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MEMORANDUM

Date: April 17, 2016

To: Water Policy Interim Committee

From: Abigail J. St. Lawrence

Subject: Change applications presentation at May 3, 2016 WPIC meeting

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Thank you for the invitation to present to you regarding the change application process at your May 3rd meeting. The purpose of this memo is to highlight two primary issues with the present change application process: the gaps or "dead zone" in the processing timeline and the application of the irrigation water requirements ("IWRs"). I attach to this memo the relevant statutes and regulations for your reference. The Chair has also asked that I discuss the impact of the 2010 Hohenlohe v. DNRC decision, dealing with how return flow analysis in conducted in change applications and other general issues in change applications. I attach hereto a copy of that decision as well. During my presentation, as time allows, I will also present a few concrete examples of how different change applications have been processed. Which examples I present is pending client permission to share their experiences.

1. Processing Timeline

As DNRC has previously acknowledged to this committee, there is a gap in the application processing timeline that leaves an indefinite time period open for a correct and complete determination after an applicant responds to a deficiency letter. This gap applies to both change applications and applications for new beneficial use permits. There are also gaps in the timeline when objectors come in to play. The timeline at present, with statutory cites is as follows:

- 180 days after application is received, DNRC shall notify applicant of any deficiencies in application. (MCA § 85-2-302(5))
  - If no notice to applicant of any deficiencies within 180 days of receipt of application, the application is treated as correct and complete.
- 90 days after receipt of deficiency notice, applicant responds to deficiency notice. (MCA § 85-2-302(6))
  - For new permit applications, if the applicant responds within 30 days of the deficiency notice, the priority date remains the date on which the application was submitted.
  - For new permit applications, if the applicant responds within 31-90 days of the deficiency notice, the priority date is the date on which the application is made correct and complete. (*Note—lack of clarity here as to whether this is the date on which DNRC deems the application correct and complete, or the date on which the applicant submitted responses to the deficiency notice.*)

- If the applicant does not respond to the deficiency notice within 90 days, the application is terminated. (MCA § 85-2-302(7))

<u>GAP IN TIMELINE BETWEEN SUBMISSION OF RESPONSE TO DEFICIENCY NOTICE AND CORRECT AND COMPLETE DETERMINATION</u>

- 120 days after the correct and complete determination, DNRC issues a written preliminary determination. (MCA § 85-2-307(2)(a)
  - If preliminary determination is to grant, application goes out for public notice for 15-60 days. (MCA § 85-2-307(3))
    - DNRC shall notify objectors of any deficiencies in objections. (MCA § 85-2-308(5))

<u>GAP IN TIMELINE BETWEEN SUBMISSION OF OBJECTIONS AND NOTICE OF ANY DEFICIENCIES IN OBJECTIONS</u>

    - Objectors have 15 days from the date of any deficiency notice to correct the deficiency.
    - A hearing shall be held on objections within 90 days of the deadline for objections. The hearing may be extended for good cause shown or upon the request of applicant and all objectors.
  - If preliminary determination is to deny, a show cause hearing is held unless the applicant withdraws the application. (MCA § 85-2-310(1)).
    - A determination is made by the hearing examiner within 90 day of the close of the administrative record. (MCA § 85-2-310(5))

There are other timelines that apply pursuant to administrative rule in the hearing process. There are also additional permutations of the above-detailed timeline if the preliminary determination to grant is overturned on a hearing on objections. Finally, if a decision by a hearing examiner is appealed to district court, that adds another layer to the process. However, the fundamental issue for purposes of this presentation is the lack of clarity highlighted in the above outline. This committee should consider legislation to address these two specific unclear deadlines, providing distinct guidelines for both applicants and DNRC.

2. <u>IWR Application</u>

In the change application process, an applicant is limited to changing that amount of water that the applicant has historically used. This is part of demonstrating that the applicant meets the "no adverse effect" criteria set forth in Mont. Code Ann. § 85-2-3111(1)(b). In determining historical use, DNRC applies, among other guidelines, IWRs to determine historical consumption under irrigation rights. Because calculation of the IWRs is quite detailed, I provide the full administrative rule setting out that calculation as an attachment to this memo.

The primary issue with application of the IWRs is that in application, they may result in a "trimming back" of an applicant's existing irrigation right. Even where the water right that is the subject of a change application has gone through the adjudication process and historical use has been determined by the Water Court, DNRC still goes through its own historical use analysis and applies IWRs to irrigation rights. *See*, Admin. R. Mont. 36.12.1902(2):

> Final Water Court approved stipulations and master's reports related to the water right being changed must be referenced with the application; however, this information or an abstract of a water right from the department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use.

This often results in a re-adjudication of sorts of existing water rights. This committee should examine DNRC's historical use analysis to protecting existing senior water users' ability to fully utilize their rights as adjudicated by the Water Court.

3. *Hohenlohe v. DNRC*—return flow analysis

The 2010 Montana Supreme Court decision in Hohenlohe v. DNRC involved a change application where a ranch north of Helena along Little Prickly Pear Creek and the Missouri River was changing from flood to sprinkler irrigation and wanted to preserve the water savings as instream flow to benefit a previously chronically de-watered portion of Little Prickly Pear Creek that was vital for restoring connectivity to the Missouri and maintaining the fish nursery in the creek. The project was supported by both Montana Fish, Wildlife and Parks and Montana Trout Unlimited, and the sole objector, an irrigator downstream of the Hohenlohes, withdrew when she realized that she was actually going to be receiving more water than she ever had before.

Despite the positive impacts of the project, DNRC denied that change application based on DNRC's determination that the Hohenlohes had submitted an incomplete return flow analysis and, therefore, had failed to show a lack of adverse effect. It was true that return flow patterns were changing as a result of the change from flood to sprinkler irrigation; water that had previously been diverted would be left instream, meaning that late-season return flow would not occur, as the water had never been diverted in the first place. The ironic part was that the change from flood to sprinkler irrigation, which was causing the change in return flow patterns, did not require a change application because the Hohenlohes were not changing the location of the acres irrigated. The only thing that triggered a change application requirement was that the Hohenlohes wanted to take the water saved in the shift from flood to sprinkler and protect it in stream for fisheries.

The Montana Supreme Court held that DNRC had "deviated from its own prior interpretation of § 85-2-408(7) in denying Hohenlohes' application." Mont. Code Ann. §85-2-408(7) reads as follows:

> The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion.

The Montana Supreme Court acknowledged that the return flow analysis should vary based on the facts of each particular case and the potential for adverse impact to downstream users. "The potential for adverse impact to downstream users appears negligible in the context of Hohenlohes' change application." Additionally, the Court noted that DNRC had previously allowed the entire diverted volume to be protected in instream flow, citing to *Authorizations Nos. 76F-30023056, Mannix Lease* (2007) and *76F 30011112, Hoxworth Lease* (2005). The Supreme Court concluded:

> It is untenable that a change of use applicant who incurs the considerable expense of installing a more efficient irrigation system in order to leave water instream—a beneficial use equal to any other recognized by the Montana Constitution—thereby risks losing a significant portion of the water he would have been allowed to divert had he continued to irrigate in an inefficient manner. Such an outcome frustrates the purpose of the instream flow statute, and does little to "encourage the wise use of the state's water resources." Section 85-2-101, MCA

The Court ultimately found that Hohenlohes had proven lack of adverse effect by a preponderance of the evidence and that DNRC's treatment of Hohenlohes' application ignored the practicalities of how the instream flow statute operates.

The Hohenlohe case demonstrates the problems with a strict and often impractical approach to applying the change application criteria. As Justice Wheat noted in his concurrence:

> The Department's actions with respect to this issue disregard the public policy mandate that the State "shall coordinate development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." Section 85-1-101(3), MCA. The Department's adversarial approach does not further the goal that all water resources of the State be put to optimum beneficial use.

Justice Wheat also noted serious concerns with not only DNRC's substantive approach to application of the change of use criteria, but also treatment of applicants as well.

> [T]he Department's obstinate approach to this issue lacks common sense and courtesy. It gives the impression that the Department did anything it could to avoid given Hohenlohes a fair shake. Once again, the Department's actions paint it as an adversary that is not interested in effecting full utilization, conservation, and protection of Montana's water resources. The Department's obstinance in this case was both unfortunate and unnecessary.

Although DNRC has made some efforts to change its treatment of applicants, the bean-counter approach to applying change application criteria, ignoring the practical realities of the situation, persists. It would be worth this committee's time to examine how that approach could be remedied.

Montana Code Annotated 2015

85-2-302. Application for permit or change in appropriation right. (1) Except as provided in 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works unless the person applies for and receives a permit or an authorization for a change in appropriation right from the department.

(2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part or a change in appropriation right pursuant to Title 85, chapter 2, part 4. The rules must be adopted in compliance with Title 2, chapter 4.

(3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted.

(b) If an application is for a permit to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, the application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

(5) The department shall notify the applicant of any defects in an application within 180 days. The defects must be identified by reference to the rules adopted under subsection (2). If the department does not notify the applicant of any defects within 180 days, the application must be treated as a correct and complete application.

(6) An application does not lose priority of filing because of defects if the application is corrected or completed within 30 days of the date of notification of the defects or within a further time as the department may allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the application is the date the application is made correct and complete.

(7) An application not corrected or completed within 90 days from the date of notification of the defects is terminated.

(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(2); amd. Sec. 6, Ch. 448, L. 1983; amd. Sec. 12, Ch. 769, L. 1991; amd. Sec. 2, Ch. 370, L. 1993; amd. Sec. 1, Ch. 422, L. 1999; amd. Sec. 2, Ch. 78, L. 2001; amd. Sec. 1, Ch. 574, L. 2003; amd. Sec. 4, Ch. 213, L. 2007; amd. Sec. 2, Ch. 391, L. 2007; amd. Sec. 2, Ch. 335, L. 2013; amd. Sec. 7, Ch. 294, L. 2015.

Provided by Montana Legislative Services

Montana Code Annotated 2015

85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

(2) (a) Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant, the persons listed in subsection (2)(d), and persons who may claim standing pursuant to 85-2-308 to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(3) The notice must state that by a date set by the department, not less than 15 days or more than 60 days after the date of publication, persons may file with the department written objections to the application.

History: En. Sec. 17, Ch. 452, L. 1973; amd. Sec. 9, Ch. 485, L. 1975; R.C.M. 1947, 89-881; amd. Sec. 2, Ch. 357, L. 1981; amd. Sec. 9, Ch. 448, L. 1983; amd. Sec. 29, Ch. 526, L. 1983; amd. Sec. 3, Ch. 535, L. 1987; amd. Sec. 3, Ch. 370, L. 1993; amd. Sec. 5, Ch. 70, L. 2005; amd. Sec. 2, Ch. 251, L. 2009; amd. Sec. 1, Ch. 52, L. 2015.

Provided by Montana Legislative Services

Montana Code Annotated 2015

85-2-310. Action on application for permit or change in appropriation right. (1) (a) If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not participate in the preliminary determination.

(ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing examiner.

(2) A proposal to grant a permit or change in appropriation right with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the permit or change in appropriation right in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to 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 the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

(7) (a) Except as provided in subsection (6), if the department proposes to grant a permit or change in appropriation right in modified form, the applicant must be given an opportunity to be heard. The addition of conditions or changes to conditions required for approval does not constitute a modification of the application.

(b) The department shall serve notice of a preliminary determination to grant a permit or change in appropriation right in a modified form by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing pursuant to 2-4-604 to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be preliminarily determined to be granted in the modified form by filing a request within 30 days after the notice is mailed. The notice must state that the permit or change in appropriation right will be preliminarily determined to be granted as modified unless a hearing is requested.

(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these

reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) except as provided in subsection (10), if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124.

(10) If water applied for is to be marketed by the applicant to other users for the purpose of aquifer recharge or mitigation, the applicant is exempt from the provisions of subsection (9)(c)(v). The applicant must provide information detailing the proposed place of use.

History: (1), (2)En. Sec. 20, Ch. 452, L. 1973; amd. Sec. 10, Ch. 485, L. 1975; amd. Sec. 5, Ch. 416, L. 1977; Sec. 89-884, R.C.M. 1947 (3)En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; Sec. 89-880, R.C.M. 1947; R.C.M. 1947, 89-880(3), 89-884; amd. Sec. 3, Ch. 357, L. 1981; amd. Sec. 1, Ch. 399, L. 1985; amd. Sec. 4, Ch. 535, L. 1987; amd. Sec. 10, Ch. 659, L. 1991; amd. Sec. 4, Ch. 422, L. 1999; amd. Sec. 7, Ch. 70, L. 2005; amd. Sec. 20, Ch. 337, L. 2005; amd. Sec. 7, Ch. 213, L. 2007; amd. Sec. 5, Ch. 251, L. 2009; amd. Sec. 3, Ch. 29, L. 2011; amd. Sec. 3, Ch. 335, L. 2013.

Provided by Montana Legislative Services

36.12.1902 CHANGE APPLICATION - HISTORIC USE

(1) The description of the historic information is related to a date that is dependent on the type of water right being changed. The following dates are applicable for each type of water right:

(a) historic information for a statement of claim must be described as it was used prior to July 1, 1973, unless the Water Right Claim was subject to a previous change in which case it is the date of completion of the change;

(b) historic information for a provisional permit must be described as it was used at the filing date of the completion notice;

(c) historic information for a certificate of water right must be described as it was used at the filing date of the completion notice;

(d) historic information for an exempt or nonfiled water right must be described as it was completed prior to July 1, 1973; and

(e) when a change application has been granted on or after July 1, 1973, the department may request additional historic information for a statement of claim as it was used prior to July 1, 1973.

(2) Final Water Court approved stipulations and master's reports related to the water right being changed must be referenced with the application; however, this information or an abstract of a water right from the department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use.

(3) The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use.

(a) The department may use column H in Table 1 for proposed irrigation to compare the historic consumptive use (HCU) to the amount of water being changed.

(4) The department shall compare historical acres irrigated to acres identified as irrigated in the Water Resources Survey, if available for the place of use. If the Water Resources Survey does not support the historical irrigation alleged in the application, the applicant shall explain why. Information from irrigation journals, logs, or old aerial photographs can be submitted for consideration.

(5) For an application to change multiple irrigation water rights, the total number of acres for each water right located within the place of use must be identified.

(6) For an application to change water rights that overlap the historic place of use, an applicant shall include those water rights in the change application or shall explain how each of the water rights has been historically used and how the unchanged water rights will be used if the change authorization were granted. If water will continue to be used at the historic place of use, the applicant shall explain how the continued use will not increase the combined historic maximum diverted flow rate, the historic diverted volume, and the historic consumptive volume.

(7) The department will corroborate the historic use, including the following of each water right being changed:

(a) water right number and the priority date;

(b) most recent year the water right was used;

(c) historic point of diversion;

(d) historic period of diversion;

(e) historic means of diversion;

(f) typical historic diversion schedule and operation pattern;

(g) means of conveyance;

(h) historic ditch capacity;

(i) maximum historic flow rate diverted from each point of diversion and how the amount was determined;

(j) historic place of use for each purpose;

(k) maximum number of acres historically irrigated;

(l) typical historic period of use for each purpose;

(m) annual or monthly historic diverted volume and how this amount was determined;

(n) the annual or monthly historic consumptive volume for each purpose;

(i) for irrigation, an applicant may choose to use the methodology described in (16); and

(ii) for irrigation, an applicant who chooses not to use the methodology described in (16), shall provide the factual basis for the historic consumptive volume calculation and why the historic consumptive use is less than or greater than the methodology described in (16);

(o) the historic efficiency including the diversion, conveyance, and overall system;

(p) the legal land description of a reservoir;

(q) the maximum volume in acre-feet of stored water;

(r) evaporation loss of stored water (evaporation standards can be found in ARM 36.12.116);

(s) maximum number of times a reservoir was filled during a year; and

(t) maximum period of time when water was legally collected for storage.

(8) The following information may be used by the department to establish the requirements under (7):

(a) aerial photographs depicting irrigated land:

(i) 1979, 1997, and 2005 photos showing the irrigated land;

(b) aerial or other photographs showing diversion or conveyance structures;

(c) Water Resources Survey book information;

(d) Water Resources Survey field notes;

(e) water commissioner field notes;
(f) Natural Resources Conservation Service (NRCS) information, such as field specific soils information;
(g) affidavits from persons with first-hand knowledge of historic use;
(h) calculation of historic ditch capacities;
(i) description of irrigation equipment, field treatments, means of conveyance, control structures, and other onsite features related to water use;
(j) description of water supply availability;
(k) log books or diaries of previous irrigators or farm operations, crop yield records, or diversion records; or
(l) an evaluation of the seniority of the water right in relation to other users.

(9) The annual or monthly historic diverted volume must be based on the appropriator's typical historic operation of their diversion, irrigation, and harvest schedule throughout the period of diversion and the period of use. If applicable, in addition to the information required in 36.12.1902(7), if a secondary diversion from a ditch or reservoir exists, an applicant shall identify the diversion means and the typical operation of that secondary diversion.

(10) The department shall calculate the historic diverted volume for water rights with the purpose of irrigation using the following equation: Historic Diverted Volume = $(\text{Volume}_{\text{historic consumptive use}}/\text{On-farm efficiency}) + \text{Volume}_{\text{conveyance loss}}$:

(a) "conveyance loss" means the portion of water diverted at the headgate that does not arrive at the irrigated place of use due to seepage and evapotranspiration from the ditch;
(b) "seepage loss" means ((flow area)*(ditch length)*(loss rate)*(days))/43,560 ft^2/ac; and
(c) "on-farm efficiency" refers to the percent of the water delivered to the field that is used by the crop.

(11) If the applicant chooses not to use the methodology in (10), they shall provide additional information on the Historic Water Use Addendum.

(12) Historic consumptive volume must be based on the acre-feet of water used for the beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that do not return to ground or surface water.

(13) The following may be used to calculate ditch capacity, historic available water supply, and reservoir capacity:
(a) Manning's equation;
(b) Orsborn's equation;
(c) Blaney-Criddle equation; and
(d) the department will determine the acceptability of other reports or methods on a case-by-case basis.

(14) The historic consumptive use methodology that the department shall use to determine historic consumptive use for water rights with a purpose of irrigation is based on data from the United States Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), and generated using the USDA NRCS Irrigation Water Requirements (IWR) program. If the applicant chooses not to accept the methodology used by the department, the applicant shall provide additional information on the Historic Water Use Addendum.

(15) IWR Data for Seasonal Alfalfa Evapotranspiration County Management Factor are shown in Table 1 and will be used by the department to identify the historic consumptive volume unless additional information is provided by the applicant on the Historic Water Use Addendum. If this table is used to establish the historic consumptive volume, the department will recognize that volume as a reasonable calculation, unless a valid objection is received which offers proof that the volume is inaccurate.

(16) To determine the historic consumptive volume using the table, the department will complete the following steps:
(a) determine which weather station (column B) is the most representative for the place of use (column C). The most representative weather station may not be in the county of the place of use, but must be nearby and about the same elevation and climatic conditions as the irrigated acres. A map showing the weather stations is located on the Internet at: http://dnrc.mt.gov/wrd/water_rts/default.asp;
(b) find the evapotranspiration inches based on whether the historic irrigation is flood, wheeline, handline, or center pivot, to estimate the historic IWR (columns D or E);
(c) identify the county in which the irrigated acres are located to determine the county management factor percentage (column F or G);
(d) multiply the IWR estimate found in column D or E by the management factor percentage in column F or G. The result is the number of inches used per irrigated acre;
(e) multiply the number of total acres within the historic place of use by the county adjusted inches used per irrigated acre calculated in (d) above to determine the historic consumptive inches for those acres; and
(f) divide the cumulative historic consumptive inches from (e) by 12 to determine the cumulative historic consumptive acre-feet for the total acres.
(g) If the historic consumptive volume determined by this methodology exceeds the historic diverted amount, the department may request additional information in order to resolve the discrepancy. This may result in a reduction of the consumptive volume.

Table 1 - Montana County Weather Station IWR Data for Seasonal Alfalfa Evapotranspiration and Montana County Management Factor.

Column

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
County	Weather Station	Elevation	ET IWR Flood Irrigation, Wheeline & Handline Seasonal (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 – 1973 (pre-July 1, 1973 HCU)	Management Factor Percentage 1973 – 2006 (post-July 1, 1973 HCU)	Management Factor Percentage 1997 – 2006 (proposed use)
Beaverhead	Dillon	5239	18.34	20.74	63.7%	82.8%	88.3%
	Wisdom	6060	7.34	9.29			
	Jackson	6480	8.35	10.30			
	Lakeview	6710	8.39	10.67			
	Lima	6583	13.75	16.01			
Big Horn	Busby	3430	20.32	22.88	55.4%	78.7%	88.1%
	Hardin	2905	27.46	29.96			
	Hysham 25	3100	20.25	22.86			
	Wyola	3750	19.19	21.89			
	Yellowtail Dam	3305	28.07	31.30			
Blaine	Chinook	2420	20.80	23.57	58.7%	63.6%	66.0%
	Harlem	2362	21.62	24.27			
Broadwater	Townsend	3840	19.42	21.88	69.2%	79.5%	87.1%
	Trident	4040	20.64	23.31			
Carbon	Joliet	3776	22.41	25.12	58.3%	66.8%	70.8%
	Red Lodge	5500	15.57	18.41			
Carter	Ekalaka	3425	20.13	23.14	38.4%	54.7%	54.1%
	Ridgeway	3320	20.28	23.01			
Cascade	Cascade 20	4600	14.12	16.63	57.3%	70.0%	78.8%
	Cascade 5	3360	17.90	20.75			
	Great Falls	3675	19.78	22.55			
	Neihart	4945	12.17	15.08			
	Sun River	3340	18.10	20.65			
Chouteau	Big Sandy	2700	21.52	24.37	52.5%	64.9%	77.9%
	Fort Benton	2640	21.98	24.75			
	Geraldine	3130	20.30	23.27			
	Iliad	2950	21.55	24.27			
	Loma	2700	22.64	25.37			
	Shonkin	4300	13.32	16.70			
Custer	Miles City	2628	26.68	29.55	54.5%	72.0%	81.1%
	Mizpah	2480	23.80	26.57			
	Powderville	2800	24.83	27.68			
Dawson	Glendive	2076	26.01	28.99	56.8%	63.6%	72.0%
Deer Lodge	No weather station				See appropriate adjacent county		
Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
			IWR Flood Irrigation, Wheeline & Handline	IWR Center Pivot Irrigation	Management Factor Percentage 1964 – 1973	Management Factor Percentage 1973 – 2006	Management Factor Percentage 1997 – 2006

County	Weather Station	Elevation	ET (inches) Seasonal	Seasonal ET (inches)	(pre-July 1, 1973 HCU)	(post-July 1, 1973 HCU)	(proposed use)
Fallon	Plevna	2780	22.48	25.34	47.6%	47.8%	47.6%
Fergus	Denton	3620	15.39	18.12	48.8%	65.8%	68.3%
	Lewistown	4167	15.54	18.44			
	Roy	3450	19.94	22.78			
	Winifred	3240	17.86	20.75			
Flathead	Creston	2949	14.97	17.81	87.6%	94.5%	96.6%
	Hungry Horse Dam	3160	14.66	18.06			
	Kalispell	2972	16.45	19.03			
	Olney	3165	12.50	15.16			
	Polebridge	3600	10.20	12.50			
	West Glacier	3154	13.74	16.78			
	Whitefish	3100	15.74	18.61			
Gallatin	Bozeman Exp Farm	4775	16.84	19.55	73.5%	92.1%	98.6%
	Bozeman MT State	4913	18.42	21.39			
	Hebgen Dam	6667	10.09	12.77			
Garfield	Cohagen	2710	22.36	24.99	43.4%	50.6%	46.1%
	Jordan	2661	23.58	26.32			
	Mosby	2750	24.51	27.34			
Glacier	Babb	4300	12.12	14.87	59.7%	73.6%	73.9%
	Cut Bank	3855	16.01	18.60			
	Del Bonita	4340	14.61	17.30			
	East Glacier	4810	10.60	13.26			
	St Mary	4560	13.64	16.60			
Golden Valley	Ryegate	4440	17.60	20.17	62.6%	65.5%	64.6%
Granite	Philipsburg Ranger Station	5270	12.90	15.26	86.5%	87.4%	96.6%
Hill	Fort Assinniboine	2613	22.42	25.20	54.1%	59.8%	60.4%
	Guilford	2820	19.54	22.06			
	Havre	2585	20.94	23.46			
	Simpson	2815	19.67	22.13			
Jefferson	Boulder	4904	17.08	19.47	61.0%	77.9%	81.1%
Judith Basin	Moccasin Exp Station	4243	16.17	19.06	49.3%	68.0%	68.8%
	Raynesford	4220	16.14	19.05			
	Stanford	4860	16.74	19.69			
Lake	Bigfork	2910	17.37	20.61	55.0%	69.2%	68.7%
	Polson	2949	20.46	23.23			
	Polson Kerr Dam	2730	21.37	24.08			
Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H

County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 – 1973 (pre-July 1, 1973 HCU)	Management Factor Percentage 1973 – 2006 (post-July 1, 1973 HCU)	Management Factor Percentage 1997 – 2006 (proposed use)
	St Ignatius	2940	19.53	22.33			

County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 – 1973 (pre-July 1, 1973 HCU)	Management Factor Percentage 1973 – 2006 (post-July 1, 1973 HCU)	Management Factor Percentage 1997 – 2006 (proposed use)
Lewis & Clark	Augusta	4070	17.51	20.13	60.1%	79.0%	79.7%
	Austin	4790	15.41	17.96			
	Helena	3828	20.23	22.69			
	Holter Dam	3490	23.88	26.61			
	Lincoln Ranger Station	4575	12.87	15.22			
Liberty	Chester	3132	19.28	21.74	54.8%	65.7%	63.9%
	Joplin	3300	19.01	21.40			
	Tiber Dam	2850	22.98	25.46			
Lincoln	Eureka Ranger Station	2532	20.63	23.26	47.1%	56.3%	58.8%
	Fortine	3000	16.09	18.69			
	Libby Ranger Station	2096	21.20	23.71			
	Libby	3600	11.06	13.36			
	Troy	1950	19.90	22.68			
Madison	Alder	5800	14.33	16.75	65.2%	79.0%	83.3%
	Ennis	4953	17.19	19.71			
	Glen	5050	17.81	20.01			
	Norris	4750	20.88	23.97			
	Twin Bridges	4777	16.98	19.22			
	Virginia City	5770	15.57	18.13			
McCone	Brockway	2630	20.74	23.35	43.7%	55.0%	60.6%
	Circle	2480	22.23	25.01			
	Fort Peck Power Plant	2070	25.37	28.16			
	Vida	2400	21.74	24.65			
Meagher	Lennep	5880	11.93	14.38	57.3%	70.4%	78.3%
	Martinsdale	4800	15.19	17.73			
	White Sulpher Spr	5060	16.41	18.89			
Mineral	St Regis Ranger Stn	2680	17.61	20.05	56.1%	63.3%	63.6%
	Superior	2710	21.94	24.54			
Missoula	Lindbergh Lake	4320	14.63	17.22	69.5%	67.5%	69.4%
	Missoula	3420	18.85	21.49			
	Missoula WSO AP	3199	19.45	21.89			
	Potomac	3620	14.05	16.26			
Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
	Seeley Lake Ranger Station	4100	14.86	17.31			
Musselshell	Melstone	2920	24.22	27.17	50.0%	58.7%	56.2%
	Roundup	3386	23.98	26.79			
Park	Cooke City	7460	8.68	11.63	56.9%	66.1%	67.5%
	Gardiner	5275	22.46	24.70			

	Livingston	4870	16.59	19.41			
	Livingston FAA AP	4656	18.63	21.39			
	Wilsall	5840	13.20	16.01			
Petroleum	Flatwillow	3133	22.27	25.01	44.0%	50.0%	43.2%
Phillips	Content	2340	21.15	23.97	54.7%	54.7%	54.9%
	Malta 35	2650	20.28	22.99			
	Malta 7	2262	21.61	24.39			
	Port of Morgan	2830	20.15	22.72			
	Saco	2180	20.13	22.70			
	Zortman	4660	14.38	17.40			
Pondera	Conrad	3550	16.93	19.42	71.4%	81.0%	83.7%
	Valier	3810	18.31	20.96			
Powder River	Biddle	3597	21.87	24.66	38.5%	49.3%	53.3%
	Broadus	3032	23.03	25.69			
	Moorhead	3220	23.72	26.42			
	Sonnette	3900	18.32	20.96			
Powell	Deer Lodge	4678	13.14	15.32	77.6%	90.0%	100.0%[1]
	Ovando	4109	12.28	14.43			
Prairie	Mildred	2510	22.92	25.58	59.6%	73.6%	84.3%
	Terry	2248	22.82	25.47			
	Terry 21	3260	18.65	21.34			
Ravalli	Darby	3880	18.91	21.44	79.5%	88.6%	96.1%
	Hamilton	3529	19.93	22.34			
	Stevensville	3380	19.19	21.44			
	Sula	4475	12.09	14.42			
	Western Ag Research	3600	19.82	22.15			
Richland	Savage	1990	23.61	26.59	56.0%	72.9%	88.4%
	Sidney	1931	22.49	25.45			
Roosevelt	Bredette	2638	19.99	22.86	46.5%	64.9%	74.6%
	Culbertson	1942	20.84	23.73			
	Wolf Point	1985	24.16	27.03			

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 – 1973 (pre-July 1, 1973 HCU)	Management Factor Percentage 1973 – 2006 (post-July 1, 1973 HCU)	Management Factor Percentage 1997 – 2006 (proposed use)
Rosebud	Birney	3160	24.57	27.29	47.7%	67.7%	72.7%
	Brandenberg	2770	23.83	26.52			
	Colstrip	3218	23.32	26.10			
	Forsythe	2520	25.17	28.04			
	Ingomar	2780	23.18	25.83			
	Rock Springs	3020	21.35	23.93			
Sanders	Heron	2240	14.82	17.73	58.8%	69.1%	62.8%
	Thompson Falls Power	2380	22.49	25.36			
	Trout Cr Ranger Station	2356	16.60	19.40			
Sheridan	Medicine Lake	1975	21.64	24.49	44.8%	68.5%	80.7%

	Plentywood	2063	20.64	23.48			
	Raymond Border Station	2384	19.13	22.04			
	Redstone	2300	17.86	20.58			
	Westby	2120	18.10	21.033			
Silverbow	Butte FAA AP	5545	14.73	17.06	68.8%	90.3%	93.6%
	Divide	5350	15.25	17.58			
Stillwater	Columbus	3602	22.31	25.09	46.5%	62.9%	72.5%
	Mystic Lake	6544	13.57	16.57			
	Nye	4840	15.00	17.93			
	Rapelje	4125	20.35	23.07			
Sweet Grass	Big Timber	4100	20.60	23.47	44.7%	53.6%	49.4%
	Melville	5370	12.83	15.49			
Teton	Blackleaf	4240	14.74	17.34	68.8%	80.2%	88.4%
	Choteau Airport	3845	20.53	23.07			
	Fairfield	3980	19.10	21.76			
	Gibson Dam	4724	13.57	16.22			
Toole	Goldbutte	3498	16.30	18.96	51.8%	66.5%	70.8%
	Sunburst	3610	18.74	21.46			
	Sweetgrass	3466	18.22	21.22			
Treasure	Hysham	2660	25.01	27.78	53.4%	75.2%	91.5%
Valley	Glasgow WSO AP	2293	23.48	26.12	57.9%	66.6%	74.9%
	Hinsdale	2670	22.18	25.25			
	Opheim 10	2878	16.19	18.86			
	Opheim 16	3258	16.73	19.34			
Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H

County	Weather Station	Elevation	IWR Flood Irrigation, Wheeline & Handline Seasonal ET (inches)	IWR Center Pivot Irrigation Seasonal ET (inches)	Management Factor Percentage 1964 – 1973 (pre-July 1, 1973 HCU)	Management Factor Percentage 1973 – 2006 (post-July 1, 1973 HCU)	Management Factor Percentage 1997 – 2006 (proposed use)
Wheatland	Harlowton	4162	17.83	20.56	46.6%	58.7%	54.4%
	Judith Gap	4573	13.77	16.40			
Wibaux	Carlyle	3030	19.87	22.75	See appropriate adjacent county		
	Wibaux	2696	18.69	21.50			
Yellowstone	Billings Water Plant	3097	26.16	28.92	59.5%	71.4%	77.8%
	Billings WSO	3648	25.49	28.22			
	Huntley Exp Station	3034	21.92	24.61			

[1]The 1997-2006 county management factor was calculated to be slightly greater than 100%, therefore the 1997-2006 Management Factor is set to 100%.

(17) In addition to the amount determined by the methodology described in (14) and (15), the department will add the following consumptive loss components to account for irrecoverable losses at the field:

(a) 5% of the volume applied to the field for flood systems; and

(b) 10% of the volume applied to the field for sprinkler systems.

History: 85-2-112, 85-2-113, 85-2-302, MCA; IMP, 85-2-302, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-436,

MCA; NEW, 2004 MAR p. 3036, Eff. 1/1/05; AMD, 2009 MAR p. 2259, Eff. 11/26/09; AMD, 2012 MAR p. 2071, Eff. 10/12/12; AMD, 2013 MAR p. 1344, Eff. 7/26/13.

357 Mont. 438
Supreme Court of Montana.

Christian C. **HOHENLOHE** and Nora R. **Hohenlohe**, Petitioners and Appellees,
v.
STATE of Montana, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Respondent and Appellant.

No. DA 09–0429.
|
Argued April 7, 2010.
|
Submitted May 11, 2010.
|
Decided Sept. 21, 2010.

Synopsis
Background: Ranch owners sought judicial review of denial by Department of Natural Resources and Conservation of their application for change of use of irrigation water rights to increase instream flow. The First Judicial District Court, County of Lewis and Clark, Dorothy McCarter, Presiding Judge, granted petition and ordered Department to grant application. Department appealed.

Holdings: The Supreme Court, Brian Morris, J., held that:

[1] Department was not adjudicating quantity of owners' water rights by requiring proof of historic volume of their water rights and return flow analysis;

[2] Department's denial of application was arbitrary and abuse of discretion; and

[3] past wasteful use was permissible factor for Department to consider in determining whether proposed change be approved for full, historically diverted amount, amount historically consumed, or smaller amount.

Reversed and remanded.

Michael E. Wheat, J., filed concurring opinion in which James C. Nelson, J., joined.

West Headnotes (10)

[1] **Administrative Law and Procedure**
Scope
The Supreme Court employs the same standard when reviewing the district court's decision either affirming or reversing a ruling by an administrative agency.

Cases that cite this headnote

[2] **Administrative Law and Procedure**
Clear error
Administrative Law and Procedure
Substantial evidence
The Supreme Court employs a three-part test to determine whether an administrative agency's findings of fact are clearly erroneous: (1) the Court reviews the record to see if substantial evidence supports the findings; (2) if substantial evidence supports the findings, the Court determines whether the agency misapprehended the effect of the evidence; and (3) if both of the above are satisfied, the Court still may decide a finding is clearly erroneous if a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. MCA 2–4–704.

Cases that cite this headnote

[3] **Administrative Law and Procedure**
Law questions in general
The Supreme Court review for correctness an administrative agency's conclusions of law. MCA 2–4–704.

Cases that cite this headnote

[4] **Water Law**
Proceedings on application to amend permit or decree, or to transfer rights
Requirement by Department of Natural Resources and Conservation that ranch owners prove historic volume of their water rights

and provide analysis of return flows on their application for change of use to increase instream flow did not demonstrate that Department was adjudicating quantity of owners' water rights to creek appurtenant to property; rather, determination of quantity of owners' water rights remained under exclusive jurisdiction of Water Court. MCA 85–2–402, 85–2–408.

Cases that cite this headnote

[5] **Water Law**
Proceedings on application to amend permit or decree, or to transfer rights

Denial by Department of Natural Resources and Conservation of ranch owners' application for change of use of appurtenant creek water for instream flow, based on Department's determination that owners had not shown that change would not adversely impact downstream water right holders due to failure to submit complete return flow analysis, was arbitrary and abuse of discretion; owners' presented evidence of historical use, change to reduce irrigation right and to increase instream flow actually benefited sole downstream user, irrigation use had dewatered creek, and potential impact of returning small portion of water to creek by increasing instream flow was significant for creek, while harm to river where water that had been diverted for irrigation use had flowed was minimal. MCA 85–2–402(2).

1 Cases that cite this headnote

[6] **Water Law**
Proceedings on application to amend permit or decree, or to transfer rights

A preponderance of the evidence that an application for change of use of water flow would not adversely affect other right holders requires that the applicant meet the relatively modest standard that the statutory criteria are more probable than not to have been met. MCA 85–2–402(2).

1 Cases that cite this headnote

[7] **Statutes**
Judicial construction; role, authority, and duty of courts

Statutes
Intent

The Supreme Court acts under an affirmative duty to interpret statutes so as to give effect to the underlying legislative intent.

Cases that cite this headnote

[8] **Statutes**
Unintended or unreasonable results; absurdity

Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.

Cases that cite this headnote

[9] **Water Law**
Change in Place, Manner, or Purpose of Appropriation, Diversion, or Use of Water

Water Law
Proceedings on application to amend permit or decree, or to transfer rights

Department of Natural Resources and Conservation possesses the discretion to require return flow analysis to the extent necessary to determine lack of adverse effect from a change of use of water rights to downstream users. MCA 85–2–402(2), 85–2–408(3).

Cases that cite this headnote

[10] **Water Law**
Change in Place, Manner, or Purpose of Appropriation, Diversion, or Use of Water

On application for change of use of water rights from appurtenant creek by reducing amount diverted for irrigation and increasing instream flow, past wasteful use was permissible factor for Department of Natural Resources and Conservation to consider in determining whether proposed change be approved for full historically diverted amount, amount historically consumed, or smaller amount. MCA 85–2–408(7).

1 Cases that cite this headnote

Attorneys and Law Firms

****629** For Appellant: Anne W. Yates (argued) and Kevin R. Peterson, Department of Natural Resources and Conservation, Helena, Montana.

For Appellees: Abigail J. St. Lawrence (argued) and John E. Bloomquist, Doney, Crowley, Bloomquist, Payne, Uda, P.C., Helena, Montana.

For Amicus: Stan Bradshaw, Attorney at Law, Helena, Montana (MT Trout Unlimited) Barbara Hall, Attorney at Law, Missoula, Montana (MT Water Trust) Hertha L. Lund, Wittich Law Firm, P.C., Bozeman, Montana (MT Farm Bureau Federation).

Opinion

Justice BRIAN MORRIS delivered the Opinion of the Court.

***439** ¶ 1 The Montana Department of Natural Resources and Conservation (Department) appeals from an order of the First Judicial District Court, Lewis and Clark County, ordering the Department to grant the ***440** change of use application filed by Christian and Nora **Hohenlohe** (**Hohenlohes**). We reverse and remand to the Department for further proceedings consistent with this opinion.

¶ 2 We review the following issue on appeal:

¶ 3 *Did the Department abuse its discretion in denying **Hohenlohes**' change of use application?*

FACTUAL AND PROCEDURAL HISTORY

¶ 4 **Hohenlohes** purchased the Sentinel Rock Ranch in Lewis and Clark County in 1999. **Hohenlohes** obtained Water Right Nos. 41 QJ–17073 and 41 QJ–17074 on Little Prickly Pear Creek as appurtenances to their purchase. These rights have priority dates of August 22, 1892, and May 17, 1890, respectively. The rights comprise a combined flow rate of 32.5 cubic feet per second (cfs), according to the water right abstracts.

¶ 5 **Hohenlohes** applied for and received a grant from the Department of Fish, Wildlife, and Parks (FWP) to convert approximately 150 acres of their land from flood to sprinkler irrigation. The conversion resulted in a significant water savings. A condition of the ****630** grant required **Hohenlohes** to leave the excess or "salvage" water instream pursuant to § 85–2–408, MCA. This stipulation required that **Hohenlohes** leave the salvaged water instream for at least thirty years.

¶ 6 **Hohenlohes** filed an application under §§ 85–2–402, –407, and –408, MCA, on December 13, 2004, for a temporary change of irrigation water rights to instream flow. **Hohenlohes**' application sought to change the existing 32.5 cfs flood irrigation right to a combined right comprising 3.5 cfs for sprinkler irrigation and designating the remaining 29 cfs as instream flow under § 85–2–408, MCA.

¶ 7 **Hohenlohes** supported their change of use application with an affidavit of the former ranch owner, J.C. Kantorowicz (Kantorowicz affidavit), a letter from George Liknes, Regional Fisheries Manager for FWP, ditch capacity calculations prepared by the Department, and testimony of John Westenberg, a hydrologist and former Department employee. **Hohenlohes** claimed, based on the Kantorowicz affidavit, that the ditch headgate at the point of diversion would support 36 to 40 cfs. The Kantorowicz affidavit further stated that the ditch had been filled to capacity, subject to water availability, during Kantorowicz's tenure from 1948 to 1999. The Department calculated **Hohenlohes**' ditch capacity to be up to 34 cfs.

¶ 8 **Hohenlohes** also provided information on historic flow rates for Little Prickly Pear Creek from a U.S. Geological Survey gauging ***441** station located half a mile upstream from their point of diversion. These records provided data on water availability in cubic feet per second from 1961 through 2007. The flow rate in Little Prickly Pear Creek—averaged over the forty-six year period—ranged from a mean low of 40 cfs in January to a mean maximum flow rate of 278 cfs in June.

¶ 9 The Department's engineer conducted a site inspection and determined, based on the soil type and topography of the ranch, that 1,863 acre feet (AF) of water would constitute a more reasonable volume to flood irrigate 193 acres of alfalfa. The Department further determined, based on the Montana Irrigation Guide, that 372 AF of water constituted the consumptive use for 193 acres of alfalfa.

¶ 10 **Hohenlohes** installed five sprinkler pivots in 2004. The Department conducted a field investigation on August 22, 2005. The Department deemed **Hohenlohes**' application "correct and complete" on October 4, 2005, and issued its environmental assessment on October 18, 2005. The Department issued a public notice of the proposed change on November 17, 2005.

¶ 11 Josephine M. Lahti (Lahti), the lone downstream right holder on Little Prickly Pear Creek, filed the sole objection to the application on December 16, 2005. Lahti withdrew her objection on May 31, 2007, pursuant to a settlement agreement with **Hohenlohes**. The Department cancelled the scheduled contested case hearing on Lahti's objection on June 6, 2007, and remanded the matter to the Helena regional office to analyze whether **Hohenlohes** had complied with § 85–2–402, MCA.

¶ 12 The Department issued a Statement of Opinion on January 28, 2008, recommending denial of **Hohenlohes**' application. Jan Langel (Langel), Helena Regional Manager for the Department, authored the Statement of Opinion. Langel cited as grounds for denial that **Hohenlohes** had failed to present sufficient evidence of historic consumptive use to show that downstream right holders would not be affected adversely by their proposed change of use.**Hohenlohes** requested a hearing on the Statement of Opinion on February 11, 2008.

¶ 13 The Department granted **Hohenlohes**' request for a show cause hearing, but appointed Langel as hearings examiner. **Hohenlohes** immediately moved to disqualify Langel on grounds of bias, lack of independence, and denial of due process. The Department denied **Hohenlohes**' disqualification request. The Department reasoned that Langel possessed the greatest knowledge of **Hohenlohes**' application ***442** and was therefore the most appropriate person to preside over the hearing.

¶ 14 **Hohenlohes** also objected to the Department's decision to conduct the hearing under the informal contested case proceedings ****631** of § 2–4–604, MCA. **Hohenlohes** based their objection on a letter dated March 14, 2008, from the Department Water Rights Division Administrator to **Hohenlohes** that had characterized the denial of **Hohenlohes**' application as being subject to formal proceedings under the Montana Administrative Procedure Act (MAPA). Langel noted this objection for the record, but did not institute formal proceedings.

¶ 15 **Hohenlohes** next moved the Department to issue the change permit under the reasoning of the Eighteenth Judicial District Court, Gallatin County, in *Bostwick Props., Inc. v. Mont. Dept. of Nat. Resources & Conserv.,* Cause No. DV–07–917AX (Mont. 18th Jud. Dist. May 12, 2008). Bostwick had applied to the district court for a writ of mandate directing the Department to issue its change of use application after the Department had exceeded the 180 day statutory deadline imposed by § 85–2–310(1), MCA (2007), "to grant, deny, or condition an application." *Id.* at 8.

¶ 16 The district court ordered the Department to appear at a hearing concerning the writ. The Department finally issued a statement of opinion recommending denial of Bostwick's application only after Bostwick had sought judicial relief. *Id.* at 8–9. The Department also assigned as the hearing examiner the same official who had written the statement of opinion recommending denial of Bostwick's application. *Bostwick Props., Inc. v. Mont. Dept. of Nat. Resources & Conserv.,* 2009 MT 181, ¶ 29, 351 Mont. 26, 208 P.3d 868 (Rice, J., concurring). The district court granted Bostwick's motion based on these procedural abuses. *Bostwick,* Cause No. DV–07–917AX, at 32.

¶ 17 The Department deemed **Hohenlohes**' application correct and complete on October 4, 2005. Langel did not issue the Department's Statement of Opinion until January 28, 2008 —742 days after the objection deadline had passed and 237 days after Lahti had withdrawn her objection. **Hohenlohes** argued that the Department had no option under *Bostwick* other than "." *Id.* at 28. This Court later reversed the district court in *Bostwick* on the basis that the granting of a change permit does not constitute a ministerial act subject to a writ of mandate. *Bostwick,* 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868. The Department denied **Hohenlohes**' motion to issue the permit.

***443** ¶ 18 The Department finally conducted the show cause hearing on June 24, 2008. **Hohenlohes** presented the testimony of George Liknes, the Department Regional Fisheries Manager, and John Westenberg, Senior Water Rights Specialist and a former Department employee. **Hohenlohes** introduced into the administrative record a number of exhibits, including photographs, correspondence, affidavits, and maps. The Department issued its final order denying **Hohenlohes**' application on July 28, 2008.

¶ 19 The Final Order adopted the reasoning of the Department's earlier Statement of Opinion. The Department found that **Hohenlohes** had provided sufficient information to support their claimed diverted flow rate, but had failed to prove historic consumptive use. The Department further determined that **Hohenlohes** had failed to meet their burden under §§ 85–2–402 and –408, MCA, because the consumptive volume implicated return flow analysis and potential impacts to downstream users. The Department specifically found that **Hohenlohes**' application had failed to provide information on the frequency and timing of diversion.

¶ 20 **Hohenlohes** petitioned for judicial review pursuant to § 2–4–704, MCA. The District Court granted **Hohenlohes**' petition on June 10, 2009. The District Court declared itself "at a loss" as to how "such a beneficial change" could be denied. The court specifically determined the Department's findings of fact and conclusions of law regarding historic use, adverse effect, and salvage water to be both clearly erroneous, as well as arbitrary and capricious under § 2–4–704(2), MCA, of MAPA.

¶ 21 The District Court based its determinations on evidence and testimony concerning the benefits that had accrued to the waterway and its fishery since **Hohenlohes**' conversion to sprinkler irrigation. The court relied heavily on the fact that **Hohenlohes**' asserted water right could dewater Little Prickly Pear Creek. The court concluded ****632** that "no showing was made by DNRC that **Hohenlohes**' current use of the water is wasteful." The District Court also determined that neither § 85–2–402, MCA, nor § 85–2–408, MCA, required analysis of return flows. The court reached this determination based on the fact that § 85–2–408(7), MCA, does not contain the term "return flows." The District Court concluded that "so long as the increased stream flows do not adversely affect downstream users ... these types of change requests should be summarily granted." The Department appeals.

***444** STANDARD OF REVIEW

[1] ¶ 22 A district court reviews an agency's decision under § 2–4–704, MCA. A court must confine its review of an agency's decision to the record. The reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence. Section 2–4–704(1)-(2), MCA. This Court employs the same standard when reviewing the district court's decision. *Denke v. Shoemaker,* 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3d 284.

[2] **[3]** ¶ 23 This Court employs a three-part test to determine whether an agency's findings of fact are clearly erroneous: 1) we review the record to see if substantial evidence supports the findings, 2) if substantial evidence supports the findings, we determine whether the agency misapprehended the effect of the evidence, and 3) if both of the above are satisfied, we still may decide a finding is clearly erroneous if a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Owens v. Mont. Dept. of Revenue,* 2007 MT 298, ¶ 13, 340 Mont. 48, 172 P.3d 1227. Finally, we review for correctness an agency's conclusions of law. *Owens,* ¶ 12.

DISCUSSION

¶ 24 *Did the Department abuse its discretion in denying **Hohenlohes**' change of use application?*

¶ 25 Representatives from the agricultural, recreation, and conservation communities developed the instream flow provisions of the Montana Water Use Act. The legislature ratified the provisions in 1995. Sections 85–2–408, –439, MCA (1995). The provisions authorized "the temporary use of existing water rights for instream flow to benefit the fishery resource ... within the prior appropriation water rights system." Statement of Intent, Mont. H. 472, Sec. 1, Ch. 322, L.1995 (Mar. 31, 1995). The provisions proved so successful that at the termination of the ten year sunset period provided for by the 1995 Act, the 2005 legislature approved amendments that made permanent the instream flow provisions and allowed for a maximum lease term of thirty years. Mont. H. 308, Sec. 6, Ch. 85, L.2005 (Mar. 24, 2005). The amendments also merged a separate provision that had applied only to the Clark Fork River into the statewide provisions and adopted as § 85–2–408(7), MCA, the language from a 1989 FWP leasing statute. *Id.; see also*§§ 85–2–408(7), MCA (2005), 85–2–436, MCA (1989).

A. The Department's Review of a Change of Use Application for Instream Flow Does Not Constitute Adjudication of an Applicant's Water Right.

[4] ***445** ¶ 26 The Department claims on appeal that the District Court improperly substituted its judgment for that of the Department as to two factual issues: 1) the determination

of the historic volume of **Hohenlohes**' water rights, and 2) the analysis of return flows. The Department argues that the District Court impermissibly shifted the applicant's burden to the agency when it determined that **Hohenlohes** had no statutory obligation to analyze return flows to demonstrate historic consumptive use. The linchpin of the Department's argument appears to be that without a "complete" return flow analysis, applicants will attempt to use a temporary instream flow conversion to parlay an inefficient flood irrigation right into a much larger consumptive use right. The Department reasons that if water historically diverted, but used only for conveyance purposes, is approved for instream use under § 85–2–408, MCA, that water may, at the expiration of the lease, be converted to a consumptive use. The extensive statutory safeguards that exist to ****633** prevent this type of bootstrapping undermine the Department's reasoning.

¶ 27 Section 85–2–407(6), MCA, provides that a temporary change automatically reverts to its "permanent purpose, place of use, point of diversion, or place of storage" at the expiration of the lease or conversion period. This reversion applies to both the consumptive and non-consumptive components of the subject water right, encompassing both the proportional and actual quantities of water represented by them. The original appropriator may salvage the non-consumptive portion of a water right diverted for beneficial use, but lost to seepage. Section 85–2–419, MCA. The appropriator may use or sell salvage water for a beneficial use, including instream flow. *Id.* This historically non-consumptive portion of a water right, or salvage water, may be changed to instream flow (also a non-consumptive use). This salvage water automatically will revert to its original non-consumptive use, however, at the conclusion of the lease or conversion period. The statutory provisions specifically protect against any effort by an appropriator to bootstrap a non-consumptive use—such as carriage, seepage, or wastewater that has been salvaged—into a consumptive use or to enlarge the flow rate that may be used consumptively. A temporary change will remain in effect, moreover, if the water right to which it is attached is transferred as an appurtenance to real property "unless otherwise authorized by the department." Section 85–2–407(8), MCA.

¶ 28 Sections 85–2–407 and –408, MCA, proscribe any change of use that would affect adversely another water user and contain affirmative ***446** provisions safeguarding the rights of other users. An instream flow change applicant may not, as a matter of law, expand a consumptive use right by means of a temporary change to instream flow. Section 85–2–407(6), MCA. An instream flow change applicant likewise may not convert the non-consumptive portion of a water right to a consumptive use. *Id.* More importantly, the Department's decision to approve a temporary change to instream flow in no way constitutes a quantification of the applicant's water right. The Department lacks authority to determine the quantity of a water right for purposes of adjudication.

¶ 29 The Montana Water Court possesses exclusive jurisdiction to determine quantities of water rights and issue decrees as part of the statewide adjudication process. Sections 3–7–501, 85–2–216, MCA. Montana law further provides that the adjudication process—and not a permit for a new appropriation or change of use issued by the Department—provides the sole forum in which a water right holder may quantify and ascertain his water right. *Id.; see also*§ 85–2–101(5), MCA. We emphasize that under Montana law, **Hohenlohes**' proposed change to instream flow would revert at the end of the conversion period to its permanent purpose (flood irrigation), its place of use (the Sentinel Rock Ranch), and its former point of diversion (Little Prickly Pear Creek). Section 85–2–407(6), MCA.

¶ 30 **Hohenlohes** raise their own claim that the Department lacks authority to "quantify" their water right. **Hohenlohes** argue that the Department's requirement of a volume metric in change applications constitutes an adjudication of their water rights that invades the province of the Water Court. **Hohenlohes** cite *McDonald v. State,* 220 Mont. 519, 722 P.2d 598 (1986), for the proposition that "volume is an inappropriate metric of direct flow irrigation rights." **Hohenlohes** mischaracterize *McDonald.* This Court in *McDonald* actually rejected a constitutional challenge to the use of volume to quantify decrees. *McDonald,* 220 Mont. at 535, 722 P.2d at 608.

¶ 31 The Department's regulatory provisions comport with this holding by requiring applicants for a change of use to state both flow rate and volume. Admin. R.M. 36.12.1902(7). **Hohenlohes**' water rights, regardless of whether they are approved for change of use by the Department, remain subject to final adjudication and quantification by the Water Court. Section 85–2–101(5), MCA. The Department's use of volume in the processing of change applications does not constitute adjudication. The volume represents the amount of water available for a willing lessee or right holder to devote to instream flow use during the lease ****634** or conversion period. As a result, we do not attempt in any manner to quantify **Hohenlohes**' water right. Our analysis focuses

instead on the two central issues: 1) whether **Hohenlohes** have met their statutory burden of demonstrating that the proposed change of use for instream flow would have no adverse effect on the rights of other water users, and 2) the scope and application of the Department's discretion pursuant to §§ 85–2–402(8) and –408(7), MCA, to limit the amount, or otherwise condition the amount of an applicant's water right that may be protected as instream flow.

B. The Applicant's Burden Under §§ 85–2–402(2) and –408(3), MCA.

[5] ¶ 32 The Water Use Act requires an applicant who seeks a change of use for instream flow to prove by a preponderance of the evidence that certain criteria have been met. Sections 85–2–402(2), –408(3), MCA. The criteria applicable to instream flow change applications include lack of adverse effect to other right holders, evidence that the proposed change constitutes a beneficial use, proof that any proposed water saving methods will salvage the amount of water asserted by the applicant, and evidence that the amount of water claimed is necessary to benefit the fishery. *Id.*

[6] ¶ 33 The first criteria of lack of adverse effect provides the only point of contention and thus we will examine whether **Hohenlohes**' change of use application would affect adversely other right holders. The Department must grant the change application if an applicant has demonstrated the statutory criteria by a preponderance of the evidence. Section 85–2–402(2), MCA. A preponderance requires that the applicant meet the relatively modest standard that the statutory criteria are "more probable than not" to have been met. *Narum v. Liberty Northwest Ins. Corp.*, 2009 MT 127, ¶ 28, 350 Mont. 252, 206 P.3d 964.

¶ 34 The Department points specifically to *In re Royston*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991), for the proposition that the applicant bears the burden to satisfy the statutory requirements for a change of use. This Court upheld the Department's determination in *Royston* that an applicant had failed to present substantial credible evidence to support its change of use application. *Id.* at 432, 816 P.2d at 1060. We rejected the applicant's claim that the burden of demonstrating lack of adverse effect rested with the objector to a change of use application rather than with the applicant. *Id.* at 428, 816 P.2d at 1057. This Court noted that the burden indeed had rested with the objector before the adoption of the Water Use Act in 1973. The adoption of the Water Use Act, and the ***448** 1985 amendments to § 85–2–402(2), MCA, had shifted that burden squarely to the applicant. *Id.*

¶ 35 Neither party disputes that the burden to prove the statutory criteria rests with the applicant. *Royston*, therefore, provides no significant guidance. The parties disagree as to whether **Hohenlohes** met their burden. To resolve this question, we must clarify the scope of the applicant's burden under §§ 85–2–402 and –408, MCA. Both § 85–2–402(2) and § 85–2–408(3), MCA, require that the applicant prove certain criteria by a preponderance of the evidence.

¶ 36 Each provision itemizes the criteria that must be proven by a preponderance of the evidence. Section 85–2–402(2), MCA, contains the requirements that all change of use applicants must prove by a preponderance of the evidence. Section 85–2–402(2)(a)–(g), MCA. Section 85–2–408(3), MCA, imposes additional criteria that must be proven by a preponderance of the evidence by instream flow applicants. Section 85–2–408(3)(a)–(b). Both sections impose a number of additional limitations on change of use applicants that are listed separately from the criteria that must be proven by a preponderance as part of the applicant's burden to demonstrate lack of adverse effect to other right holders. Sections 85–2–402, –408, MCA. For example, § 85–2–408(6), MCA, provides that a temporary change authorization for instream flow does not create a right of access across private property. This stipulation is unrelated to the criteria that an applicant must prove by a preponderance of the evidence under § 85–2–408(3), MCA. Likewise, § 85–2–408(7), MCA, constitutes an entirely separate provision from the statutory ****635** criteria listed under § 85–2–408(3), MCA. Subsection (7) limits the amount of water that may be changed to instream flow and grants the Department the authority to further limit that amount.Section 85–2–408(7), MCA. Subsection (7) does not impose an additional requirement that must be proven by the applicant.

¶ 37 The applicant's burden extends, therefore, to adduce proof by a preponderance of the evidence that the criteria listed at §§ 85–2–402(2)(a)–(g) and 85–2–408(3)(a)–(b), MCA, have been met. The showing required of the applicant under these provisions undoubtedly will contribute to the calculation of the "amount historically diverted" and "amount historically consumed" under § 85–2–408(7), MCA. The Department may then use these calculations to limit the amount of water an applicant may put to instream use under the authority granted to it by § 85–2–408(7), MCA. Where the applicant successfully has proven the requirements listed under ***449** §§ 85–2–402(2) and –408(3), MCA, the Department may not refuse to grant a change of use solely on

the grounds of the applicant's failure to "prove" the limitation articulated by § 85–2–408(7), MCA, because subsection (7) does not impose a burden on the applicant.

¶ 38 The Department concluded that **Hohenlohes** had failed to establish a lack of adverse effect to other right holders. The Department pointed specifically to **Hohenlohes**' failure to analyze the historic volume of water consumed by the crop or how the diverted water not consumed by the crop had returned to the source. The Department relied on § 85–2–408(7), MCA, to determine that **Hohenlohes** were entitled to change to instream use only that portion of their water right that historically had been consumed. The Department denied **Hohenlohes**' application in large part based on **Hohenlohes**' failure to establish by a preponderance of the evidence the volume of historic consumptive use.

¶ 39 Section 85–2–408(7), MCA, dictates that the amount of water historically diverted represents the maximum amount of water that may be protected instream to benefit the fishery. The provision further provides, however, that the maximum quantity of water that may be used to maintain or enhance streamflows below the existing point of diversion is the "amount historically consumed, or a smaller amount if specified by the department." Section 85–2–408(7), MCA. We recognize the potential contradictions posed by these provisions. **Hohenlohes**' application demonstrates both the difficulty of accurately determining the amount historically consumed, and the large discrepancy that may exist between historic diversion and consumption. This discrepancy may render impossible the satisfaction of both provisions of § 85–2–408(7), MCA.

[7] **[8]** ¶ 40 We act under an affirmative duty to interpret statutes so as to give effect the underlying legislative intent. *Delaney & Co. v. City of Bozeman,* 2009 MT 441, ¶ 22, 354 Mont. 181, 222 P.3d 618. Statutory construction "should not lead to absurd results if a reasonable interpretation can avoid it." *Bitterroot River Protective Ass'n v. Bitterroot Conserv. Dist.,* 2008 MT 377, ¶ 72, 346 Mont. 507, 198 P.3d 219. To read § 85–2–408(7), MCA, as allowing the Department to approve a change of use application for the amount historically diverted, the amount historically consumed, or a lesser amount, as determined by the Department, gives effect to all of the words of the statute and to legislative intent. This interpretation also comports with the Department's own past interpretations of the phrase "amount historically consumed."

***450** ¶ 41 The Department deviated from its own prior interpretation of § 85–2–408(7), MCA, in denying **Hohenlohes**' application.*See e.g. Authorization Nos. 76F–30023056, Mannix Lease* (2007), and *76F–30011112, Hoxworth Lease* (2005). Moreover, the Department has conflated the subsection (7) consumptive use language with the showing of no adverse effect required by §§ 85–2–402(2) and –408(3), MCA. As a consequence, the Department reasoned that the determination of historic consumptive use comprised part of the applicant's burden to show, by a preponderance of the evidence, that the proposed change would inflict no adverse effect on the water rights of other users.

¶ 42 Within the parameters set by § 85–2–408(7), MCA, return flow and historic beneficial ****636** use present related issues in the context of a change of use application for instream flow. 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. The Department defines "return flow" as that part of diverted flow that is applied to irrigated land and is not consumed, but returns underground to its original source or another source, "and to which other water users are entitled to a continuation of, as part of their water right." Admin. R.M. 36.12.101(56).

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

¶ 44 This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. *See e.g. In the Matter of Application*

for Change Authorization No. G (W)028708–411 by Hedrich/Straugh/Ringer, Final Order (Dec. 13, ***451** 1991); *in the matter of application for change authorization no. G(W)008323–g76l by Starkel/Koester,* Final Order (Apr. 1, 1992). The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

¶ 45 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. The amount of return flow analysis required will vary, however, with the facts of a particular case and the potential for adverse impact to downstream users. The potential for adverse impact to downstream users appears negligible in the context of **Hohenlohes**' change application. The Department nonetheless cited **Hohenlohes**' failure to provide a "complete" analysis of return flows in support of its denial. Without such an analysis, the Department argued, it was unable to ascertain whether **Hohenlohes** had met the requirements of §§ 85–2–402 and –408, MCA, or to determine whether **Hohenlohes** successfully had proven lack of adverse effect.

¶ 46 The Department based its denial—and its determination that a "complete" return flow analysis was required—on an overly narrow reading of § 85–2–408(7), MCA. The Department argued that the phrase "the amount historically consumed" limits the amount of water that may be protected instream to the water that had been lost to plant consumption (evapotranspiration). The District Court disagreed. The court observed that in many cases large volumes of water may be diverted that are not lost to evapotranspiration, yet never return to the protected reach. The District Court determined that the Department's reading of "the amount historically consumed," in the context of **Hohenlohes**' application, conflicted with its prior applications of that provision and with the plain language of the statute. The Department's own definition of consumptive use makes clear that return flow represents only one variable—albeit an important variable—in the calculation of consumptive use. In addition to evapotranspiration, consumptive use includes direct evaporation from soils or water surfaces and any water incorporated into vegetation or that otherwise does not return to ground or surface water. Admin. R.M. 36.12.101(15).

****637** ¶ 47 The Department does not contest the District Court's determination on the definition of "the amount historically consumed." The Department argues instead that in prior cases in which it accepted the full diverted volume as the volume to be protected instream, the ***452** applicant had provided a "complete return flow analysis." The Department raises the specter of a water right holder using the instream flow change provisions to bootstrap a larger amount of water for a consumptive purpose. We already have determined that the temporary change provisions of the Water Use Act provide adequate insurance against such an outcome. Section 85–2–407(6), MCA. This bootstrapping concern, therefore, can no more constitute the sole grounds for limiting the quantity of **Hohenlohes**' diverted water right that may be put instream to benefit the fishery than it can justify the outright denial of their application.

¶ 48 As we have noted, prior change of use decisions by the Department have allowed for the full diverted volume to be protected as instream flow under similar circumstances. *Authorization Nos. 76F–30023056, Mannix Lease* (2007), and *76F–30011112, Hoxworth Lease* (2005). The Department approved these change of use applications for the entire diverted amount even in cases where the return flow historically had been lost to the protected reach, but returned downstream of it. These approvals reflected the policy and purpose of the Water Use Act, which aims to "encourage the wise use of the state's water resources," and to seek "the stabilization of streamflows." Section 85–2–101(3), MCA. They further reflected a rule that the Department asserts here against **Hohenlohes**, that Montana water law does not discriminate among uses. Section 85–1–101(4), MCA. An applicant who wishes to change his point of diversion or to change to a more efficient form of irrigation and thereby irrigate a larger acreage is entitled—on making the required statutory showing—to make use of the historically diverted amount. Section 85–2–402(2), MCA.

¶ 49 It is untenable that a change of use applicant who incurs the considerable expense of installing a more efficient irrigation system in order to leave water instream—a beneficial use equal to any other recognized by the Montana Constitution—thereby risks losing a significant portion of the water he would have been allowed to divert had he continued to irrigate in an inefficient manner. Such an outcome frustrates the purpose of the instream flow statute, and does little to "encourage the wise use of the state's water resources." Section 85–2–101, MCA.

¶ 50 **Hohenlohes** submitted information as to historic diverted use and ditch capacity. **Hohenlohes** claimed a historic diverted volume of 4,682.7 AF based on their alleged

diversion rate of 32.5 cfs. **Hohenlohes**' change application sought a combined use of 4,342.44 AF that included both irrigation and instream flow. **Hohenlohes** performed ***453** a return flow analysis for the 200–foot section below their point of diversion on Little Prickly Pear Creek that they had defined as the "protected reach." **Hohenlohes** did not analyze how 4,342.44 AF of water historically had returned to the Missouri River.

¶ 51 The regulatory framework provides applicants with a variety of methods to establish historic use. *See* Admin. R.M. 36.12.1902(9). **Hohenlohes** produced the available historic documentation. By doing so, **Hohenlohes** established the maximum quantity of water that § 85–2–408(7), MCA, entitles them to convert to instream flow. The Department then should have focused its analysis on whether **Hohenlohes**' conversion of this maximum amount of water to instream flow would affect adversely other right holders. Sections 85–2–402(2) and –408(3), MCA.

¶ 52 **Hohenlohes** point out that no practical difference exists for upstream water right holders—all are junior appropriators in this case—between their use of all 32.5 cfs for flood irrigation versus their use of 3.5 cfs for sprinkler irrigation and their leaving the remaining 29 cfs in the waterway. We agree. The effect of a call for an upstream junior would be the same regardless of whether **Hohenlohes** put the water back into Little Prickly Pear Creek or continued to divert it. Return flows from **Hohenlohes**' property would have no effect on upstream users on Little Prickly Pear Creek.

****638** ¶ 53 The sole downstream user on Little Prickly Pear Creek—Lahti—initially filed an objection to **Hohenlohes**' application. Lahti, as the sole downstream user, posed the most likely potential candidate to suffer adverse effect from **Hohenlohes**' change of use application. Lahti withdrew her objection on May 31, 2007, pursuant to a settlement agreement with **Hohenlohes**, before the case proceeded to a contested case hearing. Lahti determined that **Hohenlohes**' proposed change to instream flow in fact had increased her water supply. The Department's own analysis supports Lahti's determination.

¶ 54 The Department contends that the topography of the acreage historically irrigated indicates that much of **Hohenlohes**' diverted water actually returns directly to the Missouri River above the confluence with Little Prickly Pear Creek, rather than to Little Prickly Pear Creek itself. This water under natural circumstances, of course, would remain in Little Prickly Pear Creek and augment the flow available to downstream users such as Lahti. **Hohenlohes**' decision to leave the water in Little Prickly Pear Creek to enhance instream flow would produce the same outcome —more water available in Little ***454** Prickly Pear Creek than if **Hohenlohes** continued to divert the water. By the Department's own admission, **Hohenlohes**' return flow goes directly to the Missouri River to the detriment of downstream users on Little Prickly Pear Creek.

¶ 55 The Department argues that the mere absence of objections by other right holders does not necessarily equate with a determination that the applicant has met the statutory criteria to prove lack of adverse effect. The Department fails to explain how the requirement of a "complete" return flow analysis applies where no downstream users depend on return flow to trigger analysis under Admin. R.M. 36.12.1903(2)(d). In this case, where **Hohenlohes** have applied for a change of use to instream flow on the lower reaches of a small tributary, and satisfactorily have established lack of adverse effect to other users, the Department abuses its discretion by requiring more than is necessary to meet the statutory criteria. The Department undoubtedly possesses the discretion to require a more or less comprehensive return flow analysis depending on circumstances. This discretion does not exist in a vacuum, however, and the degree of analysis required in a given situation will vary according to the underlying facts. The Department admits that "[i]n some cases an amount need not even be calculated."

¶ 56 The Department's definition of a "complete" return flow analysis in this case appears to be unlimited in scope. The Department's requirement, moreover, would extend to all potential users with points of diversion falling within the path of water that would—under natural stream conditions—never leave Little Prickly Pear Creek. The Department stresses the large amount of water claimed by **Hohenlohes** as justification for requiring an extensive return flow analysis, but appears to have lost sight of the fact that the return flow analysis serves to establish the statutory requirement of proving lack of adverse effect. The Department appears similarly distracted from the hydrologic significance of **Hohenlohes**' claimed diverted volume on Little Prickly Pear Creek. The Department instead fixates on the relatively negligible effect of **Hohenlohes**' proposed change of use on the flow of the Missouri River. Though the Department is entitled to—and indeed required to—consider both of these factors, it must not sacrifice the underlying statutory purpose to guard against a purely hypothetical bootstrapping.

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¶ 57 **Hohenlohes** claim a flow rate of 32.5 cfs—enough, based on historical records, to have dewatered Little Prickly Pear Creek entirely. The Missouri River at the gauging station closest to the ***455** confluence with Little Prickly Pear Creek, by contrast, had an annual flow rate in 2009 of 23,376 cfs. The potential impact of returning 29 cfs of water to the fishery from which it was diverted—Little Prickly Pear Creek—would be significant. The potential harm from a reduction in return flow to the Missouri River would be negligible.

¶ 58 **Hohenlohes** argue that the Department should consider their claimed diverted amount of 4,342.44 AF as the amount of their historic consumptive use in the absence of an ****639** objecting downstream user. The Department's own past interpretation of the phrase "the amount historically consumed" reflects the reality that under certain circumstances the diverted amount and consumed amount will, for all intents and purposes, be the same where no water historically had returned to the protected reach, and no downstream users are likely to be affected adversely.

¶ 59 The Department based its own calculations of what volume would constitute reasonable historic use on the Montana Irrigation Guide, while Admin. R.M. 36.12.1902(14) gives applicants a variety of options for calculating historic consumptive use. These options range from quantification of actual historic consumption using historic measurements, to proxy estimations for historic use based on crop, soil type, and region.

¶ 60 Proxy approaches such as the Montana Irrigation Guide—used here by the Department—and Natural Resources Conservation Services Irrigation Water Requirements, represent at best rough estimates of historic consumptive use. These estimates may prove useful for applications that seek to change from one consumptive use to another, or in cases where the potential for adverse effect on the rights of other users remains unclear. For instream flow applications on the lower portions of small tributaries where the applicant successfully has demonstrated no adverse effect to other users, however, such subjective estimates may serve to counteract the intent of the instream flow provisions by arbitrarily limiting the amount of water that may be protected to benefit fisheries. In fact, the Department's decision to limit the amount of water that a right holder may transfer from consumptive use to instream flow in such situations may have the anomalous result of forcing an appropriator to continue with inefficient irrigation methods in order to preserve the full extent of his water right.

[9] ¶ 61 We agree as a general matter that the Department possesses the discretion to require return flow analysis to the extent necessary to determine lack of adverse effect. We are troubled, however, by the ***456** Department's failure to use its discretion in a consistent manner so as to provide instream flow change applicants with sufficient guidance as to the factual circumstances that will correlate with a given level of analysis. No bright line rule governs the scope of this analysis. The analysis will vary from one application and accompanying set of facts to the next. This inherent variability does not mean that the Department may act with impunity according to its own whims and without regard for the facts of a case or the underlying purpose and intent of the statute that it is empowered to uphold.

¶ 62 Here the applicant successfully has demonstrated by a preponderance of the evidence that no other users would be affected adversely by potential changes to instream flow. We agree with the District Court that the Department's denial of the application for want of a "complete" return flow analysis—without further explication and where it has granted similar applications in the past—constitutes arbitrary conduct under § 2–4–704(2)(a)(vi), MCA. Such conduct conflicts with the substantive mandates of the Water Use Act as a whole, and with the purpose and intent of the instream flow provisions in particular. Sections 85–1–101, 85–2–408, MCA.

¶ 63 Moreover, the Department's conduct ignores how the instream flow statute has worked in practice. The majority of the leases and conversions that the Department processed during the initial ten-year period of the instream flow provisions have been on small tributaries. Mont. H. 308, Fish, Wildlife and Parks Comm. *Hearing on HB 308,* L.2005, Reg. Sess. (Jan. 27, 2005) (Exhibit 10: *Private Water Leasing—A Montana Approach: A Report on the 10–Year History of a Unique Montana Program,* Trout Unlimited Report). The lower reaches of these small tributaries represent the preferred spawning habitat for most of the native fish species that inhabit the larger rivers of Montana. In addition, leases on the lower reaches of tributaries likely would prove more effective because they are less prone to diminution by a call from a downstream right holder. The instream flow statutes do not specify the size of water body to be targeted, but the practical reality of fish biology—and the legal reality of the prior appropriation ****640** system—dictate that the greatest

benefit to the fishery will accrue from water being protected instream in the lower reaches of small tributaries.

¶ 64 **Hohenlohes** have demonstrated by a preponderance of the evidence that their proposed change of use to instream flow would not affect adversely the water rights of other users on Little Prickly Pear Creek. The Department has not identified any users on the Missouri ***457** River under Admin. R.M. 36.12.1903(2)(d) who potentially are "dependant on return flow" from **Hohenlohes**. The Department may not require **Hohenlohes** to establish that their proposed change of use would not affect adversely a hypothetical water right holder on the Missouri River—to do so imposes a heavier burden on the applicant than the statutory provisions warrant.

¶ 65 The Department's insistence that **Hohenlohes** submit an undefined "complete" return flow analysis overlooks this basic hydrologic fact, and thereby frustrates the purpose of the return flow statute. **Hohenlohes** submitted all of the available historic documentation as to historic use of the water rights they seek to change. Most importantly, **Hohenlohes** adequately demonstrated that it is "more likely than not" that their change of use will not affect adversely other users. **Hohenlohes** have satisfied the burden imposed by §§ 85–2–402(2) and –408(3), MCA, that their proposed change will not result in adverse effect to other right holders. The Department's denial of **Hohenlohes**' change application based on an alleged incomplete return flow analysis is arbitrary and constitutes an abuse of discretion under these circumstances. Section 2–4–704(2)(a)(vi), MCA.

C. The Department's Exercise of its Discretion Under § 85–2–408(7), MCA.

[10] ¶ 66 The administrative record establishes that **Hohenlohes** demonstrated by a preponderance of the evidence under §§ 85–2–402(2) and –408(3), MCA, that their proposal to return to Little Prickly Pear Creek 29 cfs of the 32.5 cfs of water that they formerly had diverted would have no adverse effect on other right holders. Our determination that the Department abused its discretion in its handling of **Hohenlohes**' change application does not conclude the inquiry.

¶ 67 **Hohenlohes**' showing of no adverse effect established the maximum amount of water that they may convert to instream flow under the first provision of Section 85–2–408(7), MCA—"the amount historically diverted." The Department still possesses 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." Section 85–2–408(7), MCA. Section 85–2–402(8), MCA, likewise allows the Department to approve an application for a change in appropriation right "subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section."

¶ 68 **Hohenlohes** seek a broad ruling that would eliminate the ***458** Department's discretion. In this regard, **Hohenlohes** characterize consumptive use as a malleable concept that can be changed to accommodate unique factual situations. As a result, **Hohenlohes** argue that the Department should consider their full diverted amount of 4,342.44 AF as the amount of their historic consumptive use in the absence of an objecting downstream user.

¶ 69 Consumptive use actually represents a legally defined term within the context of the Water Use Act. "Consumptive use" constitutes the volume of water used annually for a beneficial purpose, "such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products *that does not return to ground or surface water.*" Admin. R.M. 36.12.101(15) (emphasis added). **Hohenlohes**' characterization of their historic use as both diversion and consumption conflicts with the regulatory provisions promulgated by the Department. The rule proposed by **Hohenlohes** improperly would constrain the Department under almost any circumstances from limiting the amount of water that an applicant may dedicate to instream use in future cases. Other change of use applications may present a greater potential for adverse effect to other right holders and we decline to adopt such a blanket rule here.

****641** ¶ 70 We recognize, however, that the Department's own past interpretation of the phrase "amount historically consumed," as contemplated by § 85–2–408(7), MCA, reflects the reality that under some circumstances the diverted amount and consumed amount will be the same. These circumstances likely will arise in situations where no water historically had returned to the protected reach, and no downstream users likely would be affected adversely. The Department properly exercises the discretion bestowed by § 85–2–408(7), MCA, to limit that amount of water that an applicant may dedicate to instream flow when questions arise as to whether a proposed change would affect adversely other right holders. These questions generally will arise in change applications in which some portion of the historically diverted

water returns directly to the protected reach and in which identifiable downstream users potentially will be affected adversely by the proposed change of use.

¶ 71 The Department must evaluate, on a case by case basis, whether an instream flow application may be approved for the full historically diverted amount, the "amount historically consumed," or a smaller amount. The Department alleges in this case that past wasteful use by Kantorowicz, **Hohenlohes**' predecessor, accounts for the significant discrepancy between **Hohenlohes**' claimed diverted volume and the ***459** Department's calculated "reasonable" volume. The Department's engineer opined that Kantorowicz had "actually wasted water just because he could." The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. *See Bostwick,* 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.

¶ 72 In exercising this discretion, however, the Department must not lose sight of the ultimate purpose of the instream flow statute—to restore water to streams for the benefit of the fishery resource. The Department must balance this purpose with the realistic likelihood of adverse effect to *existing* right holders. The Department further must bear in mind the fact that **Hohenlohes**' water rights remain subject to ultimate adjudication by the Water Court.

¶ 73 We deem it appropriate under the circumstances to reverse the District Court's order that directed the Department to grant summarily **Hohenlohes**' change of use application for the full diverted amount. The District Court's order sweeps too broadly and casts aside entirely the Department's discretion granted by § 85–2–408(7), MCA, to limit under appropriate circumstances the amount of water that a change of use applicant may dedicate to instream flow. The Department should evaluate in the first instance **Hohenlohes**' change of use application consistent with the principles set forth here.

¶ 74 In evaluating **Hohenlohes**' application, the Department further must comply with all applicable statutory procedures. For example, the Department issued its final order denying **Hohenlohes**' application 742 days after the objection deadline had passed. Section 85–2–310(1), MCA (2007). This same type of dilatory response prompted the Eighteenth Judicial District Court, Gallatin County, to grant the applicants a writ of mandate in *Bostwick.*

¶ 75 We reversed the district court in *Bostwick* solely on the basis that the Department's decision on a change of use application represents a discretionary action not subject to a writ of mandate. *Bostwick,* 2009 MT 181, ¶¶ 19–20, 351 Mont. 26, 208 P.3d 868. The Department cites *Bostwick,* however, for the proposition that this Court may not overturn its discretionary act in refusing to grant **Hohenlohes**' change of use application. The Department reads a level of administrative immunity into *Bostwick* that does not exist in statute or case law. Our decision in *Bostwick* determined only that mandamus did not represent an available form of relief for the Department's completed discretionary act. *Bostwick,* 2009 MT 181, ¶ 19, 351 Mont. 26, 208 P.3d 868. We declined to "delve into the precise hydrological and scientific reasons" for the Department's denial because we did not ***460** reach the merits of Bostwick's claim. *Bostwick,* 2009 MT 181, n. 1, 351 Mont. 26, 208 P.3d 868. We in no way intended to condone the Department's procedural deficiencies.

****642** ¶ 76 The Department also refused to appoint a hearing examiner different from the Department employee who had evaluated **Hohenlohes**' application. The Department based its denial on the grounds that "Mr. Langel is the Department-appointed decision-maker with the most knowledge about the Application." We note that the legislature has seen fit to amend the hearing provisions at § 85–2–310, MCA, since **Hohenlohes** filed their complaint. Subsection (1)(b)(i) now provides specifically that the Department *shall* appoint a hearing examiner at the applicant's request "who did not participate in the preliminary decision." Section 85–2–310(1)(b)(i), MCA. **Hohenlohes** should receive the benefit of this subsequent legislative enactment on remand.

CONCLUSION

¶ 77 We reverse the District Court's order and remand to the Department for further proceedings consistent with this opinion. The Department either may approve **Hohenlohes**' application as presented, or it must grant **Hohenlohes** a new hearing on the amount of water that **Hohenlohes** may dedicate to instream flow. A new hearing examiner must conduct any future hearings on this issue.

¶ 78 Justice Jim Rice recused himself after oral argument.

We Concur: MIKE McGRATH, C.J., W. WILLIAM LEAPHART, PATRICIA COTTER, JAMES C. NELSON and MICHAEL E. WHEAT, JJ.

Justice MICHAEL E. WHEAT, concurring.

¶ 79 I concur in the Court's Opinion. I write separately to address four points.

¶ 80 First, while I recognize that the Department is not required by law to share information and coordinate with the FWP, in this case, it would have been appropriate and beneficial for the Department to do so. This is especially true because the State generally and FWP specifically had as much to gain from the change in water use as **Hohenlohes**. **Hohenlohes** received a grant from the FWP to convert 150 acres of their land from flood irrigation to sprinkler irrigation. Opinion, ¶ 5. This change resulted in significant water savings, all of which was used to increase instream flows and improve aquatic habitat.*Id.*

¶ 81 In my mind, when multiple state agencies are involved, the better course of action is for each agency to work with the other agencies that ***461** are involved to reach a result in the most efficient manner, using the most complete dataset available. This approach is bolstered by well-established public policy in Montana. It is the public policy of the State "to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens." Section 85–1–101(2), MCA. The State "shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." Section 85–1–101(3), MCA.

¶ 82 With these mandates in mind, it would have benefitted all stakeholders—i.e. **Hohenlohes**, the Department, the FWP, and the general public—for the Department and the FWP to have communicated and shared information concerning **Hohenlohes**' change of use application. I hope that State agencies will find a way to coordinate their efforts in future cases like this so that all interested parties are involved in the process.

¶ 83 Second, I recognize that the law imposes on **Hohenlohes** an affirmative duty to prove the beneficial nature of their claimed historic use. Opinion, ¶ 43 (citing *In Re Adjudication of Existing Rights to the Use of All Water*, ¶ 56). Regardless of that duty, however, I observe that the Department went to great lengths to gather its own facts to evaluate **Hohenlohes**' application. The Department sent Jim Beck, a field engineer, to conduct an on-site investigation and generate calculations as to historic use. Opinion, ¶ 9. The Department went so far as to expend its limited resources to gather information that would expand its understanding of the issues posed by **Hohenlohes**' application.

¶ 84 Once the Department took that step, the Department should have shared that information ****643** with **Hohenlohes** and supplemented the record accordingly. In fact, in my opinion, the Department was obligated to supplement the record with the information it had developed. Instead, the Department denied **Hohenlohes**' application for failure to meet their burden to prove lack of adverse effect, the extent of historic use, and historic consumption—all while the Department itself had data that it could have contributed to the record. The Department's actions with respect to this issue disregard the public policy mandate that the State "shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." Section 85–1–101(3), MCA. The Department's adversarial approach does not further the goal that all water resources of the State be put to optimum ***462** beneficial use.

¶ 85 Third, I recognize that under then-existing law, the Department was not required to appoint a new hearing examiner. Opinion, ¶ 76. That being said, the Department's obstinate approach to this issue lacks common sense and courtesy. It gives the impression that the Department did anything it could to avoid giving **Hohenlohes** a fair shake. Once again, the Department's actions paint it as an adversary that is not interested in effecting full utilization, conservation, and protection of Montana's water resources. The Department's obstinance in this case was both unfortunate and unnecessary.

¶ 86 Fourth, I agree with the Court's characterization of the Department's approach to **Hohenlohes**' application as "dilatory." Opinion, ¶ 74. In addition, I observe that the Department's delay and adversarial attitude forced **Hohenlohes** to bear a heavy burden. Most applicants in Montana would not have been able to afford to see this process through to the bitter end. I recognize that the Department is underfunded—as nearly every State agency is during hard (and even good) economic times—but the Department's drawn-out process will prevent all but the most

fortunate and persistent from pursuing and litigating change of use applications. I urge the Department to reconsider its approach so that all Montanans may pursue optimum beneficial use of water resources.

¶ 87 I concur.

Justice JAMES C. NELSON joins in the foregoing concurrence.

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