**

Acres	AF/acre	% involved in this change	Total Return Flow AF
122	1.25	25	38.1
87	1.25	100	108.8
		<b>Total</b>	<b>146.9</b>

The Department Technical Report apportioned the historical return flows for each claim based on the 80/20 apportionment utilized by the Applicant, but this apportionment only applied to the period of use from May 1 – June 15. The calculations used in this document are based on the individual percentage of the total HCV contributed by each right over the entire period of diversion for Claim 41A 133547-00, resulting in a more accurate apportionment of the individual return flows. Apportioning the return flows based on the percentage of the HCV each right contributed to the total results in claim 41A 133547-00 contributing 90% of the total historical return flows, or 132.2 AF.



32. The flow through volume to Corral Creek under the proposed use for Claim 41A 133547-00 would be 97.1 AF (121.7 AF delivered volume based on the Applicant's calculations for proposed conveyance losses for the proposed use less the 24.6 AF proposed consumed volume). The difference between the loss of 132.2 AF of return flows from historic use and the addition of 97.1 AF of flow through volume from Claim 41A 133547-00 under proposed use would result in an annual reduction in flows in Corral Creek of 35.1 AF.

33. The Department Technical Report identified one water right below the point where historic return flows began accruing in Corral Creek: Water Reservation 41A 30017438 for Instream Flow for Fishery by the Montana Department of Fish, Wildlife, and Parks (MTDFWP). The purpose of the proposed change is to allow for the prioritization of instream flows in Corral Creek as authorized under previous Instream Flow Change Authorization 41A 30154943, while still allowing the Applicant to satisfy the water requirements of the proposed pond. The previous instream flow change was authorized to protect 0.37 CFS up to 112 AF in Corral Creek from May 1 to October 1, from a point approximately 0.5 miles upstream from where the historical return flows from this application began to accrue to the confluence with the Red Rock River. The protected volume from the previous instream flow change of 112 AF plus the proposed flow-through volume of 100.3 AF from this change and concurrent change 41A 30159714 would exceed the calculated loss of 146.9 AF of return flows to Corral Creek from this change and change 41A 30159714.

34. Under the proposed use, 5 CFS up to 229.4 AF will be diverted from Hellroaring Creek, and 119.6 AF of formerly diverted volume will be left instream and will be available to downstream users of Hellroaring Creek.

35. The Applicant will install a measuring device in the ditch that supplies water from Hellroaring Creek which will be used to ensure that the authorized flow rate and volume are not exceeded.

36. The Department finds that changing 5 CFS flow rate and 229.4 AF diverted volume from Claim 41A 133547-00 to the purpose of Fishery to supply the proposed pond will not adversely affect other users on Hellroaring Creek or Corral Creek.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

37. Applicant proposes to use water for a fishery pond. Applicant proposes to use 229.4 AF diverted volume and 5 CFS flow rate.

38. The beneficial use of 150 AF of volume delivered to the pond was substantiated in previous Change Application 41A 30126471, including a description of the need for the fill volume of 18.7 AF, an evaporative volume of 12.0 AF, and up to 119.3 AF of flow through volume to support oxygenation for fish habitat. The Applicant cited references to *The Montana Lake Book, Third Edition* and the Wyoming Game and Fish Dept. document *Designing, constructing, and Stocking a Fish Pond* to support the pond design and need for flow-through volume.

39. The Applicant submitted flow measurements from 2021 and 2022 indicating that the target instream flows in Corral Creek under the Centennial Valley Candidate Conservation Agreement with Assurances (CCAA) were not met for a portion of the period of diversion for the pond authorized under the previous change. The supplemental water from Hellroaring Creek proposed in this application is necessary to supply the 150 AF to the pond in years where flows in Corral Creek are inadequate to meet both instream flow targets and diversions to the pond. Under this change, Claim 41A 133547-00 will supply up to 121.7 AF of delivered volume (229.4 AF diverted less 107.7 AF conveyance losses) to supplement the required fill volume of 18.7 AF, evaporative volume of 12.0 AF, and flow through volume of 119.3 AF, in years when previously changed Claim 41A 133546-00 is unable to fully supply the pond.

40. The Department finds that a diverted volume of 229.4 AF and a diverted flow rate of 5 CFS for the purpose of Fishery is a beneficial use.

## **ADEQUATE DIVERSION**

### **FINDINGS OF FACT**

41. The Applicant proposes to utilize the historic 18-inch circular headgate diversion and the historic Hellroaring Ditch.

42. An 18-inch circular orifice will allow 1.8 CFS for every 1 foot per second of velocity. To allow 5 CFS, flow velocity through the headgate would need to be 2.8 feet per second, which is a reasonable flow in a high gradient mountain stream. Manning's estimates supplied by the Applicant support a capacity of over 5 CFS in the Hellroaring Ditch.

43. The Department finds that the proposed diversion and ditch are adequate for the proposed flow rate.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

44. 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.

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

45. 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. 411 30002512 by Brewer

Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

46. 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>

47. 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 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

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

<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).

<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

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).<sup>4</sup>

48. 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

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<sup>4</sup> 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 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.)

use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; 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. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 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 right and is subject to appropriation by subsequent water users).<sup>5</sup>

49. 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).

50. 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

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<sup>5</sup> 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).



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, 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).

51. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. 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.

52. 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.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

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

54. 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).

55. 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.16).

56. 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”).

57. 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 133547-00 of 381.5 AF diverted volume and 5.0 CFS flow rate with a consumptive use of 56.8 AF. (FOF Nos. 8-20)

58. 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. 21-36)

### **BENEFICIAL USE**

59. 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).

60. Applicant proposes to use water for a Fishery which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence Fishery is a beneficial use and that 229.4 acre-feet of diverted volume and 5.0 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 37-40)

#### ADEQUATE MEANS OF DIVERSION

61. 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. 6<sup>th</sup> 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).

62. 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. 41-43)

#### POSSESSORY INTEREST

63. 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

64. 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 No. 44)

### **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. 41A 30160010 should be granted subject to the following.

Applicant is authorized to retire 209 acres of flood irrigated land and change 229.4 AF diverted volume up to 5 CFS flow rate to supply a fishery pond in the NWNE of Sec 22, T14S, R1E, Beaverhead County. Applicant will continue to utilize the historic Hellroaring Creek diversion in the SWSWSW of Sec 24, T14S, R1E, and Hellroaring Ditch to convey water to the proposed place of use via an extension ditch from the historic place of use to the existing ditch that feeds the pond from Corral Creek.

#### **Necessary conditions for this change:**

THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS IN THE HELLROARING DITCH BELOW THE HEADGATE. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE UNTIL PROJECT COMPLETION USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A CHANGE.

THE APPLICANT OR DESIGNEE SHALL MEASURE THE FLOWS IN THE DITCH SUPPLYING THE POND TO ENSURE THE DELIVERED VOLUME DOES NOT EXCEED 150 AF. MEASUREMENTS WILL BE TAKEN MONTHLY DURING THE PERIOD OF USE UNTIL PROJECT COMPLETION USING DEPARTMENT APPROVED MEASURING DEVICES. ALL MEASUREMENTS WILL BE REPORTED TO THE DNRC HELENA REGIONAL OFFICE BY NOVEMBER 30. 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 29<sup>th</sup> day of February 2024.

/Original Signed by Jennifer Daly/  
Jennifer Daly, 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 29th day of February 2024, by first class United States mail.

GRAYLING CENTENNIAL LLC  
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ANDY BRUMMOND  
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