

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

APPLICATION TO CHANGE WATER RIGHT) NO. 43B 30161110 by ROBERT E. AND) MICHELLE R. BARBER)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On December 26, 2023, Robert E. and Michelle R. Barber (Applicants) submitted Application to Change Water Right No. 43B 30161110 to change Statement of Claim 43B 30160763 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant’s attorney on July 10, 2023. The Application was determined to be correct and complete as of March 13, 2024. An Environmental Assessment for this application was completed on February 26, 2024.

INFORMATION

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

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606
- Maps:
 - Aerial photograph dated 1951, showing historical point of diversion, conveyance, and place of use.
 - Aerial photograph dated 1977, showing historical point of diversion, conveyance, and place of use.
 - Aerial photograph dated 2021, showing proposed points of diversion, conveyance, and place of use.

Information Received after Application Filed

- E-mail from Abigail Brown, Attorney, to Mark Elison, Billings Regional Manager, dated February 6, 2024, detailing overlapping water rights and proposed operation.
- Letter dated March 13, 2024 from Mark Elison to Abigail Brown detailing proposed conditions, signed by Robert Barber on March 27, 2024, accepting proposed conditions and returned to the Department.

Information within the Department’s Possession/Knowledge

- Sweet Grass County Water Resources Survey, dated July 1950
- Department file for Statement of Claim 43B 41756-00
- Department file for Statement of Claim 43B 30160763
- Department file for Change Authorization 43B 30103020
- Verified Motion to Amend Water Right Claim 43B 41756-00, dated October 15, 2015, signed by Andrew Butts, President of the Kent Ditch Company, seeking to amend the place of use
- Verified Motion to Amend Water Right Claim 43B 41756-00, dated November 19, 2015, signed by Andrew Butts, President of the Kent Ditch Company, seeking to amend the volume
- Master's Report, by Water Master Peter Fritsch, dated June 1, 2016, recommending that the October 15, 2015, and November 19, 2015, amendments be granted
- Montana Water Court Order, signed by Douglas Ritter, Associate Water Judge, dated June 17, 2016, adopting the recommendations in the June 1, 2016, Master's Report
- Water Right Quit Claim Deed from the Kent Ditch Company to Robert and Michelle Barber, dated November 12, 2021, conveying 10.18 CFS flow rate and 2,271.93 AF of volume (20.35%) of Statement of Claim 43B 41756-00
- Department Water Rights database
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents.
 - Consumptive Use Methodology Memo dated March 17, 2010
 - Development of Standardized Methodologies to Determine Historic Diverted Volume Memo dated September 13, 2012
 - Change in Method of Irrigation Memo, dated December 2, 2015
 - Return Flow Memo dated April 1, 2016

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

For the purposes of this document, Department of DNRC means the Department of Natural Resources & Conservation; POD means point of diversion; POU means place of use; CFS

means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Statement of Claim 43B 30160763 by adding a point of diversion. Statement of Claim 43B 30160763 is for 10.18 CFS flow rate and 2271.93 AF diverted volume from the Yellowstone River via means of a headgate for the purpose of flood irrigation on 170.5 AC. The period of use and the period of diversion are May 15 through October 31. The point of diversion is in the NENWNW Section 19, T1S, R17E, Sweet Grass County and water is conveyed to the place of use by means of the Kent Ditch. Statement of Claim 43B 30160763 has a priority date of July 1, 1894.

Table 1: Water Right Proposed for Change

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion	Priority Date
43B 30160763	10.18 CFS	2,271,93 AF	Irrigation (170.5 AC)	5/15 - 10/31	S2NW and SW Section 20, N2N2 Section 29, T1S, R17E, Sweet Grass County	NENWNW Section 19, T1S, R17E, Sweet Grass County	7/1/1894

2. Statements of Claim 43B 43484-00 and 43B 182437-00 have partially overlapping places of use with 43B 30160763. Statement of Claim 43B 43484-00 is from a spring in the SENENW Section 19, T1S, R17E, Sweet Grass County and is conveyed to the place of use by the Kent Ditch. Statement of Claim 43B 182437-00 is from a spring in the SWNESW Section 20, T1S, R17E, Sweet Grass County and conveyed to the place of use by a different unnamed ditch. These overlapping Statements of Claim are not included in the historical use calculations because they are less reliable than Statement of Claim 43B 30160763 and have only been used when the headgate to the Kent Ditch is unavailable.

Table 2. Supplemental Water Rights to Statement of Claim 43B 30160763

WR Number (Irrigation)	Flow Rate	Period of Use	Point of Diversion	Place of Use	Priority Date	Acres
43B 43484-00	3.75 CFS	5/20 – 10/15	SENENW Section 19, T1S, R17E, Sweet Grass County	SW Section 20, T1S, R17E, Sweet Grass County	6/30/1901	120
43B 182437-00	50 CFS	4/1-11/1	SWNESW Section 20, T1S, R17E, Sweet Grass County	Sections 20 and 29, T1S, R17E, Sweet Grass County	12/31/1898	276

3. Statement of Claim 43B 30160763 was generated by a split from parent right Statement of Claim 43B 41756-00. A previous change authorization was issued on Statement of Claim 43B 41756-00 under application 43B 30103020. The change authorization, issued on July 28, 2016, added acres to the place of use and added a place of storage. Water from the Kent Ditch was comingled with water from a new permit requiring the change in place of use although no changes were made to historical diversion pattern, flow rate, consumed volume, or diverted volume. A historical use analysis was completed on Statement of Claim 43B 41756-00 as part of the change authorization prior to the split that created 43B 30160763. The split was based upon the historical use analysis completed for Change Authorization 43B 30103020 and detailed in a quit claim deed dated November 12, 2021, from the Kent Ditch Company to Robert and Michelle Barber. The Kent Ditch Company is the original and sole owner of Statement of Claim 43B 41756-00.

4. The historical use analysis completed for Change Authorization 43B 30103020 will be used for the purposes of this change. Statement of Claim 43B 30160763 represents 170.5 AC of the original 838 AC found for historical use under Statement of Claim 43B 41756-00. This is 20.35% of the parent right. Historical flow rate, historical consumptive use, historical applied volume, and historical diverted volume for this change are taken as 20.35% of that found in Change Authorization 43B 30103020. This is what was conveyed in the 2021 quit claim deed and is appropriate because the earlier change did not affect the acres subsequently split from Statement of Claim 43B 41756-00 to create Statement of Claim 43B 30160763 and the historical use analysis is valid.

5. The Applicants have chosen to present the findings from Change Authorization 43B 30103020 as evidence for the historical use of Statement of Claim 43B 30160763.

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicant proposes to add a transitory point of diversion downstream from the original point of diversion along their property in Government Lots 2, 3, 6, and 7, Section 20, T1S, R17E and Government Lot 2, Section 29, T1S, R17E, Sweet Grass County. A moveable pump will serve as the means of diversion. The Applicant proposes no change to the place of use, purpose, or place of storage. The moveable pump would provide water to two center pivot sprinkler systems entirely within the footprint of historical irrigation. The Applicant proposes to keep the existing

headgate point of diversion and alternate use of the two points of diversion. After this change the Applicant will appropriate up to 2,271.93 AF at a flow rate of 10.18 CFS. Figure 1 shows the elements of the proposed change.

7. The historical and proposed place of use is along the Yellowstone River approximately 10 miles west of Reed Point, MT.

Barber Change 43B 30161110

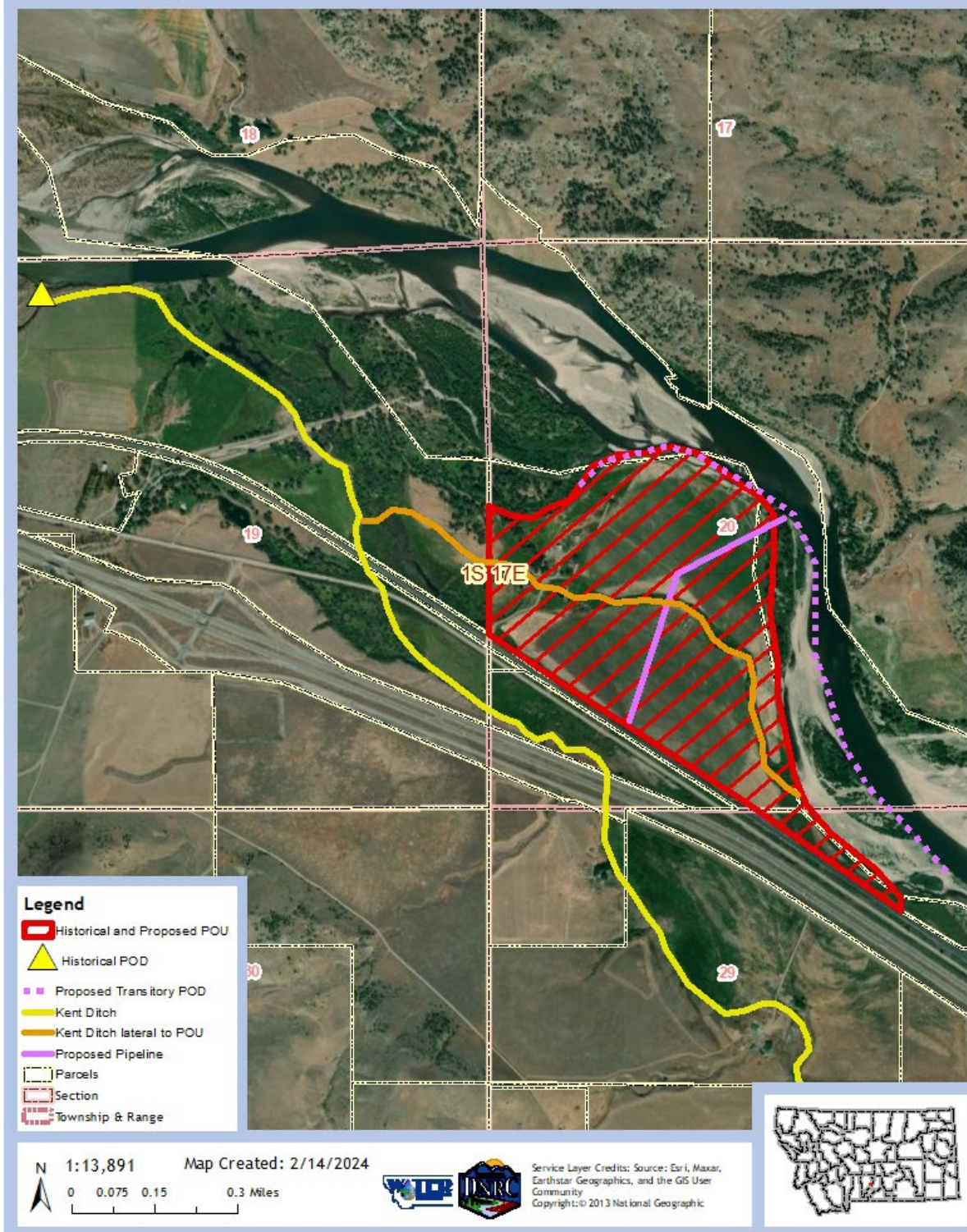


Figure 1. Historical and proposed use map for change application 43B 30161110

CHANGE CRITERIA

8. The Department is authorized to approve a change if the Applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. *Matter of Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an Applicant's burden to prove change criteria by a preponderance of evidence is "more probable than not."); *Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

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

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

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

10. Statement of Claim 43B 41756-00 from which 43B 30160763 was split has been decreed. The priority date for both Statements of Claim is July 1, 1894. The Sweet Grass County Water Resources Survey (WRS), dated July 1950, details the history of the Kent Ditch including the original appropriation in 1894.

11. Statement of Claim 43B 41756-00 from which 43B 30160763 was split on December 14, 2021, was the subject of a change authorization issued on July 28, 2016. A historical use analysis was completed for Statement of Claim 43B 41756-00 as part of the change process. The place of use for Statement of Claim 43B 30160763 was entirely within the place of use for Statement of Claim 43B 41756-00 prior to the split and was included in the historical use analysis. According to the 1950 Sweet Grass County WRS, there were 948 acres being irrigated under Statement of Claim 43B 41756-00 by the Kent Ditch. A Verified Motion to Amend was filed with the Montana Water Court on October 15, 2015, to correct the place of use for 43B 41756-00 to accurately describe the historical place of use. The corrected place of use is 838 acres. Of the 838 historically irrigated acres, 170.5 AC are the historically irrigated acres under Statement of Claim 43B 30160763 following the split. These acres are shown as irrigated in the 1950 Sweet Grass County WRS. The historical place of use includes 32.25 AC in S2NW and 132.75 AC in SW of Section 20 and 5.50 AC in N2N2 Section 29, T1S, R17E, Sweet Grass County.

12. Irrigated acres under 43BV 30160763 constitute 20.35% ($170.5/838 = .20346$) of total acres irrigated under Statement of Claim 43B 41756-00 for which a previous historical use analysis was completed (Change Authorization 43B 30103020). In that analysis, consumptive use was based on an efficiency of 45% for flood irrigation, an IWR water requirement for flood irrigation at Big Timber, MT of 20.60 inches and a county management factor of 44.7%. The historically diverted volume was based on a Historical Use Addendum detailing the operation of the Kent Ditch.

13. The historical use of 43B 30160763 is taken as 20.35% of the historical use of the parent Statement of Claim as shown in the table below.

Table 3. Historical Use for 43B 30160763

	43B 41756-00	Percentage of 43B 41756-00 conveyed to 43B 30160763	43B 30160763
Irrigated Acres	838	20.35	170.5

Flow Rate (CFS)	50	20.35	10.18
Consumptive Use (AF)	643.04	20.35	130.86
Applied Volume (AF)	1428.98	20.35	290.80
Irrecoverable Losses (IL)(AF)	71.45	20.35	14.54
Consumptive Use w/ IL (AF)	714.49	20.35	145.40
Diverted Volume (AF)	11164.29	20.35	2271.93

14. Statements of Claim 43B 43484-00 and 43B 182437-00 have overlapping places of use with Statement of Claim 43B 30160763 (Table 2). These water rights are from other less reliable sources and were used when the Kent Ditch was unavailable. Statement of Claim 43B 43484-00 has a period of diversion and period of use from May 20 through October 15; shorter than the period of diversion and period of use for Statement of Claim 43B 30160763. Statement of Claim 43B 182437-00 has a period of diversion and period of use from April 1 through November 4; longer than the period of diversion and period of use for Statement of Claim 43B 30160763.

15. Because Statement of Claim 43B 30160763 provided full-service irrigation when the Kent Ditch was available and Statements of Claim 43B 43484-00 and 43B 182437-00 could have provided full-service irrigation on the overlapping acres when the Kent Ditch was unavailable, the Department will add the following condition, agreed to by the Applicant on March 27, 2024:

IMPORTANT INFORMATION

THE SUM TOTAL VOLUME OF WATER APPLIED TO THESE ACRES FROM ALL SOURCES SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

16. The historical POD for Statement of Claim 43B 30160763 is the headgate to the Kent Ditch located in the NENWNW Section 19, T1S, R17E, Sweet Grass County. Water was conveyed by the Kent Ditch to the place of use. The Kent Ditch was determined to have a capacity of between 67 and 168 CFS in the previous change authorization based on the culvert size at the headgate and the dimensions of the ditch. Flow rates totaling 2,000 miner's inches (50 CFS) were decreed to the Kent Ditch by the District Court for the Sixth Judicial District in Sweet Grass County on May 18, 1921. The historical flow rate for the ditch is taken as 50 CFS (Table 2) of which 10.18 CFS is attributed to 43B 30160763.

17. The historical period of diversion and period of use are from May 15 through October 31. The place of use lies within irrigation climatic area 2. The period of diversion and period of use are within Department standards for that climatic region.

18. The Department finds the following historical use, as shown in Table 4.

Table 4. Summary of historical use findings for Statement of Claim 43B 30160763

Water Right Number	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
43B 30160763	7/1/1894	2271.93 AF	10.18 CFS	Irrigation (170.5 AC)	145.4 AF	S2NW & SW Section 20, N2N2 Section 29, T1S, R17E, Sweet Grass County	NENWNW Section 19, T1S R17E, Sweet Grass County

ADVERSE EFFECT

FINDINGS OF FACT

19. The Applicants propose to add a transitory point of diversion from Government Lot 2, Section 20, T1S, R17E, Sweet Grass County to Government Lot 1, Section 29, T1S, R17E, Sweet Grass County. The new POD would be a pump in the Yellowstone River. The pump would provide water through a pipeline to two new center-pivot sprinkler systems. The flow rate from the new POD would be 1.58 CFS based on the requirements of the two center-pivot sprinkler systems.

20. The historical headgate and ditch would be retained, and the Applicant will alternate use of the two PODs. To prevent an increase in diverted flow rate, the Department will add the following condition agreed to by the Applicant on March 27, 2024:

CONDITION – FLOW RATE

THE TWO POINTS OF DIVERSION SHALL NOT BE USED SIMULTANEOUSLY.

21. Because there is no proposed change to the purpose, place of use or place of storage, the historical consumptive use and proposed consumptive use are considered equal. The Department does not consider a change in method of irrigation when calculating the proposed consumptive and field applied volumes on acreage that was historically irrigated by a given water right. Because the proposed use lies entirely within the footprint of the historically irrigated acreage, the Department finds that the proposed consumed and field applied volumes are equal to the historically consumed and field applied volumes.

22. Water rights considered for adverse effect are those that share the Kent Ditch and those with points of diversion between the original point of diversion for the Kent Ditch in NENWNW Section 19, T1S, R17E, Sweet Grass County and the lower end of the proposed transitory point of diversion in Government Lot 2, Section 29, T1S, R17E, Sweet Grass County. The intervening water rights are shown in the table below.

Table 4. Water rights considered for adverse effect

WATER RIGHT NUMBER	OWNERS	PURPOSES	FLOW RATE (CFS)	PRIORITY DATE	PERIOD OF DIVERSION
43B 191340 00	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	FISH AND WILDLIFE	1800	1970-12-14	08/01 to 10/31
43B 191341 00	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	FISH AND WILDLIFE	2200	1970-12-14	05/01 to 07/31
43B 191342 00	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	FISH AND WILDLIFE	1800	1970-12-14	04/16 to 04/30
43B 191343 00	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	FISH AND WILDLIFE	1300	1970-12-14	11/01 to 04/15
43B 30109277	SWEET GRASS COUNTY CONSERVATION DISTRICT; GLENN C WARREN; VICKI J WARREN	IRRIGATION	4.9	1978-12-15	04/01 to 11/01
43B 30160763	MICHELLE R BARBER; ROBERT E BARBER	IRRIGATION	10.18	1894-07-01	05/15 to 10/31
43B 41756 00	KENT DITCH CO	IRRIGATION	39.82	1894-07-01	05/15 to 10/31
43QJ 79843 00	GEORGE M RUTH; SWEET GRASS COUNTY CONSERVATION DISTRICT	IRRIGATION	13.4	1978-12-15	05/01 to 09/30
43B 30137406	HOBBLE DIAMOND RANCH OF MONTANA LLC	STOCK	0.07	1917-09-07	01/01 to 12/31
43QJ 43482 00	MICHELLE R BARBER; ROBERT E BARBER; ANDREW B BUTTS; THERESE L BUTTS; HOBBLE DIAMOND RANCH OF MONTANA LLC; LEN SEDON FAMILY LLC; GLENN C WARREN; VICKI J WARREN	STOCK	0.07	1904-08-10	01/01 to 12/31

23. There will be no adverse effect to other users of the Kent Ditch because the ditch will continue to be operated in the same manner as historically. The addition of a point of diversion to Statement of Claim 43B 30160763 will not prevent users of the Kent Ditch from utilizing the diversion as they normally would.

24. The Applicant will alternate use of the two points of diversion to ensure the historical flow rate is not exceeded. When the Kent Ditch POD is in use there will be no change from historical practices and no adverse effect. When the new transitory POD is in use, the diverted flow rate would be lower than the historical flow rate (1.58 CFS vs. 10.18 CFS). Water would be left instream for the use of intervening water rights and would prevent adverse effects. There would be no change to the overall timing of diversions but when the new transitory POD is being used, the diverted flow rate would be lower.

25. There is no change to the place of use and the Department does not consider a change in method of irrigation when calculating the proposed consumptive and field applied volumes on acreage that was historically irrigated by a given water right. There would be no change to calculated return flow in rate, timing, or location.

26. Statement of Claim 43B 30160763 provided full-service irrigation when the Kent Ditch was available and Statements of Claim 43B 43484-00 and 43B 182437-00 could have provided full-service irrigation on the overlapping acres when the Kent Ditch was unavailable. The potential for an increase in water use exists. To prevent any adverse effect from the potential increase in water use, the Department will add the following condition:

IMPORTANT INFORMATION

THE SUM TOTAL VOLUME OF WATER APPLIED TO THESE ACRES FROM ALL SOURCES SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

27. The Department finds that no other water rights will be impacted as a result of this change because the change is only to add a point of diversion and the new point of diversion will be operated at a lower flow rate than the historical point of diversion. The Applicant proposes to alternate the use of the points of diversion to prevent any increase in diverted flow rate. The Department will add the following condition:

CONDITION – FLOW RATE

THE TWO POINTS OF DIVERSION SHALL NOT BE USED SIMULTANEOUSLY.

BENEFICIAL USE

FINDINGS OF FACT

28. The Applicants propose to use water for irrigation which is a recognized beneficial use under the Montana Water Use Act. § 85-2-102, MCA

29. The Applicants propose to continue the historical use of 10.18 CFS flow rate and 2271.93 AF diverted volume. This amount is supported by the historical use of Statement of Claim 43B 30160763.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The historical point of diversion will continue to be used to flood irrigate acres that are not under the two new center-pivot sprinkler systems.

31. The proposed transitory point of diversion would be a Cornell 4RB pump operating at 30 HP and capable of diverting 710 GPM (1.58 CFS). The water would be delivered through a pipeline to two center-pivot sprinkler systems. One of the center-pivots operates at 385 GPM and the other at 325 GPM.

32. The entire irrigation system was designed by Watson Irrigation Specialists in Townsend, MT.

33. The Department finds that the proposed diversion and conveyance are adequate for the beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

34. The Applicants signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

35. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to

an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (beneficial use constitutes the basis, measure, and limit of a water right); *Featherman v. Hennessy*, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911) (increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940) (appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924) (“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); *Town of Manhattan*, ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied).¹

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

37. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

² See also *Holmstrom Land Co., Inc., v. Newlan Creek Water District*, 185 Mont. 409, 605 P.2d 1060 (1979); *Lokowich v. Helena*, 46 Mont. 575, 129 P. 1063 (1913); *Thompson v. Harvey*, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896) (change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff's subsequent right).

water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, ¶ 44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); *Matter of Application For Beneficial Water Use Permit By City of Bozeman*, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

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

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 55 -57 (Colo., 1999); *Farmers Reservoir and Irr. Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation

38. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g., Hohenlohe*, ¶ 44; *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *Popham v. Holloron*, 84 Mont. 442, 275 P. 1099, 1102 (1929); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909); *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731; *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; ARM 36.12.101(56) (Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

39. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. *Royston*, 249 Mont. at 431, 816 P.2d at 1059-60; *Hohenlohe*, at ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

40. In *Royston*, the Montana Supreme Court confirmed that an Applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-

system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

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

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

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

42. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right”

requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In *McDonald v. State*, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

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

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

44. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. *E.g.*, *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See *MacDonald*, 220 Mont. at 529, 722 P.2d at 604; *Featherman*, 43 Mont. at 316-17, 115 P. at 986; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

45. The Department has adopted a rule providing for the calculation of historical consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative an Applicant may present its own

evidence of historical beneficial use. In this case Applicants have not elected to proceed under ARM 36.12.1902. (FOF 5).

46. If an Applicant seeks more than the historical consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historical use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g., Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.; Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217, 1223-1224 (Colo., 1988) (historical use of a water right could very well be less than the duty of water); *Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 317, 618 P.2d 1367,

47. Based upon the Applicant's evidence of historical use, the Applicants have proven by a preponderance of the evidence the historical use of 43B 30160763 to be a diverted volume of 2,271.93 AF, a historically consumed volume of 145.4 AF, and flow rate of 10.18 CFS. (FOF 10 - 18)

48. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(b), MCA. (FOF 19 - 27)

BENEFICIAL USE

49. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. *E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519 (Mont. 1st Jud. Dist. Ct.) (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108

P.3d 518); *Worden v. Alexander*, 108 Mont. 208, 90 P.2d 160 (1939); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924); *Sitz Ranch v. DNRC*, DV-10-13390,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900) (“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

50. The Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. The Applicants have proven by a preponderance of the evidence irrigation is a beneficial use and that 2,271.93 acre-feet of diverted volume and 10.18 CFS flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF 28, 29).

ADEQUATE MEANS OF DIVERSION

51. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. *Crowley v. 6th Judicial District Court*, 108 Mont. 89, 88 P.2d 23 (1939); *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002) (information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

52. *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

53. Pursuant to § 85-2-402 (2)(b), MCA, the Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 30 - 33)

POSSESSORY INTEREST

54. Pursuant to § 85-2-402(2)(d), MCA, the Applicants must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

55. The Applicants have proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (FOF 34).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 43B 30161110 should be GRANTED subject to the following.

The Applicants may add a transitory point of diversion from Government Lot 2, Section 20, T1S, R17E, Sweet Grass County, to Government Lot 1 Section 29, T1S R17E, Sweet Grass County. The new point of diversion is limited to 1.58 CFS flow rate.

IMPORTANT INFORMATION

THE SUM TOTAL VOLUME OF WATER APPLIED TO THESE ACRES FROM ALL SOURCES SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

FLOW RATE

THE TWO POINTS OF DIVERSION SHALL NOT BE USED SIMULTANEOUSLY.

NOTICE

The Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2, chapter 4, part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

Dated this 28th day of March 2024.

/Original Signed by Mark Elison/

Mark Elison, Manager
Billings Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 28th day of March, 2024, by first class United States mail.

NAME AND ADDRESS OF ATTORNEY

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