

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

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<b>APPLICATION TO CHANGE AN EXISTING IRRIGATION WATER RIGHT NO. 43D 30145836 BY RONALD A. AND DARLENE J. LUOMA</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On October 7, 2019, Ronald A. and Darlene J. Luoma (Applicants) submitted Application to Change an Existing Irrigation Water Right No. 43D 30145836 to change Water Right Claim No. 43D 197540-00 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. The Application was determined to be correct and complete as of March 13, 2020.

The Department met with the Applicants over the phone on October 2, 2019 for a pre-application meeting. Mark Elison and Christine Schweigert were present for the Department, Ronald Luoma was present for the Applicants. An Environmental Assessment for this Application was completed on March 25, 2020.

**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 IR
- Maps:
  - Undated color aerial photograph showing the historical points of diversion for the past and proposed ditches, conveyance and place of use.
  - Undated color aerial photograph showing the historical and proposed points of diversion.
  - Undated color aerial photograph showing the historical and proposed place of use.

**Information received after application filed**

- Phone interview between West Fork Rock Creek and Rock Creek Water Commissioner PJ Bertolino and DNRC Hydrologist, Christine Schweigert March 12, 2020, discussing ditch operation and capacity.

- Email chain between Christine Schweigert and Department Hydrologist James Heffner dated March 11-12, 2020, discussing conveyance losses.

Information within the Department's Possession/Knowledge

- DNRC water right records
- Water Resources Survey (WRS) for Carbon County dated 1966.
- Aerial photograph DWT-3CC-175 dated 7/30/1962
- Aerial photograph USDA 179-54 dated 9/26/1980
- Sixth Judicial District Court Decree no. 275 dated May 5, 1903
- 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 406-247-4419 to request copies of the following documents.
  - Return Flow Memo dated April 1, 2016
  - Consumptive Use Methodology Memo dated March 17, 2010

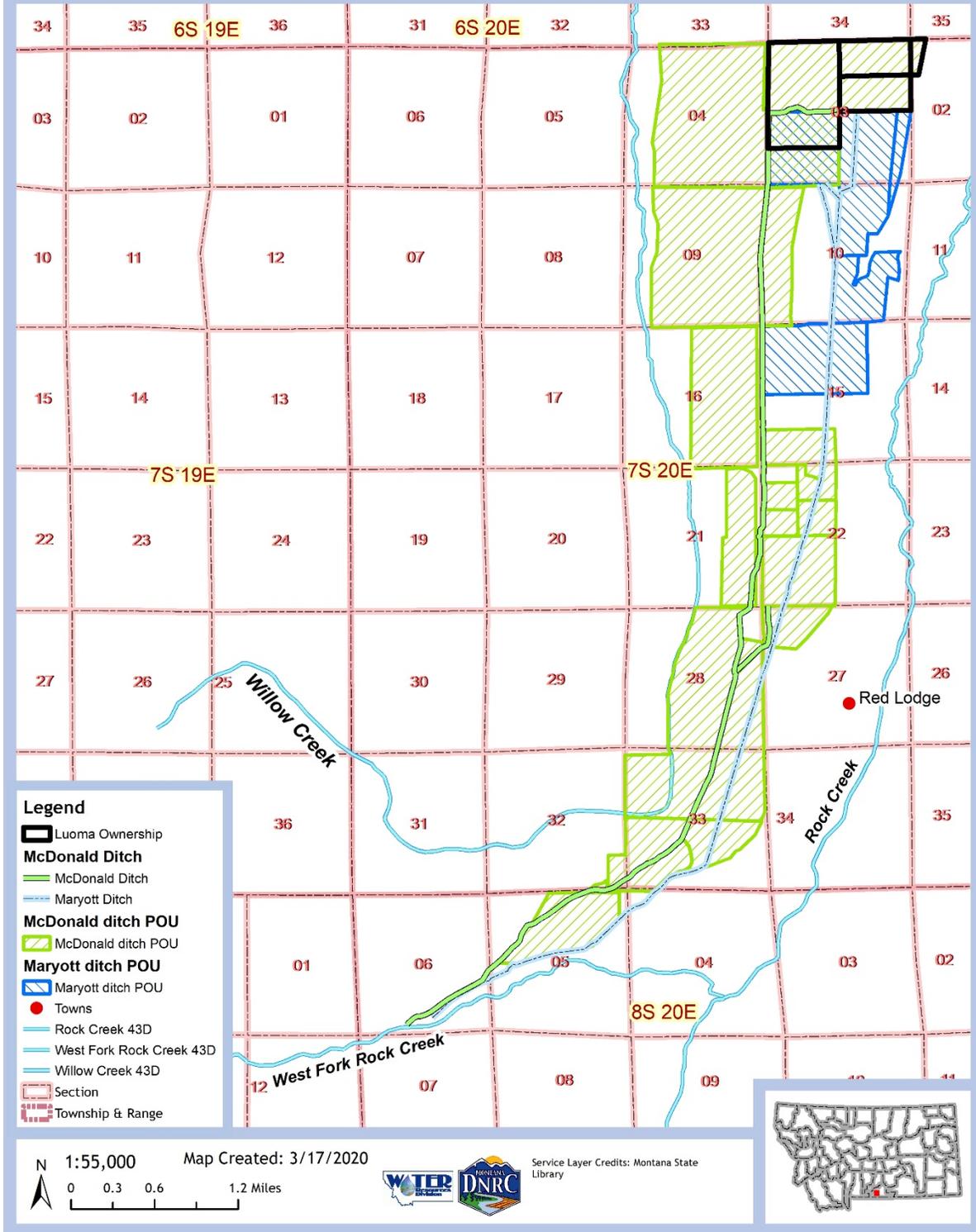
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; IWR means irrigation water requirement POD means point of diversion and POU means place of use.

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

1. The water right proposed for change is Statement of Claim No. 43D 197540-00 with a priority date of June 10, 1893. The point of diversion is the headgate for the McDonald Ditch in the NENWNW Sec. 7, T8S, R20E, Carbon County. The water right diverts up to 1.63 CFS from West Fork Rock Creek to irrigate 174.15 acres; 14.15 in Gov't lot 4 Sec. 2 and 160 in NE Sec. 3, T7S, R20E, Carbon County. The period of diversion and period of use are from May 15 through October 15 each year. The point of diversion is approximately 3.6 miles southwest of Red Lodge and the place of use is approximately 4.5 miles north of Red Lodge, Mt.

**CHG 43D 30145836 Luoma**



2. There are no supplemental or overlapping water rights on the place of use for the water right proposed for change. There have been no previous changes authorized on this water right.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

3. The Applicants propose to change the point of diversion on this water right from the McDonald ditch in the NENWNW Sec. 7, T8S, R20E to the Maryott ditch in the SWSESW Sec. 6, T8S, R20E. The headgates for the historical and proposed points of diversion are approximately 1,000 ft. apart on the West Fork Rock Creek.

4. The McDonald ditch and the Maryott ditch each have multiple users, all other water users on both ditches have been notified, in writing, about the proposed change.

5. There will be no change in the purpose, method, or place of use, there will be no change in the timing of diversion because both ditches divert water before and after the Applicants' period of diversion. There are no diversions between the old and new diversions, therefore no change in the source will occur downstream.

### **CHANGE CRITERIA**

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

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

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

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

appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

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

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

## **HISTORIC USE AND ADVERSE EFFECT**

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

8. The Applicants have historically irrigated 174.15 acres as shown in the Water Resources Survey (WRS) for Carbon County as well as in aerial photos dated July 30, 1962 and September 26, 1980. The entire place of use appears irrigated in the published Carbon County WRS book, the 1962 and 1980 photos show 180.78 acres. Water was historically diverted at a rate of 1.63 CFS via the McDonald ditch headgate from West Fork Rock Creek into a network of ditches. This flow rate was decreed and is distributed by a water commissioner when one is on the source.

9. The Applicant chose to use the Department method outlined in ARM 36.12.1902 to calculate historic consumptive use. Using the Carbon County IWR of 15.57 inches per acre and management factor of 58.3% on 174.15 acres, the historic consumptive use is 131.73 AF ( $174.15 * 15.57 * 0.583 / 12 = 131.73$ ). As per ARM 36.12.1902(17), the Department adds 5% of the field applied volume to account for irrecoverable losses on flood irrigation systems. Field applied volume is calculated as the historically consumed volume divided by on-farm efficiency.

Conversations with the Applicant determined that the efficiency is 60% so the field applied volume is 219.55 AF ( $131.73 / 0.6 = 219.55$ ) and irrecoverable losses are 10.98 AF ( $219.55 * 0.05 = 10.98$ ). The total historic consumptive use including irrecoverable losses is 142.71 AF ( $131.73 + 10.98 = 142.71$ ).

10. The main McDonald ditch is approximately 6 ft. wide and typically runs 3 feet deep at the headgate. The water commissioner stated that a 7 ft. wide 2 ft. deep flume is used to measure water some distance down ditch. The capacity of the flume, according to the US Bureau of Reclamation Water Measurement Manual, is 84.9 CFS. The commissioner said the ditch typically is run between 0.6 to 0.8 which would be a flow of 12.4-19.6 CFS but that they like to run it at 2,000 miner's inches or 50 CFS. The lower flow rates are outside of high spring flows when the water commissioner comes onto the source. The water rights claimed in the McDonald ditch total 80.21 CFS without counting the DNRC water right for 100 CFS to fill Cooney Reservoir (43D 119247-00) and two rights for stock drinking from the ditch (43D 20207-00 and 43D 200016-00). The DNRC right was excluded because it claims multiple sources and ditches and it is impossible to determine how much if any of that water right may be delivered by the McDonald ditch. The stock rights are excluded because they don't have flow rates assigned to them. The claimed flow rates in excess of typical ditch operation indicate that the ditch operation is key to the successful irrigation of all the fields that use the McDonald ditch to deliver their water. The removal of this right from the ditch will not affect the other water users' ability to exercise their rights.

11. The historical diverted volume is 365.81 AF. The Department uses the following formula to determine historic diverted volume:  $\text{Historic Diverted Volume} = (\text{Volume}_{\text{historic consumptive use}} / \text{On-farm efficiency}) + \text{Volume}_{\text{conveyance loss}}$ . The historic consumptive use, not including irrecoverable losses is 131.73 AF. Using a flood irrigation efficiency of 60%, the field applied volume is  $131.73 / 0.60 = 219.55$  AF. Conveyance loss is defined as the portion of water diverted at the headgate that does not arrive at the irrigated place of use due to seepage and evapotranspiration from the ditch. In this case, there are multiple water rights using the same diversion and conveyance facilities. The Department broke the ditch down into 9 segments based on the locations where other water rights are taken out of the ditch. The Applicant's flow rate was then divided by flow remaining in the ditch for each segment to determine their percent of flow in each segment. Those percentages were then applied to the conveyance losses for each segment to determine the Applicants' portion.

12. The conveyance loss is broken down into three parts; seepage loss, vegetative loss and evaporation loss.

13. Seepage loss is calculated as (wetted perimeter)(ditch length)(loss rate)(days)/43560 ft<sup>2</sup>/acre. For the McDonald Ditch up to the Applicants' field, seepage loss is 2,447.71 AF ( $12 \times 44,073.27 \times 1.2 \times 168 / 43560 = 2,447.71$ ) where the ditch is 6 feet wide and 3 feet deep, 44,073.27 ft. long (8.35 miles), the loss rate of 1.2 is based on sandy loam soils and 168 is the number of days the ditch is running (May 15-October 15). The Applicant's portion of the seepage loss is 102.01 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

14. Vegetation loss is calculated as (% loss per mile)(flow in CFS)(days ditch is flowing)(ditch length in miles)\*2. For the McDonald ditch, up to the Applicants' field, vegetation loss is 208.67 AF ( $0.0075 \times 50 \times 168 \times 8.35 \times 2 = 208.67$ ) where percent loss per mile is a constant 0.0075, historical flow rate of 50 CFS is per phone conversation with the water commissioner), 168 days the ditch is on, 8.35-mile length and the unit conversion constant 2 is the number of AF/Day/CFS rounded up from 1.98. The Applicants' portion of the vegetation loss is 43.83 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

15. Ditch evaporation is calculated as (surface area of ditch (length\*width in ft.))(evaporation rate in ft./acre/yr., period adjusted)/43,560 ft<sup>2</sup>/acre. For the McDonald ditch, up to the Applicants' field, the ditch evaporation is 9.77 AF ( $6 \times 44,073.27 \times 1.61 / 43,560 = 9.77$ ) where the ditch is 6 ft. wide, 44,073.27 ft. long and the period adjusted evaporation from Potts is 1.61 (42 inches/year = 3.5 ft. /365\*168 days = 1.61 ft.). The Applicants' portion of evaporation losses is 0.41 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

16. The Applicants' portion of conveyance losses total 146.26 (102.1 + 43.83 + 0.41 = 146.26) with an applied volume of 219.55 AF, the total historic diverted volume for this right is 365.81 (219.55 + 146.26 = 365.81). Calculation spreadsheets listing all of the water rights on each ditch and breaking down the percent of flow for each segment of the McDonald ditch are in the Application file under the "Processing Information & Correspondence" flag.

17. There are no supplemental rights on this place of use. The irrigation system was last used last year.

18. The Department finds the following historic use:

<b>WR Claim #</b>	<b>Priority Date</b>	<b>Diverted Volume</b>	<b>Flow Rate</b>	<b>Purpose (Total Acres)</b>	<b>Consump. Use</b>	<b>Place of Use</b>	<b>Point of Diversion</b>
43D 197540- 00	6/10/1893	365.81	1.63 CFS	Irrigation 174.15 acres	131.73 AF	Gov't Lot 4 Sec. 2 and NE Sec. 3, T7S, R20E	NENWNW Sec. 7, T8S, R20E

***FINDINGS OF FACT – Adverse Effect***

19. The historical and proposed ditches run in the same general direction, sometimes within a few feet of each other, and both deliver water to the proposed place of use. The McDonald ditch main canal delivers the water to within a half mile, a lateral ditch carries the water the rest of the way. The Maryott ditch delivers to the neighbor to the south who flood irrigates using canvas dams and concrete box structures down the last mile of ditch to where it terminates at the Applicants' property and place of use.

20. Department Hydrologist, Christine Schweigert, spoke with the water commissioner, PJ Bertolino on March 12, 2020. Mr. Bertolino said there will be no change in the operation of either ditch due to the proposed change because the ditches don't flow at the rate claimed but at the rate needed to service all of the rights. Because there will be no change in the operation, there will be no change in the conveyance losses to either ditch.

21. There is no change in purpose, place of use or method of irrigation, the historical and proposed consumed volume are the same. Because there will be no increase in the flow rate diverted and therefore no new conveyance losses in the Maryott ditch, the proposed diverted volume is 219.55 which is the field applied volume.

22. Monthly volumes that return to hydraulically connected surface waters under historical and proposed practices will not change because the applied volume and place of use will not change. The other water users on both ditches were notified of the proposed change.

23. The change in claimed flow rates assigned to the Maryott and McDonald ditches will not prevent the other ditch users from exercising their rights. The flow rate of water rights claimed

in both ditches exceed the respective ditch capacity, the water users are able to exercise their rights because of how they operate the ditch.

24. The Applicants' can and will shut down their secondary diversion or the water commissioner will reduce flow at the headgate if a valid call for water is made.

### **BENEFICIAL USE**

#### **FINDINGS OF FACT**

25. Applicant proposes to use water for irrigation. Irrigation is a recognized beneficial use under §85-2-102, MCA.

26. Applicant proposes to use 1.63 CFS flow rate and 219.55 AF diverted volume for 174.15 irrigated acres. This flow rate is supported by the District Court decree case no. 275 dated May 5, 1903 and the phone interview with the water commissioner for the West Fork Rock Creek. The volume is the amount calculated by the Dept using the formulas and equations in rule and policy (FOF 16).

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

27. The Applicants propose to use the existing headgate and conveyance for the Maryott ditch. The water commissioner has stated that this will work and will not cause any change in the operation of the canal. The Applicant will continue to flood irrigate using their existing system.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

28. The Applicants signed the affidavit on the application form affirming the Applicants have 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. (Department file)

### **CONCLUSIONS OF LAW**

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

29. Montana’s change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator’s right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

30. 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

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<sup>1</sup> DNRC decisions are available at:  
[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

31. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana

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

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

Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

32. 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, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

33. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

34. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following 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

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

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).

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

36. 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).

37. 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).

38. 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).

39. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF 9).

40. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular

case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

41. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 43D 197540-00 of 1.63 CFS flow rate and 365.81 AF diverted volume with a consumptive use of 142.71 AF including irrecoverable losses for 174.15 acres. (FOF 8, 9 and 21)

42. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF 19-24)

### **BENEFICIAL USE**

43. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical

year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900) (“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

44. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that the 1.63 CFS flow rate and 219.55 AF diverted volume of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 25-26)

#### ADEQUATE MEANS OF DIVERSION

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

46. In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion);

47. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 27)

## POSSESSORY INTEREST

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

49. The Applicants **have proven** by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (FOF 28)

## 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. 43D 30145836 should be **granted** subject to the following.

The Department determines the Applicants may change 1.63 CFS up to 219.55 AF of 43D 197540-00 and change the point of diversion to the Maryott ditch headgate located in the SWSESW Sec. 6, T8S, R20E, Carbon County.

## NOTICE

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

DATED this 1st day of April 2020.

/Original signed by Mark Elison/  
Mark Elison, Regional Manager  
Billings Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 1st day of April 2020, by first class United States mail.

RONALD A. AND DARLENE J. LUOMA  
310 WILLOW CREEK RD  
RED LODGE, MT 59068

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CHRISTINE SCHWEIGERT  
Billings Regional Office, (406) 247-4419