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Memorandum

To: Danna Jackson, Chief Legal Counsel
Water Resources Division
From: Tim D. Hall
RE: History of DNRC Change Process
Date: February 21, 2017

In 2014 when I was working part-time as an attorney for the DNRC (having previously retired from my position as DNRC Chief Legal Counsel), I received a request from Tim Davis, then the DNRC Water Resources Division Administrator, for a history Montana's change of water use law. I researched and wrote the attached history, and finalized it on May 21, 2015, at which time I e-mailed it to Tim Davis.

The attached history has been requested and used by staff on numerous occasions since its completion. Accordingly, Chief Legal Counsel has requested issuance of the history a as an official legal memorandum entitled "History of DNRC Change Process."

Historical Background of the Law of Changing a Water Right in Montana

For over a hundred years in Montana if someone wanted to change their water right, all they had to do was change it. If no one took them to court, the change would remain in effect. Essentially, the only limitation to a change was that it not adversely affect other water users.[1] There was no burden on the person changing their water right; the burden was on all those existing water users who alleged adverse effect to their water rights to bring a court action in district court and to prove to the court that they had been adversely affected by the change.[2] That change process, if it could be called a process, remained in effect until June 30, 1973. On July 1, 1973, the Montana Use Act went into effect, and that law ushered in the new era of having to administratively obtain a change authorization from the DNRC before a change could occur. Most importantly, and deliberately, that act ultimately switched the burden of proof to the person proposing a change of water right.[3] The new default in water rights was the *status quo*; if a person could not prove to the DNRC in advance by a preponderance of the evidence that their proposed change would not adversely affect other water users (junior and senior), then no change could take place – the *status quo* that other water users were used to and reliant upon would remain in effect. The Water Use Act was structured to protect existing water users. When the new change process and the new burden on change applicants were challenged, they were upheld by the Montana Supreme Court.[4] The prior appropriation doctrine can be seen as a conservative doctrine protecting prior property investments, protecting the *status quo* and providing certainty; anyone who now wants a new water right or wants to change a water right has to prove beforehand that they will not upset the priorities that exist on a stream.

In addition to revising change law, the legislature in enacting the Water Use Act of 1973 simultaneously provided for a new process for adjudicating streams.[5] For years University of Montana School of Law Professor Al Stone had repeatedly pointed out the follies of Montana's archaic water rights records system and the many non-comprehensive, non-binding water court decrees.[6] Streams

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[1] *See* Hutchins, *The Montana Law of Water Rights*, pp. 75-76 (1958); *Holmstrom Land Co. v. Newlan Creek Water District*, 185 Mont. 409, 435, 605 P.2d 1060, 1075 (1979); *Quigley v. McIntosh*, 110 Mont. 495, 506, 103 P.2d 1067, 1072 (1940); *Hansen v. Larsen*, 44 Mont. 350, 353, 120 P. 229, 231 (1911); *Lokowich v. City of Helena*, 46 Mont. 575, 577, 129 P. 1063, 1063 (1913); *Head v. Hale,* 38 Mont. 302, 308, 100 P. 222, 224 (1909); *see* § 89-803, R.C.M. 1947; § 7095, R.C.M. 1921.

[2] *Holmstrom Land Co. v. Newlan Creek Water District*, 185 Mont. 409, 435, 605 P.2d 1060, 1075 (1979); *Thompson v. Harvey*, 164 Mont. 133, 136, 519 P.2d 963, 965 (1974); *McIntosh v. Graveley*, 159 Mont. 72, 83, 495 P.2d 186, 192 (1972); *Thrasher v. Mannix & Wilson*, 95 Mont. 273, 276, 26 P.2d 370, 371 (1933); *Lokowich v. City of Helena*, 46 Mont. 575, 577, 129 P. 1063, 1063 (1913); *Hansen v. Larsen*, 44 Mont. 350, 353, 120 P. 229, 231 (1911).

[3] 1973 Mont. Laws 452, § 28; 1985 Mont. Laws 573, § 7; § 85-2-402(2)(a)(2013), MCA; *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41s and 101967-41s by Keith and Alice Royston*, 249 Mont. 425, 432, 816 P.2d 1054, 1060 (1991)("Prior to adoption of the Water Use Act of 1973 and amendment of § 85-2-402, MCA, in 1985, parties objecting to the change had the burden of demonstrating adverse impact to their water rights.")

[4] *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41s and 101967-41s by Keith and Alice Royston*, 249 Mont. 425, 432, 816 P.2d 1054, 1060 (1991)("The application was properly denied because the evidence in the record does not sustain a conclusion of no adverse affect [sic] to others and it cannot be concluded from the record that the means of diversion and operation of the appropriation works are adequate."); *see also Castillo v. Kunneman*, 197 Mont. 190, 199-200, 642 P.2d 1019, 1026 (1982)("In commenting upon the new provision, Montana's noted water law authority, Albert Stone said: 'The *1973 Water Use Act,* R.C.M., section 89-892, continues the policy of the repealed section 89-803, only adding that any change must have the approval of the Department of Natural Resources and Conservation. So the case law developed under the prior code section should remain applicable to the new section.' Selected Aspects of Montana Water Law, p. 40.").

[5] 1973 Mont. Laws 452, §§ 6-15.

[6] Albert W. Stone, *Montana Water Rights—A New Opportunity,* 34 Mont. L. Rev. 57 (1973);
Albert W. Stone, *The Long Count on Dempsey Creek: No Final Decision on Water Right Adjudication*, 31 Mont. L. Rev. 1 (1969);
Albert W. Stone, *Are There Any Adjudicated Streams in Montana?* 19 Mont. L. Rev. 19 (1957).

had previously been adjudicated, some many times, with fewer than all water right holders.[7] Consequently, each decree was binding only on those who had been served in the proceedings so as to bring them personally before the court.[8] The new law provided for the filing of declarations of all water rights on a stream by order of the DNRC for a comprehensive adjudication of that stream.[9] Essentially, streams could, as needed, one-by-one "where the need for a determination is most urgent,"[10] be comprehensively adjudicated. The Powder River adjudication was undertaken under that law.[11] For a variety of reasons, including federal lawsuits for adjudication of federal reserved rights in federal courts, fear by some that Montana's adjudication might be seen as an impermissible administrative adjudication in violation of the McCarran Amendment[12], and after allegations that the Powder River process was too slow[13], the legislature in 1979 revised the adjudication statutes that resulted in today's present mandatory statewide general adjudication process,[14] and created the Montana Water Court.[15] The Water Court will be busy adjudicating water rights until 2028.[16]

Thus, the legislature in 1973 and with further refinements in 1979 created two processes side-by-side that were in parallel and without conflict: the DNRC would preside over post July 1, 1973, changes of water rights,[17] and the Water Court would adjudicate pre-July 1, 1973 water rights.[18] The DNRC's change process was a science-based process evaluating site specific facts whereby the DNRC as an agency of expertise was set up to judge whether a change proponent, who had the burden of proof, had proven by a preponderance of the evidence that the water rights of others would not be adversely affected by a proposed change.[19] In contrast, the Water Court's adjudication process was an historical inquiry involving the cataloging, mapping and decreeing of pre-1973 water right claims that had been given *prima facie* status[20] by the legislature – water right claimants without their claims being objected

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[7] Albert W. Stone, *The Long Count on Dempsey Creek: No Final Decision on Water Right Adjudication*, 31 Mont. L. Rev. 1 (1969).
[8] Albert W. Stone, *Are There Any Adjudicated Streams in Montana?* 19 Mont. L. Rev. 19, 21-22 (1957); *Woodward v. Perkins*, 116 Mont. 46, 51, 147 P.2d 1016, 1017-18 (1944).
[9] *See* 1973 Mont. Laws 452, § 8.
[10] *Id.* at § 6(2).
[11] *See also* § 85-2-222(1) (2013), MCA.
[12] 43 U.S.C. § 666.
[13] Donald Duncan MacIntyre, *The Adjudication of Montana's Waters – A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211, 221-234 (1988)(there were also allegations that the DNRC was seeking too much on-the-ground detail of claimed water rights).
[14] 1979 Mont. Laws 697 (often referred to as "S.B. 76").
[15] *Id.* at §§ 1-9; *see* §§ 3-7-101 to -225, MCA (2013).
[16] *Water Rights Adjudication*, Performance Audit, A Report to the Montana Legislature (June 2010), at 28.
[17] *See* Albert Stone, "Seminar on Water Law," given to the Subcommittee on Water Rights in 1977: "For the future under the 1973 Water Use Act, for any change of use you have to get the permission of the Department of Natural Resources." *Id.* at 30.
[18] *See In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 17, 833 P.2d 1120, 1124 (1992) ("...the clear purpose of statewide adjudication is to adjudicate water rights as they existed on July 1, 1973."); *see also* Water Court Order of August 5, 1988, in Case No. 40A-B at 4-5 (Chief Water Judge W.W. Lessley in a remedies discussion involving permits and changes clearly describes the role of the Water Court, the district court, and the DNRC).
[19] *See* § 85-2-402(2), MCA (2013); *see* Admin. R. M. 36.12.1801 to 1802; 36.12.1901 to 1904.
[20] § 85-2-227(1), MCA (2013)("prima facie proof of its content"); Rule 19, W.R.Adju.R. [Water Court Practice and Procedures]: "A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims." See *Memorandum Opinion*, Water Court Case No. 40G-2 at pp. 6, 12-13 (March 11, 1997)(After a review of over 100 Montana Supreme Court opinions the Water Court ruled in part, "A prima facie claim meets the minimum threshold of evidence necessary to establish the facts alleged and shifts the burden of production to an objector to overcome that threshold."); Water Court Case No. WC-2000-07 at pp. 3, 4-5 (*prima facie* statement of claim contradicted and overcome by testimony and evidence presented by the objectors; the burden of production of evidence then shifted to the claimants to rebut the objector's

to or otherwise being called into question essentially did not have a burden of proof regarding their historic water rights.[21] It is important to remember that the adjudication was never set up as a water availability study – the Water Court does not need to determine how much water is actually in a stream to adjudicate the water rights on that stream. The DNRC, however, in a change proceeding has to scientifically analyze whether the change of a water right would injure other water users on a stream[22] (and in permit proceedings has to scientifically analyze water availability for new water right applications)[23]. 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 they located, and those appropriators may insist that prior appropriators do not affect adversely their rights.[24] The Montana Supreme Court recently reiterated that it does not dispute the "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."[25] The calculation of the historic *consumptive* use of the water right to be changed is critical in a change proceeding in order to protect other water users.[26] And in order to protect other water users on the stream a proposed change can be conditioned so that it is granted in a way to not adversely affect other water right holders.[27] So in contrast to the adjudication of the existence and priority of the water rights on a stream by the Water Court regardless of the amount of water in a stream (and with claims having *prima facie* status with a limited analysis of actual historic use), and regardless of what happens to other water rights on that stream resulting from the adjudication, the DNRC change process involves a detailed analysis of actual historic use and a scientific analysis of historic consumptive use in order to assess whether other water users would be harmed by the proposed change.

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case and the prove the validity of their claim, which the claimants did not successfully do); Water Court Case No. 96-2 at 9 ("This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie claim is incorrect."); *see also* Water Court Case No. WC-92-3 (*On Motion Case).*

[21] Historically in water rights litigation, a party asserting a water right had the burden of proving by satisfactory evidence that such a water right had been appropriated. *Woodward v. Perkins*, 116 Mont. 46, 51, 147 P.2d 1016, 1018 (1944).

[22] § 85-2-402, MCA (2013).

[23] *See* § 85-2-311, MCA (2013); *see* Admin. R. M. 36.12.1701 to -07; 36.12.1801 to -02.

[24] *Hohenlohe v. State*, 2010 MT 203, ¶ 43, 357 Mont. 348, 240 P.3d 628.

[25] *Id.* at ¶ 45.

[26] *See Town of Manhattan v. DNRC,* 2012 MT 81, ¶¶ 10-12, 364 Mont. 450, 276 P.3d 920; 1 Water and Water Rights (Robert E. Beck 3d ed., 2010) at § 14.04(c)(1) :

> Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation, or municipal use;" [i]irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant.
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> An appropriator may not increase, through reallocation [changes] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation [changes], historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

(emphasis added); *see* Admin. R. M. 36.12.101: "(15) 'Consumptive use' means the annual volume of water used 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."; *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 351, 96 P. 727, 731 (1908).

[27] § 85-2-310, MCA (2013); § 85-2-402(8), MCA (2013).

In recognition of the finite amount of its water resources, Montana law provides the burden of proof be on those who seek to change their water rights to prove lack of harm to others on a stream[28]. The importance of the DNRC's change process (and permit process) as to pre-1973 water rights took on a new significance in the 1980s in light of legal challenges to the accuracy of Water Court decrees.[29] To address the issues of the accuracy of Montana's adjudication, the legislature in 1987 commissioned a study by a Denver water law firm[30], and its resulting report to the legislature became known as the "Ross Report."[31] Responding to the issue of the accuracy of Montana's water right decrees, that report recognized the difference between adjudicating historic claims in the present as compared to the accuracy needed to evaluate proposed enlarged or expanded uses in the future.[32] Remedial mechanisms were suggested "which can be used if and when necessary to avoid the mischief which could result from someone attempting to expand the use of water in the exercise of a right decreed in excess of what actually historically has been beneficially used."[33] Essentially, the remedial mechanisms required permits from the DNRC (with the burden on the decreed water user) for enlarged uses in excess of decreed rights and prohibited changes from the DNRC if the decreed water user could not prove the proposed change in appropriation right would not result in "a stream depletion in excess of the stream depletion caused by the historical beneficial use of water made in the exercise of the appropriation right."[34] In regard to new permits being needed for enlarged uses, the Ross Report recognized the need to be wary of expansions of water rights beyond historic use despite how the water right was set out in the decree:

> Such a mechanism could prevent the expansion of water use under such a senior right and require the appropriator to secure a new permit for a junior right to his expansion. With such a mechanism in place, a prospective purchaser would be on notice that he could acquire only the right to the historic level of depletion resulting from the use under that senior right, regardless of the rate of flow or volume set out in the decree evidencing it.[35]

The Ross Report clearly recognized the difference in detail between decreeing uses that continued to be used as decreed and the detail needed to examine enlargements beyond historical use:

> We suggest this remedial mechanism option to the Committee as a practical way to prevent decrees which may not be "sufficiently accurate" from being used to the injury of other water rights. One of its advantages is that it avoids wholesale costly field verification at the expense of the State of Montana during the present process while recognizing that expanded uses may never be pervasively attempted. It also recognizes that unless and until actual expansion and use under such senior rights are attempted, no real injury to junior rights can occur. Finally, it casts the burden of proving the right to receive such a permit on the appropriator who seeks to

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[28] § 85-2-402(2)(a), MCA (2013); *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41s and 101967-41s by Keith and Alice Royston*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991).

[29] *Montana Department of Fish, Wildlife & Parks v. Water Court of the State of Montana and the Judges of that Courts,* Montana Supreme Court Cause No. 85-345 (Filed July 17, 1985)("FWP writ of supervisory control"); *United States of America, v. Water Court of the State of Montana and the Judges of that Court,* Montana Supreme Court Cause No. 85-493; *see McDonald v. State,* 220 Mont. 519, 522, 722 P.2d 598, 600 (1986).

[30] Saunders, Snyder, Ross and Dickson, P.C., Denver, Colorado.

[31] *Evaluation of Montana's Water Rights Adjudication Process*, prepared for the Water Policy Committee of the Legislature of the State of Montana (September 30, 1988).

[32] *Id.* at 60-61.

[33] *Id.* at 60.

[34] *Id.*, Appendix IV, p. 10.

[35] *Id.* at 60-61. (emphasis added).

benefit from the terms of a decree which is not "sufficiently accurate," rather than on the State of Montana.[36]

The Ross Report is significant because it recognized that decreed water users in the future could not hide behind their water rights as decreed by the Water Court to expand their actual historic uses. Although its remedial mechanism language was not specifically enacted, it turns out that it really didn't need to be – Montana law already provides for permits needed for new uses of water[37], and change statutory[38] and case law[39] prevent expansion of historic use. The Water Court does not adjudicate post-1973 changes of water rights.[40] Former Chief Water Judge Loble in a 2000 ruling very clearly recognized the jurisdictional differences between the Water Court and the DNRC in Case No. WC-90-1, where the Water Court questioned and did not accept a settlement stipulation between the parties that it said represented "a judicial admission that they neglected in 1981 to comply with ...85-2-402(1)[changes of use]..." and ruled "the Water Court will not knowingly make decisions which intrude on the DNRC's jurisdiction over post June 1973 water usage, make findings which could lead to circumvention of the Water Use Act of 1973, or sanction the unlawful use of water." *Memorandum on Anderson and Harms Amended Stipulation* at 17. After reciting how the Supreme Court had ruled the Water Use Act of 1973 was meant to protect senior water users, the Chief Water Judge ruled:

> Accordingly, the Montana Legislature has established a **clear line between the jurisdiction of the Water Court and that of the DNRC**. The Supreme Court has expressed the public policy of the state with respect to post June 1973 appropriations *and changes* in the use of water right claims. *The Water Court should not knowingly adopt private agreements and thereby judicially recognize and sanction the allocation of a public resource that does not comply with the law that existed prior to July 1, 1973 or that may circumvent the Water Use Act of 1973.*

Id. at 20. (emphasis added).

Chief Water Judge Loble worried that the Water Court's acceptance of incorrect stipulations of alleged pre-1973 water use "might be interpreted by the DNRC as an inoculation of the Andersons from the consequences of any potential criminal prosecution arising from their apparent violation of the Water Use Act of 1973 or, at least, provide Andersons with plausible deniability." *Id.* at 17.

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[36] *Id.* at 61. (emphasis added).
[37] §§ 85-2-302, -311, MCA (2013).
[38] § 85-2-402, MCA (2013).
[39] *Hohenlohe*, 2010 MT 203, ¶¶43, 45, ; *Town of Manhattan,* 2012 MT 81, ¶ 10; *Quigley v. McIntosh,* 110 Mont. 495, 506-07, 103 P.2d 1067, 1072 (1940); *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 351, 96 P. 727, 731 (1908); *see also* Albert Stone, "Seminar on Water Law," pp.30-31, responding to a question from a legislator about "reuse": "It seems to me that there is a change. You are not using it as you were before. I think you described the change. Instead of returning water to the stream where others might use it, you have decided to recapture it and make more intensified use of the water. I think that is a change that the Department of Natural Resources would say you needed permission to do, and then it is my guess that they are going to say that you had an appropriation for a particular purpose and you are trying to change the purpose of your appropriation. What you need is a new appropriation – an additional one – as of 1977."
[40] *Memorandum on Anderson and Harms Amended Stipulation*, pp. 16-19, Water Court Case No. WC-90-1 (September 7, 2000)(Chief Water Judge Loble); *see also* Rule 39(b), (c)(2)(i), Montana Supreme Court Water Right Claim Examination Rules (W.R.C.E.R.).

The importance of proving historic use in change proceedings (and historic *consumptive use*, which the Water Court does not decree) has only been accentuated by subsequent Montana Supreme Court[41] and Colorado Supreme Court rulings.[42]

At the time of the 1985 writs of supervisory control challenging the accuracy of Water Court decrees, the adjudication statutes, in regard to volume, provided only for the claiming of the "amount of water appropriated,[43] and the decreeing of "the amount of water included in the right...."[44] The Water Court adjudicated only *diverted* volumes, as claimed under the guidance of an arithmetic calculation based on the time of diversion at a certain flow rate.[45] Even so, at the time, the Water Court's decreeing of *diverted* volumes created an uproar among water users who were used to having decrees with only flow rates describing their water rights, and the constitutionality of diverted volumes was challenged directly in the Montana Supreme Court.[46] Even though the Supreme Court upheld the constitutionality of *diverted* volumes in decrees[47], the legislature promptly amended the law to require no volume for direct flow irrigation claims.[48] Thus, the Water Court, since 1987, has not been required on direct flow irrigation claims to decree historic diverted volumes.[49] The DNRC's change process, however, involves the evaluation of both the historic diverted and *consumptive use* volume of a water right, a site-specific, scientific evaluation.[50] The Water Court did not then, and does not now, decree historic *consumptive use* volumes on direct flow irrigation rights. Historic use is an indispensable piece of information needed for a DNRC change proceeding.[51] Keep in mind that water users are entitled to the maintenance of

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[41] *Hohenlohe*, 2010 MT 203, ¶¶43, 45; *Town of Manhattan*, 2012 MT 81, ¶ 10; Admin. R. M. 36.12.1801-02.

[42] *In re Application for Water Rights in Rio Grande*, 53 P.3d 1165, 1170 (Colo. 2002) (*en banc*); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 55-57 (Colo. 1999); *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217, 1223 (Colo. 1988).

[43] 1973 Mont. Laws 452, § 8(2).

[44] *Id.* at § 13(4)(b).

[45] The present adjudication claim examination rules clearly define volume as diverted, not consumptive: "'Volume' means the amount of water which has been diverted, impounded, or withdrawn from the source over a period of time for beneficial use, usually measured in acre-feet per year." Rule 2(a)(72), W.R.C.E.R. (amended by the Montana Supreme Court, effective December 5, 2006) (emphasis added). *See also* Rule 15(c), W.R.C.E.R.: "**Direct flow irrigation claims.** For direct flow irrigation claims, except for water spreading systems and irrigation systems involving reservoirs, a volume will not be decreed. A remark shall be added to the abstract of direct flow irrigation rights. Example: THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE." *See also* DNRC Claims Examination Manual (May 2013), Ch. 7 Irrigation, C. Volume at p.24: "Irrigation volume is the amount of water which has been diverted....[emphasis added.] **Most water rights for irrigation will not be decreed a volume.**" (original emphasis).

[46] *McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986).

[47] *Id.* at 532, 722 P.2d at 606.

[48] 1987 Mont Laws 438, § 1(5)(b)(i).

[49] Exceptions exist for water spreading systems and irrigation systems involving reservoirs, § 85.2.234(6)(b)(ii), MCA (2013); Rule 15(c), W.R.C.E.R.; and for direct flow irrigation claims decreed by volume in prior decrees, Rule 15(d), *id.*

[50] Admin. R. M. 36.12.1902; *see Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 12; *see* n. 22, *supra.*

[51] Admin. R. M. 36.12.1902; *see Hohenlohe*, 2010 MT 203, ¶¶43, 45. In *Town of Manhattan*, 2012 MT 81, ¶ 10, the Supreme Court stated:

> As provided by § 85-2-402(14), MCA, the DNRC has adopted rules to implement the statutory requirements for approval of a change in a water right, including Admin. R. M. 36.12.1902. That rule requires that for pre-July 1, 1973 existing rights, the applicant for approval of a change must provide "historic information" on the underlying water right "as it was used prior to July 1, 1973." Admin. R. M. 36.12.1902(1)(a). The required details of historic use are set forth in Admin. R. M. 36.12.1902(7), and they relate to the DNRC's obligation to ensure that a change will not adversely affect other water rights, § 85-2-402(2), MCA. Further, it is an established tenet of Montana water law that an appropriator's right attaches to "waters actually taken and beneficially applied." *Quigley v. McIntosh*, 110 Mont. 495, 509, 103 P.2d 1067, 1074 (1940); *Hohenlohe*, ¶ 43. Existing (pre-July 1, 1973) rights entitle the user to "such an amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use." *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (1986).

stream conditions that existed at the time of their appropriation.[52] Consequently, appropriators on a stream are entitled to rely on return flows[53] (and thus are entitled to protection against expansions of water rights), and the analysis of return flows is required in DNRC change proceedings.[54] The analysis of return flows is also a scientific, site specific undertaking[55], and in contrast to what the DNRC is required to analyze, the Water Court decrees do not determine the return flows of water rights. Therefore, there is nothing in Water Court decrees that the DNRC disrespects or ignores in conducting its return flow and adverse effect analysis in DNRC change proceedings.

As the Supreme Court recently ruled in *Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 8, 364 Mont. 450, 452-53, 276 P.3d 920, 921:

> Even though the Montana Constitution recognizes and protects existing rights, it does not exempt them from the requirement of DNRC approval of a proposed change. *Royston*, 249 Mont. at 429, 816 P.2d at 1057. The Act requires that the applicant for approval of a change must prove by a preponderance of the evidence that the change will not adversely affect other water users....

Additionally, as the Montana Supreme Court reiterated in *Manhattan*: "Further, it is an established tenet of Montana water law that an appropriator's right attaches to 'waters actually taken and beneficially applied.' *Quigley v. McIntosh*, 110 Mont. 495, 509, 103 P.2d 1067, 1074 (1940); *Hohenlohe*, ¶ 43." 2012 MT 81, ¶ 10, 364 Mont. 450, 276 P.3d 920. It also held: "Based upon established Montana law and the applicable regulations, the DNRC was within its lawful authority to request that the Town provide information on its use of water prior to July 1, 1973 as part of its application for approval of its proposed changes." *Id.* at ¶ 12.

And as the Supreme Court reiterated in *Hohenlohe*:

> 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, P 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

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[52] *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 351, 96 P. 727, 731 (1908); *Hohenlohe*, 2010 MT 203, ¶43.

[53] An appropriator is not entitled to return flows in a change in appropriation where others depend on those return flows. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters, and reaches a water course, it is subject to appropriation. *E.g. Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 260, 17 P.2d 1074, 1077 (1933); *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶22, 31, 43, 346 Mont. 508, ¶¶22, 31, 43, 198 P.3d 219, ¶¶22, 31, 43, *citing Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185 (Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation); *see also* Wyo. Stat. § 41-3-104 (2014):

> When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water ... shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

(emphasis added).

[54] *Hohenlohe*, 2010 MT 203, ¶¶43–71; Admin. R. M. 36.12.1902.

[55] 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." *Hohenlohe*, 2010 MT 203, ¶ 45; "The [return flow] analysis will vary from one application and accompanying set of facts to the next." *Id.* at ¶ 61.

> 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).

Hohenlohe, 2012 MT 81, at ¶ 43 (emphasis added).

So it is replete throughout Montana water law that appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. *Spokane Ranch & Water Co. v. Beatty* (1908), 37 Mont. 342, 96 P. 727; 1 Waters and Water Rights § 14.04(c)(1) (Robert E. Beck 3d ed., 2010); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942).

As one treatise describes it, in a change proceeding, the *consumptive* use of the historical right has to be determined:

> In a reallocation [a change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [a change] are estimated. Engineers usually make these estimates.
>
> With respect to a reallocation [a change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [a change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].
>
> ....
>
> When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.
>
> ....
>
> Expected consumptive use after a reallocation [a change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

1 Water and Water Rights at § 14.04(c)(1)(Robert E. Beck 3d ed., 2010).

In *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002) (*en banc)*, the full Colorado Supreme Court explained the importance of the calculation of historic consumptive use in the change process:

> An absolute decree, whether expressed in terms of a flow rate or a volumetric measurement, is itself not an adjudication of actual historic use but implicitly is further limited to actual historic use. In order to determine that a requested change of a water right is merely that, and will not amount to an enlargement of the original appropriation, actual historic use must therefore, in some fashion and to some degree of precision, be quantified.

Id. at 1170 (emphasis added); *see* FN9, "The term 'historic use' refers to the 'historic consumptive use'...."). *Id.* at 1169 (emphasis added).

Colorado is adopting its first state water plan (Final to be submitted no later than December 10, 2015), and it summarized its change process as follows:

> Changes of water rights
>
> The right to use water in Colorado is usufructory. As such, it is limited to the location of diversion, place of use, manner of use, and type of use allowed by a water court decree. A water right may be conveyed to another water user or, with appropriate water court approval, changed to another location of diversion, place of use, manner of use, or type of use, while retaining its priority. However, changes of water rights are subject to terms and conditions that prevent injury to existing water rights.
>
> The engineering analysis in a change of water right proceeding establishes the time, place, and amount of decreed and historical consumptive use, which serves as the volumetric limitation on any new consumptive use. In addition to establishing historical consumptive use, an analysis must establish the timing, location, and amount of historical return flows (the non-consumed portion of the diversion), which must be replaced in the stream so that water users senior to the date of the change in use may continue to enjoy stream conditions in place at the time of their appropriation.14 A full analysis considering time, place, and amount of historical use on a stream is generally referred to as a "net stream depletion" analysis.
>
> The goal of the net stream depletion assessment, including historical beneficial consumptive use, is
>
> to ensure that the amount of water removed from the stream system and consumptively used is equal to the amount returned to the stream at a particular time and place. Maintaining flows after a change of water right ensures that water users who established their rights prior to the date of the change in use receive the water that they are entitled to, and do not suffer an injury to their water rights as a result of the change.

Colorado's Water Plan /DRAFT Chapter 2.1: Colorado water law & administration at p.9 (Prepared by the Colorado Water Conservation Board, December 10, 2014).

It is no wonder, then, that a recent University of Montana School of Law study could not help but acknowledge in regard to the change processes of western states that "[a]ll state agencies are examining consumptive use during the change process...."[56] Clearly, then, what the DNRC does in change proceedings is within the norm of what all other western states do in change proceedings. The UM study also recognized the difference between what the Water Court decrees, and the difference in the information the DNRC needs in a change proceeding, acknowledging that "[f]rom a practical standpoint, water users may thus have to provide additional evidence in the DNRC change proceeding beyond that required in the Water Court."[57]

[56] *Water Rights in Montana*, Report for the Montana Supreme Court, Prepared by the Land Use & Natural Resources Clinic, University of Montana School of Law, Spring 2014, at 28.
[57] *Id.* at 12.

So the adjudication process is inherently more general, and was never designed to pinpoint with precision actual historic water use.[58] It was built around general standards and guidelines to judge the "reasonableness" of a claim of water use.[59] As such, the margin of error can be significant. The margin of error is a function of conducting a mammoth statewide adjudication and is found in the Montana Supreme Court Water Right Claim Examination Rules;[60] only if the examination reveals a potential problem, or issue, outside of a margin of error is the claimant contacted and an "issue remark"[61] placed on the claim.[62] For example, below are the claimant contact ranges for irrigation parcels of 100-500 acres and the "claimant contact range":[63]

Claimed	Claimant Contact Range
100 acres	112.68 – 87.32
200	219.22 – 180.78
300	324.51 – 275.49
400	429.13 – 370.87
500	533.3 – 466.7

Pursuant to the Montana Supreme Court Water Right Claim Examination Rules, if the DNRC adjudication claim examination finds irrigated acres within a certain "range" of error, the claimant will not be contacted and the claim will proceed through the process without an issue remark. The margin of error is generally called the "claimant contact range." For example, in the DNRC's adjudication examination of a claimed water right, if an irrigator claimed a place of use of 200 acres, yet actually only irrigated about 181 acres (and DNRC found 181 acres through the examination process), then DNRC's research and investigation ends. No further questions are asked of the irrigator because the claim is within the examination rules' accepted margin of error. That particular claim is likely to go through the adjudication process and be decreed by the Water Court with a place of use at 200 acres because there is no issue remark related to the place of use. As long as the irrigator's claimed flow rate is within the

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[58] Former Chief Water Judge Loble in 2000 expressed some his frustrations with the magnitude of the adjudication task as follows:

> And so, what you've got is a sort of doubling up or tripling up of water rights. And, we know very well that when that water rights are enforced, that in all likelihood there are going to be some decreed water users who are going to just scream when they find out that they had, their priority date was number five and now they are going to be number ten. And so we struggle with that at the Water Court, just on a daily basis, trying to figure out what to do about it. Frankly, when we went to the On Motion decision, we pulled back from all those on motions. We have taken the position that by and large, that's not our problem.
>
> ....
>
> The issue remarks, I don't know what to do with the issue remarks. Whether we leave them on or take them off, I'm not concerned about that. I don't even know what that effect has if you leave the issue remarks on. I don't know.

Meeting on Water Court Rules, November 21, 2000, C. Bruce Loble, Chief Water Judge, Presiding (Recorded by: Lori M. Burnham Beck, Clerk of Court). The legislature subsequently enacted legislation requiring the Water Court to resolve all issue remarks prior to final decree. 2005 Mont. Laws 526, § 85-2-248, MCA.

[59] *See e.g.* Rule 14(b), W.R.C.E.R.("The *guideline* for irrigation within a basin or subbasin will be the flow rate necessary to *reasonably* irrigate one acre of crop.")(emphasis added); Rule 14(c)(1, W.R.C.E.R.)(where the claimed flow rate exceeds the *guideline* using the acreage identified by the DNRC)(emphasis added); Rule 29(e)(2), W.R.C.E.R. (the claimed flow rate or claimed volume exceeds the *guideline*...")(emphasis added).

[60] Exhibit B, W.R.C.E.R (logarithmic scale regarding claimed acreage providing for DNRC claimant contact).

[61] Issue remarks are the mechanism that alerts other water users to a potential problem with a claim, and are a key element for quality control in the adjudication; *see* Rules 12(e)(6)(i); 2(a)(57),W.R.C.E.R.; § 85-2-248, MCA (2013).

[62] Rule 12(b)(2),W.R.C.E.R ("Acreage differences exceeding the amount defined in Exhibit B will require claimant contact...."; *see also* Rule 28 (a)(2), 44, W.R.C.E.R.; *see* 2()(57) Rule W.R.C.E.R. (definition of "remark").

[63] Exhibit B, W.R.C.E.R.

standard provided in rule[64], then no further questions are asked. The result can be a decreed flow rate of 300 miners inches[65] (200 acres X 1.5 MI = 300 MI), based on general flow rate standards applied in the process, which may not reflect reality on the ground.

However, what if in realty the above irrigator truly only diverted 1.0 MI/acre (the per-acre flow rate often decreed in historic District Court decrees[66]), and under the example above only irrigated 181 acres, not the 200 acres he was decreed due to examination standards? In that case, the irrigator's true, historic appropriation of water was only 181 MI, yet through the adjudication process he was decreed 300 MI . There is a substantial difference between 181 MI and 300 MI (enough of a difference to operate a 200-acre irrigation system under modern equipment), which could lead to adverse effects to other users if no check and balance were instituted. All in all, if one considers the myriad of standards applied in the adjudication process, it is clear the adjudication is not always defining *actual historic* water use (and <u>never</u> adjudicating the historic *consumptive* water use).[67] The Master's Report dated August 1, 1990, on claim number 40A-W-207277-00 is an example of this "rounding" of "historic use" process on a smaller scale:

MASTER'S REPORT
<u>FINDINGS OF FACT</u>

1. This claim is a direct flow irrigation claim.
2. In this basin, a 7.00% or greater difference between claimed and verified acres triggered the input of a gray area remark into the claim abstract as it appears in the Temporary Preliminary Decree.
3. The Montana Department of Natural Resources and Conservation verified 13.10 acres of 15 acres claimed, a variance of less than 13.00%.
4. This claim was called in On Motion of the Water Court for acres irrigated, volume and flow rate.
5. The margin of verification error between 6.90% and 13.00% on a tract of land this small is less than one acre.
6. The standard of 1.5 miner's inches per acre would convert to 0.49 for 13.10 acres.
7. The claimant claimed 0.38 CFS for 15.00 acres, or 1.00 miner's inch per acre.
8. A variance of less than 13.00% between claimed and verified acreage on a tract of land this small combined with the low flow rate claimed does not warrant this claim to be further reviewed as the differences are trifling and insignificant.

<u>CONCLUSIONS OF LAW</u>

....

[64] The Montana Supreme Court Water Right Claim Examination Rules provide a general standard of 17 gpm/acre (1.5 MI/acre) to generally judge the claimed flow rate for flood irrigation. Rule 14(b)(1), W.R.C.E.R. Some irrigation claims may have substantially higher flow rates.

[65] § 85-2-103(2), MCA (2013): 100 miner's inches (MI) equals 2.5 cfs.

[66] *See e.g. Bagnell v. Lemery*, 202 Mont. 238, 246, 657 P.2d 608, 612 (1983) ("This Court generally allows one miner's inch to irrigate each acre of land unless 'evidence discloses that a greater or lesser amount is required.' *Conrow v. Huffine* (1914), 48 Mont. 437, 138 P. 1094.").

[67] Irrigators who understand the adjudication process can take advantage of the system *by amending their acreage upward* to more than they have historically irrigated, *but just below the "claimant contact" cutoff.* For example, if an irrigator claimed 150 acres of irrigation, yet truly irrigated *only* 100 acres, that irrigator could amend their claim to 112 acres (and therefore still be under "claimant contact" range), and then can be decreed 12 acres of "historic" irrigation that has never taken place, as well the associated amount of water (at least 17 gpm/acre) to irrigate that acreage. Exhibit B, W.R.C.E.R.; Rules 14; 12(e)(6)(i); 2(a)(57),W.R.C.E.R.

V.

Further review of this claim would be trifling and the law disregards trifles. Mont. Code Ann. section 1-3-224.

VI.

No changes should be made to the abstract of the Claim 40A-W-207277-00 as it appears in the Temporary Preliminary Decree of the Musselshell River Above Roundup Basin (40A).

As shown above, on both a larger scale and a smaller scale, and in between, if the DNRC simply accepted the paper or adjudicated right *"as is"* in its change proceeding, it would risk reallocating property rights from one water user to another.[68] That's not what the Water Use Act is about. *See MPC v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 ("the Water Use Act was designed to protect senior water rights holders...."). *That's why the DNRC takes its role in the change process seriously - because property rights are on the line. Its decisions are important to the long-standing property rights of existing water users who have built their operations for generations around a certain set of stream conditions.*

As unappropriated water in Montana has become increasingly scarce, and as more basins have been closed[69], changes of existing water rights have increased and the review process for changes has become increasingly important. The importance and increasing scrutiny that would accompany changes as the West became more settled was noted over 100 years ago by Samual C. Wiel in his classic, *Water Rights in the Western States* (1911):

> **§ 499. Right of Change Chiefly a Matter upon Public Lands.**- These rules, having arisen with the doctrine of appropriation itself, must be understood in the light of the origin of that doctrine, as having arisen upon the public domain. When the region is a new one, and the lands are largely public, and there are few appropriators of water, there is practically no one to be injured. The government is alone concerned, and under the act of 1866 acquiesces in the utmost freedom to the appropriator so far as the government is concerned (the doctrine of "free development"); and the only question being as to continuance of the right, the right continues and its priority is not lost by the change. But as the lands become settled and appropriations also increase, the government is no longer the only one concerned. Private rights of others are now also concerned. Hence, while in the early days the chief consideration was the freedom of change without loss of priority, in latter days the prohibition of injury is becoming the more important;

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[68] Professor Al Stone in his July 1977 address to the Subcommittee on Water Rights, "Seminar on Water Law," at p.19 pointed out the inaccuracy of water right claims and old decrees:

> What you had before the 1973 Water Use Act is what you will be decreed after the 1973 Water Use Act, but it very well may not be what you think you had.
>
> I have some interesting cases that you who think you have such definitive, certain rights should know about. The early appropriators declared excessive amounts of water and early decrees were clearly erroneous. They were very generous.
>
> ....
>
> In cases coming up since 1930, the Montana Supreme Court has been fairly skeptical with respect to early inflated decrees. In one way or another, the court has attempted to limit the amount of water to which a person is entitled.

[69] § 85-2-336, MCA (2013) (Upper Clark Fork River Basin Closure); § 85-2-344, MCA, (2013) (Bitterroot River Basin Closure); § 85-2-321, MCA (2013)(Milk River Mainstem and Southern Tributaries Closures by DNRC order); § 85-2-343, MCA (2013) (Upper Missouri River Basin Closure; § 85-2-341, MCA (2013)(Jefferson River and Madison River Basins Closure); § 85-2-330, MCA (2013)(Teton River Basin Closure); Grant Creek Basin Closure, Admin. R. M. 36.12.1010; Rock Creek Basin Closure, Admin. R. M. 36.12.1013; Walker Creek Basin Closure, Admin. R. M. 36.12.1014, Towhead Gulch Basin Closure, Admin. R. M. 36.12.1015; Musselshell River Closure, Admin. R. M. 36.12.1016; Sharrott Creek Basin Closure, Admin. R. M. 36.12.1017; Willow Creek Basin Closure, Admin. R. M. 36.12.1018; Truman Creek Basin Closure, Admin. R. M. 36.12.1019; Sixmile Creek Basin Closure, Admin. R. M. 36.12.1020; Houle Creek Basin Closure, Admin. R. M. 36.12.1021.

as settlement advances, will become the most important, and in time practically prohibit change altogether.

Nonetheless, recognizing the challenge change applicants face, the DNRC change process has legislatively[70] and administratively[71] been made more efficient. Today, as a result:

1) The DNRC holds informal meetings with applicants prior to submission of an application, so both the applicant and the DNRC can understand a proposed project. The DNRC can also take the opportunity to head off potential problems in an application at this informal stage.
2) More certainty exists for an applicant up front in the process (e.g. the DNRC makes its preliminary determination before public notice, and the determination stands unless changed through an administrative hearing).
3) The process is more user-friendly for an applicant; the DNRC collects and synthesizes much of the publicly-available information for the applicant now, where previously the burden was much heavier on an applicant. It works well for other water uses, too, because if an application is denied up front potential objectors have not had to spend time and money to get involved.
4) The cost of the process for a change has been reduced. There are a greater number of applicants who can now navigate the process without spending money on consulting services. The DNRC heeded comments that the process was too costly and cumbersome.
5) Processing times for change decisions have been reduced.

In sum, the DNRC change process today is much less contentious and litigious than it previously was. The DNRC, since the improvements to the change process, has had no change cases appealed to district court.

In order to cut down on the time and expense of applying for a change, the DNRC also in 2009 promulgated consumptive use rules that allow an irrigator to *opt* to use the consumptive use amounts set forth in those rules rather than hiring a water right consultant to calculate their historic consumptive use amount.[72]

It also has to be noted that an administrative determination in a change proceeding is not an adjudication. The grant or denial of an application for a change does not determine the existence or nonexistence of vested rights in others, *U.S. v. District Court of Fourth Judicial Dist. in and for Utah County,* 121 Utah 1, 238 P.2d 1132 (1951), so that a grant of permission for the change does not adjudicate priority rights but merely allows the applicant to make the requested change as long as he does not interfere with the prior rights of others. *Whitmore v. Murray City,* 107 Utah 445, 154 P.2d 748 (1944).[73] Although a water user in a change proceeding who obtains a change of their entire historic consumptive use may argue that there water right was given a "haircut" by the DNRC change, and seemingly got a change for less than what is in a decree, in fact they have changed all they had a right to change.

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[70] HB 40, 61st Legislative Session (effective July 1, 2009), 2009 Mont. Laws 251; *see* §§ 85-2-307 to -310, MCA (2013); § 85-2-402, MCA (2013); Admin. R. M. 36.12.1801 to -02; 1901 to -04.
[71] *Id.*
[72] Admin. R. M. 1902(2) – (10).
[73] *See Manhattan*, 2012 MT 81, ¶ 8.

As detailed above, there are differences in the degree of examination of historic water use between the Water Court and DNRC processes, and each is functioning as it was structured by the legislature. The two processes were never designed to be the same, and they serve differing purposes. One example is the fact there are no historic *consumptive* use amounts in Water Court decrees for the DNRC to ignore. And certification[74] of certain matters of water rights to the Water Court will not answer historic consumptive use questions - the Water Court is not tasked with adjudicating historic *consumptive* volumes. Any argument that the DNRC ignores Water Court decrees or disrespects the Water Court in its change proceedings overlooks the difference between what the DNRC is charged with doing with its expertise, and what the Water Court is charged with doing with its expertise.[75] Changes of water rights are critical to future water use in the State of Montana. It is also important for water users, prospective water users, the courts, and the legislature to understand the historical background of the law of changing a water right in Montana.

[74] § 85-2-309(2), MCA (2013).

[75] It should also be noted that the issuance of final decrees will still not alter the need of the DNRC in the change process to evaluate the historic use and historic *consumptive* use of water rights in change proceedings in order to protect other appropriators.