

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

**IN THE MATTER OF CHANGE APPLICATION)
NO. 41S-30103036 BY BOS TERRA LP)**

FINAL ORDER

Pursuant to the provisions of §§ 85-2-307 through 310, § 85-2-402 MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA, (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, a contested case hearing was held before the Department of Natural Resources and Conservation (Department) on March 1, 2017, in Lewistown, Montana. The purpose of the contested case hearing was to hear objections to Application No. 41S-30103036 to Change a Water Right by Bos Terra, LP for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on July 8, 2016. This Final Order (FO) must be read in conjunction with the Preliminary Determination to Grant (PD) which is hereby incorporated by reference.

APPEARANCES

Applicant Bos Terra LP (hereinafter “Bos Terra” or “Applicant”) appeared at the hearing by and through counsel John Bloomquist. Bos Terra called Scott Irvin, DNRC; Doug Mann, DNRC; Jim Fryer, employee of Bos Terra; and Karl Uhlig, WGM, to testify on behalf of Bos Terra.

Objectors Ackley Lake Water Users Association (ALWUA) and Objector Mark Wichman (collectively “Objectors”) appeared at the hearing by and through counsel James Hubble and Oliver Urick. Objectors called Myrl Nardinger, pivot salesman; Scott Irvin, DNRC; Doug Mann, DNRC; Doug Hitch, president ALWUA; Mark Wichman, Objector and member of ALWUA, Andrew Brummond, MDFWP; and Todd Davis, former employee of a Bos Terra predecessor in interest.

Objector Montana Department of Natural Resources and Conservation, Water Projects Bureau (“Water Projects Bureau”), appeared at the hearing by and through counsel Jessica Wiles. The Projects Bureau presented no testimony or exhibits and was only attending to conduct cross examination.

Objectors Earl and Ernestina Hargrove did not appear at the hearing.

DNRC attorney Barbara Chillcott attended the hearing in support of Scott Irvin and Doug Mann.

EXHIBITS

Applicant moved to admit its exhibit notebook as a whole at the start of the hearing, which consisted of 45 numbered exhibits. Of these, the following exhibits were admitted at the hearing without objection:

Exhibit A2 is described as Statement of Claim for Existing Water rights form with attached Application for Change of Appropriation Water Right and Authorization to Change Appropriation Water Right from [DNRC] claim file for Statement of Claim No. 41S-7479-00 (pages 2-6).

Exhibit A3 is an Authorization to Change Issued by DNRC for claim file for Statement of Claim No. 41S-7479-00 (page 47).

Exhibit A4 is Abstract of Water Right Claim as Modified by the Water Court from DNRC claim file for Statement of Claim No. 41S-7479-00 (pages 79-80).

Exhibit A5 is General Abstracts, map, and verification abstract examination notes from DNRC file for Change Application No. G(W) 007479-01-41S (pages 3-12).

Exhibit A6 is Authorization to Change Appropriation Water Right and Criteria Assessment Review form from DNRC file for Change Application No. G(W) 007479-01-41S (pages 32-33).

Exhibit A7 is Application to Change a Water Right and Supplement from DNRC file for Change Application No. G(W) 007479-01-41S (pages 37-41).

Exhibit A9 is Statement of Claim for Existing Water Rights form with attached Application for Change of Appropriation Water Right and Authorization to Change Appropriation Water Right from DNRC claim file for Statement of Claim No. 41S-11663-00 (pages 2-6).

Exhibit A10 is Authorization to Change Appropriation Water Right from DNRC file for Change Application No. 13619-c41S (page 11).

Exhibit A11 is Andy Brummond memorandum (July 6, 2000) from DNRC file for Change Application No. 13619-c41S (page 12).

Exhibit A13 is Statement of Claim for Existing Water Rights from DNRC claim file for Statement of Claim No. 41S-16518.00 (pages 2-3).

Exhibit A14 is Notice of Completion of Water Development from DNRC file for Permit No 13618-c41S (page 16).

Exhibit A15 is General Abstract for Statement of Claim No. 41S-16519-00.

Exhibit A16 is Statement of Claim for Existing Water Rights form DNRC claim file for Statement of Claim No. 41S 16519-00 (page 2-3).

Exhibit A17 is Change Authorization General Abstract from DNRC file for Change Application No. 41S-1651801 (pages 2-4).

Exhibit A18 is Authorization to Change Appropriation Right from DNRC file for Change Application No. 41S-1651801 (page 6).

Exhibit A19 is Application for Change of Appropriation Water Right from DNRC file for Change Application No. 41-1651801 (pages 9-10).

Exhibit A21 is Statement of Claim for Existing Water Rights form from [DNRC] claim file for Statement of Claim No.41S-16521-00 (pages 2-4).

Exhibit A26 is John Westenberg memorandum to Karl Uhlig with attachments (May 20, 2015)(IR.1.D. Memo 1)

Exhibit A28 is Affidavit of Richard Hockhalter with attachment (December 17, 2014)(IR.3.B. Affidavit).

Exhibit A31 is Certificate and partial case file for Hobson, et. al. v. Belden, et. al., Case No. 882, Mont. 10th Jud. Dist. Ct., Judith Basin (Andy Brummond Deposition Exhibit 4).

Exhibit A32 is Irrigation Water Requirements, Crop Data Summaries (Andy Brummond Deposition Exhibit 5).

Exhibit A33 is Judith River flow rate data and map (Andy Brummond Deposition Exhibit 7).

Exhibit A34 is Field Investigation report (Andy Brummond Deposition Exhibit 12).

Exhibit A35 is Flow rate and water level notes (Andy Brummond Deposition Exhibit 20).

Exhibit A36 is Judith River flow rate data by Montana Fish, Wildlife & Parks (Andy Brummond Deposition Exhibit 21).

Exhibit A37 is Curriculum vitae of Karl Uhlig (Karl Uhlig Deposition Exhibit 23).

Exhibit A43 is Mark Wichman's Responses to Discovery Requests (February 6, 2017).

Exhibit A44 is Ackley Lake Water Users Association's Responses to Discovery Requests (February 6, 2017).

Exhibit A45 is SWPB's Responses to Discovery Requests (February 8, 2017).

Applicant's Exhibits A1, A8, A12, A20, A22-A25, A27, A29, A30, and A38-A42 which consist of General Abstracts of Claims, the PD and supporting material in this matter, the Public Notice and Environmental Assessment in this matter, and the objections in this matter were offered as part of the entire package of Exhibits offered, but as was explained by the Hearing Examiner at the hearing, were not admitted because they simply duplicate what is already in the record (file).

Objectors moved to admit their exhibit notebooks as a whole at the start of the hearing, which consisted of 15 exhibits. Of these, the following exhibits were admitted at the hearing without objection:

Exhibit A is a copy of the Claim File for Statement of Claim 41S 7479-00.

Exhibit B is a copy of the Claim File for Statement of Claim 41S 11663-00.

Exhibit C is a copy of the Claim File for Statement of Claim 41S 16518-00.

Exhibit D is a copy of the Claim File for Statement of Claim 41S 16519-00.

Exhibit E is a copy of the Claim File for Statement of Claim 41S 16521-00.

Exhibit G is the Curriculum Vitae for Andrew Brummond.

Exhibit H is an affidavit by Andrew Brummond.

Exhibit I is a copy of the General Abstract for Claim 41S 119560.

Exhibit J is a copy of Judith River Measurements and Map by Andrew Brummond.

Exhibit K is copies of USGS Topo Maps of the Bos Terra vicinity.

Exhibit L are aerial photos of the Bos Terra area dated 8/30/55, 7/2/68 and 9/9/77.

Exhibit M is an aerial photograph of T15N, R15E, Sec. 34, 35 (undated).

Exhibit N is a copy of Andrew Brummond Deposition Transcript and Exhibits.

Exhibit O is a copy of Karl Uhlig Deposition Transcript and Exhibits.

Objectors **Exhibit F**, which is a copy of the DNRC Change Application File 41S 30103036 (the instant matter), was offered as part of the entire package of Exhibits offered, but as was explained by the Hearing Examiner at the hearing, would not be admitted because they simply duplicate what is already in the record (file).

The Hearing Examiner notes that many of the Exhibits offered and admitted appear to be directed at whether the water rights at issue in this hearing have been abandoned or never perfected. While that issue is not before the Hearing Examiner, those Exhibits are included in

the record in the event that a party files for judicial review of this Hearing Examiner's ruling that he would not certify those issues pursuant to Sec. 85-2-309, MCA. (FO ¶1, *infra*)

PRELIMINARY MATTERS

1. On January 10, 2017, prior to the hearing, Objectors in this matter filed "Objectors' Motion to Certify Issues to the District Court and Brief in Support of Motion." Objectors state that "analysis of Applicant's water rights have led Objectors to conclude that Applicant and/or its predecessors have abandoned or never perfected the water rights at issue." Objectors cite to Sec. 85-2-309(2), MCA, which provides:

At any time prior to commencement or before the conclusion of a hearing as provided in §(1), the Department may in its discretion certify to the District Court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including, but not limited to, issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a Water Judge over all other adjudication matters.

After being fully briefed on the Motion to Certify, this Hearing Examiner determined that given the long history of these rights, including: (1) recognition by the district court of the existence of these rights, Hobson, et al v. Noel, et al, Case No. 982, Tenth Judicial District Court, Fergus County, 1909; (2) that the rights have been subject to previous change authorizations between 1977 and 1980, in which these rights were recognized; and (3) that the Department found historical use of these rights was proven by a preponderance of the evidence (PD at ¶¶ 17-25, 36), certification under § 85-2-309(2), MCA, was not appropriate. Order Denying Motion to Certify, February 6, 2017. Additionally, as was discussed at the opening of the hearing, should at some future date the Water Court determine that these rights have been abandoned, the previous changes and the instant matter would be of no moment, as the underlying water rights would be extinguished. (Hearing Audio Tk. 02) As required by § 85-2-309(2)(b), MCA, the Motion to Certify, the briefs and the Order Denying Motion to Certify are part of the record in this matter.

2. On February 17, 2017, Objectors filed a "Motion to Allow Witnesses to Testify Telephonically." The scheduling order dated November 15, 2016 in this matter set a deadline of February 10, 2017 for any pre-hearing motions. Therefore, the February 17, 2017 motion was deemed untimely and was denied by order dated February 23, 2017.

3. At the start of the hearing, on March 1, 2017, this Hearing Examiner determined that objectors Earl and Ernestina Hargrove had not participated in any pre-hearing conferences or been involved in any way with the proceedings since filing their objection and that the Hargroves did not make an appearance at the hearing and thus concluded that the Hargrove's were in **DEFAULT** and their objection was **DISMISSED** with prejudice.

PROCEDURAL POSTURE/BURDEN OF PROOF/PRODUCTION

4. It is axiomatic that, under Montana water law the applicant for a beneficial water use permit or a change in appropriation right bears the burden of proof to show that all of the criteria under § 85-2-311 (permit) or § 85-2-402 change), MCA, are met at all stages before the Department and courts. Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA which provide:

(2) Except as provided in subsections (4) through (6), (15), and (16) 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) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-

saving methods will salvage at least the amount of water asserted by the applicant.

5. Under the Montana Water Use Act, the Department must make a preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right (§ 85-2-307(2)(ii), MCA). If the preliminary determination proposes to grant the application, the Department must prepare a public notice of the application, including a summary of the preliminary determination. The notice must state that by a date set by the Department, persons may file with the Department written objections to the application. (§§ 85-2-307(b) and 85-2-307(3), MCA).

6. The Department followed this procedure and received four valid objections. Objectors Earl and Ernestina Hargrove objected on the basis of adverse effect, Objector State Water Projects Bureau objected on the basis of adverse effect, and Objectors Mark Wichman and ALWUA objected on the basis of adverse effect. Objections to an Application to Change a Water Right must state facts indicating that one or more of the criteria in § 85-2-402, MCA are not met. (§ 85-2-308(2), MCA) The Hargrove's valid objection was on the basis that they are part owners of Water Right No. 41S-7479-00 and that the change would adversely affect their ability to irrigate their property under that water right (the Hargrove's objection was dismissed with prejudice as stated in ¶3, above). Water Projects Bureau's valid objection was on the basis of supporting the objection of ALWUA since Water Projects Bureau is the actual owner of the ALWUA water right. The ALWUA and Mark Wichman's valid objections were on the basis that there will be an increase in irrigated acres leading to more water being diverted resulting in calls from downstream senior users against ALWUA while they are filling Ackley Lake. (Department File, Objections) Thus, the only issue under consideration for the contested case hearing is the criteria of adverse effect on Objectors due to the proposed change in water rights. All other criteria evaluated in the PD are deemed met.

7. As stated previously, the applicant in a proceeding to Change a Water Right has the burden of proof, at all stages of the proceeding, to show that the applicable criteria have been met. That being said, at the onset of a contested case proceeding in which a Preliminary Determination to Grant has already been issued by the Department, the Department has determined that the applicant has satisfied the applicable criteria for issuance of a permit or change in appropriation right (§ 85-2-307(2)(ii), MCA). If valid objections are not received on an application and the Department preliminarily determined to grant the permit or change in

appropriation right, the department shall grant the application as proposed in the preliminary determination (emphasis provided). (§ 85-2-310(3), MCA).

8. In the instant matter, because an objection has been received, but the Department has preliminarily determined that the application satisfies the applicable criteria, the burden of production shifts to the objector to show how the Department's preliminary determination to grant the application will cause objector adverse effect. Applicant retains the burden of proof as to the criteria and may present evidence at the contested case hearing to rebut any evidence that the Objector proffers at the hearing.¹

9. Consistent with the foregoing, and with the procedures outlined in the Notice of First Pre-hearing Conference dated September 29, 2016, and my opening remarks at the start of the hearing, the contested case proceeded under the premise that the Objectors would have the burden of producing evidence to overcome the Department's Preliminary Determination that the Applicant's change as granted would not adversely affect existing water rights which include the Objectors' water right. The Applicant then had the opportunity to rebut the Objectors' evidence concerning adverse effect. (Notice of First Pre-hearing Conference, Hearing Procedure: (Objectors go first); Bos Terra Hearing audio, Tk. 2)

10. This Final Order addresses the Objectors' valid objection on the criteria of adverse effect – the other criteria, including adequate means of diversion, beneficial use, and possessory interest, were not at issue. Findings of Fact and Conclusions of Law regarding the uncontested criteria are adopted from the PD and incorporated into this Final Order by reference. The Final Order must be read in conjunction with the PD.

¹ See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 326 Mont. 505, 112 P.3d 964 (MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim."

§ 26-1-401, MCA, states "[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

§ 26-1-402, MCA, states "[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

Upon review of the entire record and being fully advised in the premises, this Hearing Examiner makes the following Findings of Fact and Conclusions of Law:

WATER RIGHTS TO BE CHANGED

11. The existing water rights proposed to be changed are Statements of Claim filed in Montana’s general stream adjudication. The following table displays elements of the water rights as *claimed* or *verified* during adjudication examination. (PD ¶ 1)

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41S 16518	Irrigation	Judith River	1.84 cubic feet per second (CFS)	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Sections 2,3, T14N, R15E	May 7, 1890	250
41S 16519	Irrigation	Judith River	1.84 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Sections 2, 3, T14N, R15E	April 20, 1890	250
41S 16521	Irrigation	Judith River	0.75 CFS	May 1 to Sept 30	SESWNW Sec 1, T14N, R14E	Sections 2, 3, T14N, R15E and Section 35 T15N R15E	May 7, 1890	524
41S 11663	Irrigation	Judith River	3.75 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Sections 33, 34, T15N, R15E	May 7, 1890	331
41S 7479	Irrigation	Judith River	15 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Sections 33 and 34, T15N, R15E	April 20, 1890	331

12. The source of water for the five Statements of Claim is the Judith River. Water has been historically diverted by a pump located in the NWSWSE Sec 32, T15N, R15E, and discharged

into a ditch. The ditch conveys water to secondary diversion structures that distribute water to three center pivots. The diversion/conveyance facilities were observed by Department staff during an August 7, 2014 field investigation. (Application; Department Technical Report; Department Memorandum dated January 27, 2015)

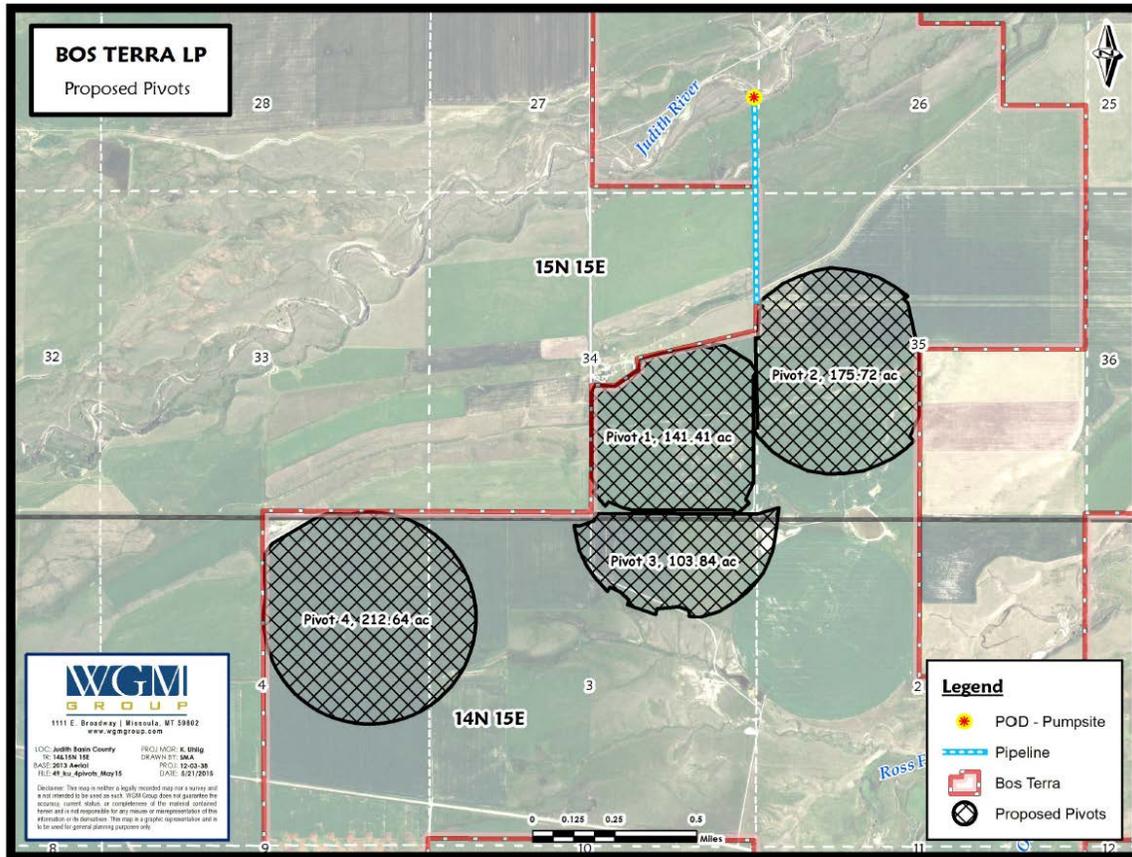
CHANGE PROPOSAL

13. Applicant proposes to change the point of diversion and place of use of the five irrigation water rights noted in Table 1 above. The proposal includes the relocation of a pumpsite and reconfiguration of three center pivot irrigation systems, and addition of a fourth center pivot system. Only three of the four irrigation systems will operate simultaneously. All of the irrigation water rights will be consolidated to appropriate water from the same diversion structure, and supply water to the same places of use. The proposed new point of diversion is located in the SENESE Section 27, T15N, R15E, Judith Basin County. The places of use for the four center pivots are generally located in the SE1/4 Section 34 and W2 Section 35, T15N, R15E, and N2 Section 3 and E2 Section 4, T14N, R15E. Collectively, the places of use for the four proposed center pivots encompass 633.6 irrigated acres, replacing 427.6 irrigated acres under the existing three center pivots. Application; Email communication with Applicant's consultant on June 30, 2016. (PD ¶ 2)

14. The type of irrigation is not changing in this proposal. As such, the timing, location and impact of return flows are not expected to change appreciably. (PD ¶ 3)

15. The application materials indicate flow meters will be installed to measure appropriations to each of the four center pivots. The flow meters will monitor the Department imposed measurement condition on the Authorization so that future use does not exceed historic use. See the Conditions section for the specific language of the condition. Application. (PD ¶ 4)

16. Following is a map of Applicant's proposed project: (PD ¶ 5)



ABANDONMENT/FAILURE TO PERFECT UNDERLYING RIGHTS

FINDINGS OF FACT

17. As stated above in ¶ 1, Objectors moved to certify the issue of abandonment/failure to perfect the instant water rights. That motion was denied by this Hearing Examiner based on the historic decree (Hobson, *supra*), the fact that the rights have been subject to previous change authorizations between 1977 and 1980, in which these rights were recognized, and that the Department found historical use of these rights was proven by a preponderance of the evidence. (PD at ¶¶ 17-25, 36)

18. Objectors continued to assert, at the hearing, that the instant water rights were at some point in time abandoned or were never perfected. Objectors rely on the 1963 Water Rights Survey, aerial photography from 1957, and Mr. Brummond's Affidavit and testimony to support

their contention. (Affidavit of Brummond; Hearing Tk. 11)

19. Objectors provide, at the hearing, evidence that Statement(s) of Claim for the instant water rights were filed with the Montana Water Court in 1980. (Exhibits A – E)

20. Objectors' own witness acknowledges, at the hearing, that the instant water rights have been used since 1977 or 1978. (Testimony of Nardinger, Hearing Tk. 03)

CONCLUSIONS OF LAW

21. Abandonment of a water right requires cessation of the use of the water right with the intention to wholly or partially abandon that right. (§ 85-2-404(1), MCA) Only a court of competent jurisdiction can determine whether an appropriation right has been abandoned. (§ 85-2-405(1), MCA). However, the Department may consider prolonged non-use for purposes of adverse effect. In the instant matter, the Department previously recognized the rights as valid and the uncontested evidence establishes that the rights have been used under the change authorizations since 1977. *See, In the Matter of Application No. 76H-30012871 to Change Water Rights Nos. 76H 105194-00, 76H 107548-00, 76H 107549-00, 76H 212610-00 by Gary and Ramona Evans, DNRC Final Order (2007).*

ADVERSE EFFECT/HISTORIC USE

FINDINGS OF FACT

22. The five water rights proposed for change in this proceeding have been used for the last 35+ years under a center pivot irrigation system now owned by Bos Terra. The basis of the Department's finding is that four of the five water rights were previously changed between 1977 and 1980. The Department has determined that the fifth right, 41S 16521, should have been included in those previous changes. (Department Memorandum dated January 27, 2015) Thus, historic use for all five water rights is based on water use over the last 35-year period. (PD ¶ 17, Testimony of Nardinger Hearing Tk. 03)

23. The Department determined that the maximum flow rate historically appropriated under the combined use of the five water rights for center pivot irrigation is 7.5 cubic feet per second (CFS). This determination is based on discharge measurements made by the Department and from computer-modeled estimates of ditch capacity provided by the Applicant's consultant. In

addition, the flow rate utilized by each of the individual water rights is based on the rate authorized in the previous change proceedings (1977 and 1980), provided the rate does not exceed 7.5 CFS. (PD ¶ 20; Department Technical Report)

24. Because the Applicant did not submit a Historical Water Use Addendum with the application, the Department calculated historic consumptive use and diverted volume as authorized by ARM 36.12.1902 and taking into account the elimination of evaporative losses due ceasing use of the open ditch/reservoir which has been historically used. Using the ARM 36.12.1902 and estimating the historic evaporative losses the Department determined the historic consumptive volume associated with the 427.6 historic irrigated acres to be 537.4 AF. (PD ¶ 22, 23; Department Technical Report)

25. The Department then considered the Applicant's historic operational pattern, irrigation system efficiency and conveyance losses in determining that the historic diverted volume was 819.5 AF, as authorized by ARM 36.12.1902. (PD ¶ 24; Department Technical Report)

26. Objectors assert that the Department's reliance on only the past 35+ years of historic use is not a true picture of the historic use of these water rights. Objectors point to ARM 36.12.1902(1)(e) which states "when a change application has been granted on or after July 1, 1973, the department may request additional historic information for a statement of claim as it was used prior to July 1, 1973." Objectors assert that the Department "ignored" its own rule when it based the historic use analysis based upon the previous change authorizations. Objectors do not provide any alternative figures to challenge the determination of the Department regarding historic diverted or consumptive use. (Hearing Tk. 05; File)

27. Scott Irvin testified that the Department in fact did consider ARM 36.12.1902(1)(e) when it was evaluating the application but given the fact that the water rights have been put to use under the previous change authorizations for the past 30 to 40 years decided not to exercise its discretion under ARM 36.12.1902(1)(e). (Hearing Tk. 05)

28. The Department places a measurement condition on the proposed change authorization wherein the Applicant will only be able to divert no more than 597.1 AF per year from the river as opposed to the historic diverted volume of 819.5 AF. The diversion limitation incorporates the historic consumptive use of 537.4 AF plus irrecoverable losses and system efficiencies. Once 597.1 AF have been diverted from the river no more water will be allowed to be diverted. (PD ¶ 38, 50, 51; Department Technical Report)

29. Objectors' adverse effect argument is based on their assertion that moving the Applicant's point of diversion downstream from the historically used diversion point and ditch will eliminate the seepage water from the ditch that historically returned to the stream below the original diversion point. Objectors provide no quantification of the seepage loss that historically returned to the stream. They argue the effect of losing that seepage water returning to the stream is that users further downstream from the Applicant, who are also senior users to ALWUA, would place calls on ALWUA if those seniors are not able to fulfill their rights thus adversely affecting ALWUA. (Hearing Tk. 08, 09, 10)

30. Objectors provide unrefuted testimony that there are springs which enter the Judith River between the historic place of diversion and the proposed place of diversion and that therefore the Applicant will have access to more water and use more water at the new diversion point. No evidence of water measurements was offered by the Objectors to establish the volumes of water provided by the springs. (Hearings Tk. 12)

CONCLUSIONS OF LAW

31. The determination of historic use in an Application to Change a Water Right is guided by ARM 36.12.1902. ARM 36.12.1902(1)(a) states "historic information for a statement of claim must be described as it was used prior to July 1, 1973 *unless* the Water Right Claim was subject to a previous change in which case it is the date of completion of the change" (emphasis provided). ARM 36.12.1902(1)(e) states "when a change application has been granted on or after July 1, 1973, the department *may* request additional information for a statement of claim as it was used prior to July 1, 1973" (emphasis provided). Upon examination of the Application and considering the previous change authorizations involving these water rights, the Department chose not to exercise its discretion and inquire into their use prior to July 1, 1973. The record in this matter fully supports the Department's decision. (FO ¶ 22 – 27)

32. Objectors reliance on the elimination of seepage water from the ditch/reservoir as contributing to adverse effect is not well taken. Seepage water (and waste) does not have the same status under the law as return flow. ARM 36.12.101(64) and (66) respectively define "return flow" and "seepage water." Return flow "means that part of a diverted flow which is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, *and to which other water users are entitled to a continuation of as part of their water right*" (emphasis provided). Seepage water "means that part of a diverted flow

which is not consumptively used and which slowly seeps underground and eventually returns to a surface or groundwater source, and which other water users can appropriate, *but have no legal right to its continuance*" emphasis provided). In other words, seepage water is treated like waste water and a water user "[cannot] be compelled to continue wasting water in order that an appropriator of the waste water may have a source of supply." In the Matter of the Application for Change of Appropriation Right No. G146094-41J by Louise Galt, DNRC Proposal for Decision (1987), adopted by DNRC Final Order (1987). See also, O'Hare v. Johnson, 116 Mont. 410, 153 P.2nd 888 (1945); Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930). (FO ¶ 29)

33. Compounding the problem with Objectors concerns over the cessation of seepage water is the fact that any seepage water that may have historically occurred would now be water that is never diverted in the first place and is left instream. The Applicant would now be limited to diverting only the volume of water historically consumptively used by the crops plus the efficiency and irrecoverable losses of the new irrigation system. Under the proposed new system there will be 222.4 AF (819.5 AF previously diverted – 597.1 proposed diverted = 222.4 AF) of water left in the stream which previously would have been diverted. That 222.4 AF of water will be available to users further downstream who may have previously relied on that same water. (FO ¶ 28 - 30)

34. Objectors argument that by moving their point of diversion downstream Applicant will have access to and use more water at the new point of diversion thus causing adverse effect is belied by the fact that the Department is limiting the amount of water which can be diverted from the river to less water from the river than was taken historically. In fact, there will now potentially be approximately 222 AF more water in the river for the benefit of users further downstream. More water downstream should lead to a reduction in the number of times Objectors water rights would be called. (FO ¶ 28 - 30)

CONCLUSION

35. This Hearing Examiner concludes that the Objectors have not met their burden to produce evidence to overcome the Department's Findings of Fact and Conclusions of Law regarding Adverse Effect, and that being the only matter at issue for this hearing, this Hearing Examiner adopts in its entirety the Department's Preliminary Determination to Grant Change dated July 8, 2016, in the Matter of Application to Change a Water Right No. 41S 30103036 by Bos Terra.

ORDER

Subject to the terms, analysis, and conditions in this Final Order, Application to Change a Water Right No. 41S 30103026 is **GRANTED**. The water user is authorized to divert no more than 597.1 AF of water between May 1 and September 1 annually from a new point of diversion in the SENESE Section 27, T15N, R15E, Judith Basin County. The water user is further authorized to change the places of use to four center pivots, encompassing 633.6 acres, generally located in the SE1/4 Section 34 and W2 Section 35, T15N, R15E, and N2 Section 3 and E2 Section 4, T14N, R15E (see map in FO Finding of Fact No. 16). Only 3 of the 4 center pivots may be operated simultaneously. Water use records shall be kept and reported to the Department as described in the Conditions section of this Final Order.

CONDITIONS

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41S 30103036 THE DEPARTMENT FINDS THE FOLLOWING CONDITIONS ARE NECESSARY TO MEET THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT § 85-2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

1. **WATER MEASUREMENT RECORDS REQUIRED

THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED IN-LINE FLOW METERS IN THE SUPPLY LINES FOR EACH CENTER PIVOT. THE LOCATION OF THE FLOW METERS MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED TO THE CENTER PIVOTS, INCLUDING THE PERIOD OF TIME. THE RECORDS MUST DISTINGUISH THE APPROPRIATION OF WATER UNDER EACH OF THE WATER RIGHTS AUTHORIZED IN THIS CHANGE AUTHORIZATION.

THE RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

SUBMIT RECORDS TO:
LEWISTOWN WATER RESOURCES OFFICE
613 NE MAIN ST, SUITE E
LEWISTOWN, MT
PHONE: 406-538-7459
FAX: 406-538-7012

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 18th day of May 2017.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 18th day of May 2017 by first class United States mail.

JOHN E BLOOMQUIST - ATTORNEY
RICHARD C TAPPAN JR - ATTORNEY
BLOOMQUIST LAW FIRM, P.C.
3355 COLTON DR STE A
HELENA, MT 59602-0252

FRED ROBINSON – ATTORNEY
JESSICA WILES - ATTORNEY
DNRC STATE WATER PROJECTS
PO BOX 201601
HELENA, MT 59620-1601

JAMES A HUBBLE - ATTORNEY
OLIVER J. URICK - ATTORNEY
HUBBLE LAW FIRM PLLP
PO BOX 556
STANFORD, MT 59479-0556

Cc:
EARL W HARGROVE
ERNESTINA P HARGROVE
123 A ST
LEWISTOWN, MT 59457

DNRC, LEWISTOWN REGIONAL OFFICE
613 NE MAIN, STE E
LEWISTOWN, MT 59457-2020

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, (406) 444-6615

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

APPLICATION TO CHANGE A WATER RIGHT) NO. 41S 30103036 BY BOS TERRA, LP)	PRELIMINARY DETERMINATION TO GRANT CHANGE
--	--

On August 24, 2015, Bos Terra, LP (Applicant) submitted Application to Change a Water Right No. 41S 30103036 to change Statement of Claim Nos. 41S 16522, 41S 138217, 41S 11661, 41S 138218, 41S 16519 and 41S 7479 to the Lewistown Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-402, Montana Code Annotated (MCA), on January 14, 2016. Applicant responded on March 30, 2016, at which point it proposed amending the water rights to be changed to 41S 16518, 41S 16519, 41S 16521, 41S 7479 and 41S 11663. Upon receipt of the substantive amendment proposing to change different water rights, the Department re-set the application received date to March 30, 2016, the received date of the deficiency response. The Application was determined to be correct and complete on June 13, 2016. An Environmental Assessment for this Application was completed on July 6, 2016.

INFORMATION

The Department considered the following information in its decision.

Application as filed:

- Form 606, attachments, maps and irrigation system design plans.

Field Investigation:

- Memorandum from Doug Mann, Department Water Resources Specialist, to Bos Terra, LP and Karl Uhlig, WGM Group, and dated January 27, 2015. The Memo documents observations and findings of the Department's August 7, 2014 field investigation of water use associated with the water rights proposed to be changed.

Information Received after Application Filed:

- Applicant's deficiency response received on March 30, 2016.

- Various email and phone communications between Applicant’s consultant and Doug Mann, Department Water Resources Specialist

Information within the Department’s Possession/Knowledge

- Publically available aerial photos and topographic maps.
- 1963 Judith Basin County Water Resources Survey and associated field notes and maps.
- District Court Decree – Montana Tenth Judicial District, Judith Basin , Case No. 982.
- Montana Supreme Court Order – Bos Terra, LP VS Kent and Julie Beers, Case No. DA 14-0354.
- Montana Tenth Judicial District Court Order, Judith Basin County, Bos Terra VS Kent and Julie Beers, Cause No. DV-13-01.
- Water right records.
- Pre-Application meeting notes.
- Statute and administrative rules.
- Irrigation Change Application Technical Report.
- Montana Irrigation Guide – Condensed Version

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The existing water rights proposed to be changed are Statements of Claim filed in Montana’s general stream adjudication. The following table displays elements of the water rights as *claimed* or *verified* during adjudication examination. Water right records.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres

41S 16518	Irrigation	Judith River	1.84 cubic feet per second (CFS)	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Section s 2,3, T14N, R15E	May 7, 1890	250
41S 16519	Irrigation	Judith River	1.84 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Section s 2, 3, T14N, R15E	April 20, 1890	250
41S 16521	Irrigation	Judith River	0.75 CFS	May 1 to Sept 30	SESWNW Sec 1, T14N, R14E	Section s 2, 3, T14N, R15E and Section 35 T15N R15E	May 7, 1890	524
41S 11663	Irrigation	Judith River	3.75 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Section s 33, 34, T15N, R15E	May 7, 1890	331
41S 7479	Irrigation	Judith River	15 CFS	May 1 to Sept 1	SWSWSE Sec 32, T15N, R15E	Section s 33 and 34, T15N, R15E	April 20, 1890	331

CHANGE PROPOSAL

FINDINGS OF FACT

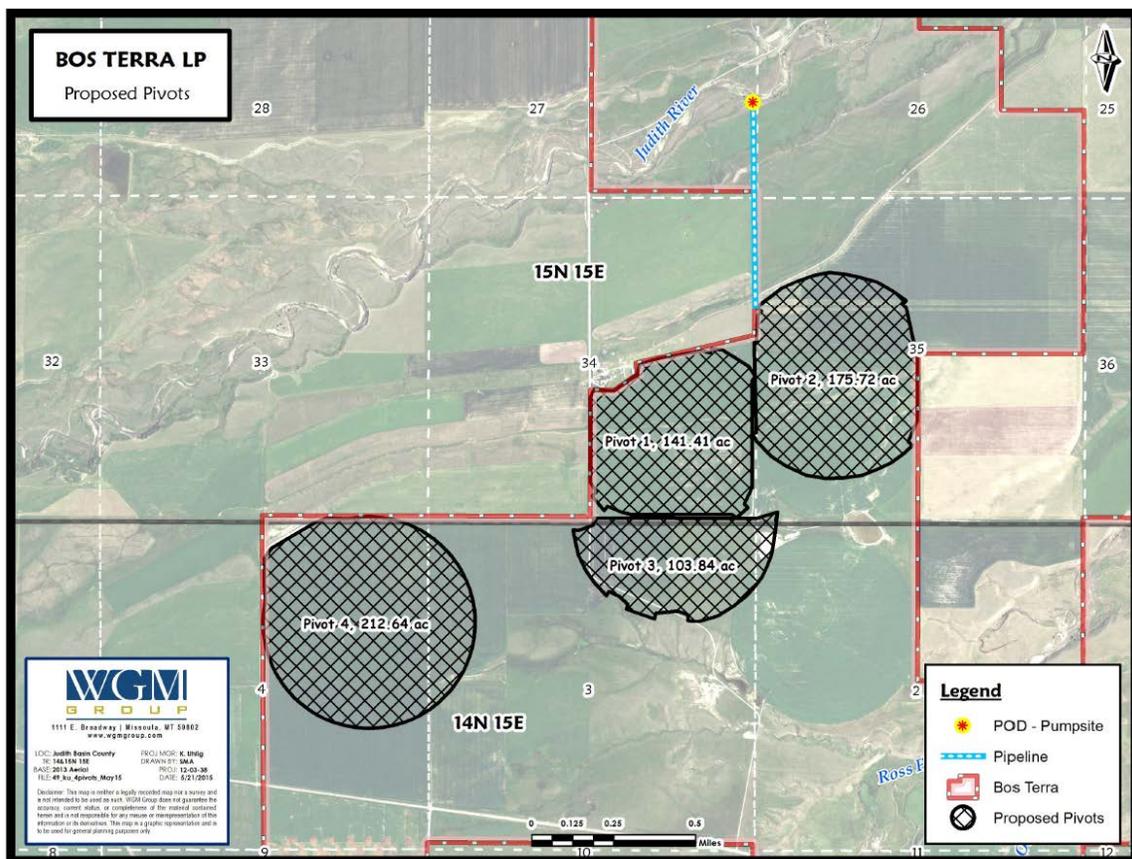
2. Applicant proposes to change the point of diversion and place of use of the five irrigation water rights noted in Table 1 above. The proposal includes the relocation of a pumpsite and reconfiguration of three center pivot irrigation systems, and addition of a fourth center pivot system. Only three of the four irrigation systems will operate simultaneously. All of the irrigation water rights will be consolidated to appropriate water from the same diversion structure, and supply water to the same places of use. The proposed new point of diversion is located in the SENESE Section 27, T15N, R15E, Judith Basin County. The places of use for the four center pivots are generally located in the SE1/4 Section 34 and W2 Section 35, T15N, R15E, and N2 Section 3 and E2 Section 4, T14N, R15E. Collectively, the places of use for the four proposed center pivots encompass 633.6 irrigated acres, replacing 427.6 irrigated acres under the

existing three center pivots. Application; Email communication with Applicant's consultant on June 30, 2016.

3. The type of irrigation is not changing in this proposal. As such, the timing, location and impact of return flows is not expected to change appreciably.

4. The application materials indicate flow meters will be installed to measure appropriations to each of the four center pivots. Therefore, the Department imposes a measurement condition on the Authorization so that future use does not exceed historic use. See the Conditions section for the specific language of the condition. Application.

5. Following is a map of Applicant's proposed project:



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

6. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. 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), and (16) 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) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

7. The burden of proof in a change proceeding by a preponderance of evidence is “more probably than not.” Hohenlohe ¶¶ 33, 35.

8. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶ 43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also 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). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) ... 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.*

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

9. Montana's change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[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.

¹ Although Montana has not codified the law in the detail, Wyoming has, and the two states' requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

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.

Colorado follows a similar analysis under its requirement that a "change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

10. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., *In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer*, (DNRC Final Order 1991); *In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester*, (DNRC Final Order (1992)); *In the Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H*, Proposal for Decision and Memorandum at pgs. 8-22, adopted by Final Order (January 9, 1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) 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, *citing McDonald*).

11. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216. ¶

[56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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 v. DNRC, 2010 MT 203, ¶¶ 43, 45](#); see also [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 9.](#)

12. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Hohenlohe ¶ 43; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); City of Bozeman (DNRC), supra (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors.”) As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA. [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 11](#) (proof of historic use is required even where a water right is decreed).

13. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. [Hohenlohe ¶¶ 30-31.](#)

14. Consumptive use of water may not increase when an existing water right is changed. [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District](#)

Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision adopted by Final Order (2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003) . An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, 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.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

15. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

16. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. Admin. R. Mont. (ARM) 36.12.221(4).

Historic Use

FINDINGS OF FACT

General

17. Generally, the five water rights proposed for change have been used for the last 35+ years under a center pivot irrigation operation, now owned by Bos Terra (Applicant). Bos Terra asserts that all historic water use associated with the five irrigation water rights has occurred under their center pivot operation, and no irrigation has occurred under the other owners of the water rights (Earl and Ernestina Hargrove, and Gregory and Karen Grove). For purposes of this change process, the Department's findings support Bos Terra's assertion. Four of the five water rights were previously changed between 1977-1980 and the fifth right, 41S 16521, should have been included in the changes. See Department Memorandum dated January 27, 2015. Historic use in this proceeding is based on water use over the last 35-year period.

Water Source, Diversion Point, Conveyance Facilities, Period of Diversion, and Flow Rate

18. The source of water for the five Statements of Claim is the Judith River. Water is diverted by a pump located in the NWSWSE Sec 32, T15N, R15E, and discharged into a ditch. The ditch conveys water to secondary diversion structures that distribute water to three center pivots. Application; Department Technical Report; Department Memorandum dated January 27, 2015. The diversion/conveyance facilities were observed by Department staff during a August 7, 2014 field investigation.

19. For adjudication purposes the claimed period of diversion/use is May 1 through September 1, except the period for one of the five claims is May 1 through September 30 (41S

16521). Applicant notes in its deficiency letter response that the irrigation systems have *typically* operated from May 1 through August 31. Richard Hockhalter, who worked on the Bos Terra property for 42 years, including in the position of Farm Manager, supplied an affidavit to the file that indicates irrigation operations historically commenced in early to late May and lasted as late as the first of October. The growing season in Climatic Area IV is reported in the Department's administrative rules to be April 20 through October 10. The Department finds the historic period of diversion/use to be May 1 through September 1. Department Technical Report; ARM 36.12.112; Application file.

20. The maximum flow rate appropriated under the combined use of the five water rights under the center pivot operation is 7.5 CFS, based on discharge measurements taken by the Department, and computer-modeled estimates of ditch capacity provided by the Applicant's consultant. The flow rate utilized by each individual water right is based on the rate authorized in the previous change proceedings (1977 and 1980) or the claimed rate (41S 16521), provided the rate does not exceed 7.5 CFS. Department Technical Report.

Place of Use

21. The Department's interpretation of a 1991 aerial photo, and 2014 field investigation, support 427.6 acres as being historically irrigated under the three center pivots. Department Technical Report; Department Memorandum dated January 27, 2015.

Volume of Water Historically Consumed and Diverted

22. Applicant did not submit an Historical Water Use Addendum with the application materials. Application. Therefore, the Department calculated historic consumptive and diverted volume based on its administrative rules. ARM 36.12.1902(16). Additionally, since an open ditch and reservoir will be eliminated from the irrigation system, evaporation associated with those two components will be added into the calculation for consumptive volume.

23. The historic consumptive volume is calculated to be 537.4 AF, including estimates for crop consumption and irrecoverable losses associated with 427.6 irrigated acres, ditch evaporation and reservoir evaporation. The consumed volume of each of the rights being changed is based on the Applicant's explanation of historic operations and is shown in Table 2 below. Department Technical Report.

24. The historic diverted volume is calculated to be 819.5 AF, including consideration of Applicant's operation pattern, irrigation system efficiency and seasonal conveyance losses.

The diverted volume of each of the rights being changed is based on the Applicant's explanation of historic operations and is shown in Table 2 below. Department Technical Report.

Historic Use

25. The Department's summarized findings for historic use of the Statements of Claim to be changed follow in the table below.

Table 2: Historic Use

W.R. NO.	FLOW RATE (CFS)	DIVERTED VOLUME (AF)	CONSUMED VOLUME (AF)	PURPOSE	PERIOD OF USE	PLACE OF USE (ACRES)	PRIORITY DATE	SOURCE
41S 16518	1.84	92.6	60.7	Irr	5/1-9/1	427.6	5/7/1890	Judith River
41S 16519	1.84	327.0	214.5	Irr	5/1-9/1	427.6	4/20/1890	Judith River
41S 16521	0.75	92.6	60.7	Irr	5/1-9/1	427.6	5/7/1890	Judith River
41S 11663	3.75	59.8	39.2	Irr	5/1-9/1	427.6	5/7/1890	Judith River

41S 7479	7.5	247.5	162.3	Irr	5/1-9/1	427.6	4/20/1890	Judith River
Total All Statements of Claims	Combined Flow Rate is 7.5 CFS	819.5 AF	537.4 AF	Irr	5/1-9/1	427.6	Variable	Judith River

CONCLUSIONS OF LAW

26. 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 no changes could have been made to those rights after that date without the Department’s approval. §85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (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, *citing Featherman v. Hennessy*, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than

not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

27. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right, or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, reflecting basic water law principles).

28. The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. Id. at Pg. 14.

29. 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 (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

30. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16)

31. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005); 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”).

32. 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., supra. 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. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

33. “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), supra; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, supra.

34. The Department has the authority to consider waste in determining a volume for change in a water right.

The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶21, 351 Mont. 26, 208 P.3d 868](#).

Hohenlohe ¶ 71.

35. Applicants may proceed under ARM. 36.12.1902, the Department's historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case the Applicant adopted the Department rule for crop consumptive volume but not for diverted volume. The Applicant's estimate for diverted volume is reasonable.

36. Evidence of historic use for Statement of Claim Nos. 41S 16518, 41S 16519, 41S 16521, 41S 7479, and 41S 11663 has been proven by a preponderance of the evidence as set forth in these findings, and as summarized in the table in Finding of Fact No. 25.

Adverse Effect

FINDINGS OF FACT

37. Applicant proposes to change the point of diversion and place of use of five irrigation water rights. The proposal includes the relocation of a pumpsite and reconfiguration of three center pivot irrigation systems, and addition of a fourth center pivot system. Only three of the four irrigation systems will operate simultaneously. All of the irrigation water rights will be consolidated to appropriate water from the same diversion structure, and supply water to the same places of use. The period of diversion and use will remain the same as historically. Application.

38. The place of use as proposed will encompass 633.6 acres, replacing an existing 427.6 acres. While the number of acres irrigated will be increased, the estimated consumed volume of water will remain the same as historically (537.4 AF), and the diverted volume will decrease from 819.5 AF to 597.1 AF. Department Technical Report.

39. The new or reconfigured place of use is located substantially in the same vicinity as the place of use over the last 35 years, and the method of irrigation under the old and new systems is the same. The efficiency of the newer model center pivot systems (proposed) may be slightly higher than the old models (existing). As such, the timing and amount of return flows will not change, or there may be a slight reduction in return flows, as a result of the proposed change.

40. Applicant will measure all appropriations of water. Application. To ensure compliance with the amount of water appropriated, the Department imposes measuring and record-keeping conditions in this order. See Conditions section for details.

41. Under the conditions imposed in this determination the Department finds the proposed change will not adversely affect the use of 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.

CONCLUSIONS OF LAW

42. The Applicant bears the affirmative burden of proving that 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. §85-2-402(2)(a), MCA. Royston, *supra*. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

43. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (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 (1909), 38 Mont. 302, 100 P. 222 (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); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, where the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it deprived the plaintiff of his subsequent right).

44. The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13; *City of Bozeman (DNRC)*, supra; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

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

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...

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 ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988). The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand

for beneficial use under the holder's decreed water right operating in priority." Citations omitted) . . .

... it is inherent in the notion of a "change" of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

...we have explained this limitation by noting that "over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes." (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) "Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion."

FN9. The term "historic use" refers to the "historic consumptive use," (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

45. Consumptive use of water may not increase when an existing water right is changed. E.g., *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted Final Order (2003). Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC Proposal for Decision 2003); *In the Matter of Application to Change a Water Right No. 43B 30002710 by USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

46. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of a water right and an appropriator is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. see also, Doney, p. 21.

The Montana Supreme Court also 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; see discussion in Hohenlohe, *supra*.

47. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., Hohenlohe, *supra*; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water

supply to exercise their water rights. E.g., Royston, supra. The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

48. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of 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 No. 41)

Beneficial Use

FINDINGS OF FACT

49. The proposed beneficial use is irrigation of agricultural crops. Specifically, Applicant indicates it will raise small cereal grains, including barley and wheat, and occasionally corn or pasture grass. Application. Irrigation is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

50. The proposed flow rate for the new diversion structure (pump) is 7.5 CFS, and the diverted volume is 597.1 AF. The total acreage to be irrigated is 633.6 acres under four center pivot sprinkler systems. However, Applicant will only operate up to 3 of the 4 center pivots at any given point in time. The per-acre allocation for flow rate is approximately 5.3 to 6.4 gallons per minute, depending on the range of acres being irrigated. The per-acre allocation is commonly within irrigation design standards for center pivots in Montana. The Department finds the proposed flow rate to be a beneficial use of water.

51. The volume of water diverted/used is based on Department administrative rule, industry-referenced center pivot efficiencies and a Department policy memo titled "Development of standardized methodologies to determine Historic Diverted Volume" dated September 13, 2012. Application; ARM 36.12.1902(16). 597.1 AF applied across 633.6 acres is equivalent to roughly 1 AF per acre. Applicant intends on growing cereal grains such as barley and wheat, and sometimes corn, which have lower water requirements than other types of crops such as alfalfa. The Montana Irrigation Guide Condensed Version shows the irrigation water requirement for small grains for Climatic Area IV in a normal year, for example, is about 1.2 AF per acre (sprinkler irrigation at 70% efficiency), or slightly more than the 1 AF per acre allocation under the change. The Department finds the proposed volume to be a beneficial use of water, irrespective of whether a full-duty of water can be applied to the crop. Montana Irrigation Guide – Condensed Version; Application.

CONCLUSIONS OF LAW

52. Under the change statute, §85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§85-2-301 and 311(1)(d), MCA.

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. The amount of water under a water right 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 (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (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); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly

v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohy. The Department can also consider waste in a change proceeding. Hohenlohe ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

53. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

54. Applicant proposes to use water for irrigation purposes, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and the amount of water proposed in this proceeding is a beneficial use. § 85-2-402(2)(c), MCA. (FOF No. 51)

Adequate Diversion

FINDINGS OF FACT

55. Water will be appropriated from the Judith River by a pumping station located in the SENESE Section 27, T15N, R15E, Judith Basin County. The proposed diversion means consists of a 200-horsepower turbine pump set in a stilling well adjacent to the river. Water will be diverted and pumped through a 24-inch PVC pipeline to a booster station, where it will be distributed to the four center pivots by two booster pumps (100 and 150 horsepower). The pumping system capacity is 7.5 CFS. The irrigation plan includes utilization of water by three of the four center pivots at any given time. That is, one of the four center pivots will set idle, while the other three apply water to their respective fields, then a system rotation will occur. The file includes system designs and specifications from RPH Irrigation Services Limited, a business specializing in irrigation equipment and design in Choteau, Montana. Application file.

56. The Department finds the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Application.

CONCLUSIONS OF LAW

57. Pursuant to §85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, 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.

58. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1) (a), MCA; see also, *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); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), affirmed, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *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); *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).

Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

59. 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. §85-2-402 (2)(b), MCA. (FOF No. 56).

Possessory Interest

FINDINGS OF FACT

60. The Applicants signed and had the affidavit on the application form notarized affirming it 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. File.

CONCLUSIONS OF LAW

61. Pursuant to §85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, 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 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.

62. Pursuant to ARM. 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory

interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

63. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. §85-2-402(2)(d), MCA. (FOF No. 60)

Salvage Water

This Application does not involve salvage water.

CONDITIONS

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41S 30103036 THE DEPARTMENT FINDS THE FOLLOWING CONDITIONS ARE NECESSARY TO MEET THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT § 85-2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

1. **WATER MEASUREMENT RECORDS REQUIRED

THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED IN-LINE FLOW METERS IN THE SUPPLY LINES FOR EACH CENTER PIVOT. THE LOCATION OF THE FLOW METERS MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED TO THE CENTER PIVOTS, INCLUDING THE PERIOD OF TIME. THE RECORDS MUST DISTINGUISH THE APPROPRIATION OF WATER UNDER EACH OF THE WATER RIGHTS AUTHORIZED IN THIS CHANGE AUTHORIZATION.

THE RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

SUBMIT RECORDS TO:
LEWISTOWN WATER RESOURCES OFFICE
613 NE MAIN ST, SUITE E

LEWISTOWN, MT
PHONE: 406-538-7459
FAX: 406-538-7012

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 41S 30103036 should be **GRANTED**. The water user is authorized to change the point of diversion to the SENESE Section 27, T15N, R15E, Judith Basin County. The water user is further authorized to change the places of use to four center pivots, encompassing 633.6 acres, generally located in the SE1/4 Section 34 and W2 Section 35, T15N, R15E, and N2 Section 3 and E2 Section 4, T14N, R15E (see map in Finding of Fact No. 6). Only 3 of the 4 center pivots may be operated simultaneously. Water use records shall be kept and reported to the Department as described in the Conditions section of this Preliminary Determination.

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 8th day of July 2016.

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown 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 8th day of July 2016, by first class United States mail.

Bos Terra, LP
PO Box 169
Hobson, MT 59452

ELECTRONIC COPY:
Karl Uhlig, WGM Group, Inc
1111 East Broadway St
Missoula, MT 59802

Lewistown Regional Office
(406) 538-7459