

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

\*\*\*\*\*

**IN THE MATTER OF CHANGE APPLICATION )  
NO. 41I-30110489 BY BLUE BOX RANCH )  
LLC )**

**FINAL ORDER ON MOTION FOR  
SUMMARY JUDGMENT**

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Pursuant to the provisions of §§ 85-2-309 through 311, 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.*, this matter comes on as a contested case before the Department of Natural Resources and Conservation (Department or DNRC). The purpose of the contested case is to resolve objections to Application for Beneficial Water Use Permit No. 41I 30110489 by Blue Box Ranch LLC., for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on October 17, 2018. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PDG) which is hereby incorporated by reference and is attached to this Order as "Attachment A".

**BACKGROUND**

On February 27, 2017 Blue Box Ranch LLC (Applicant) submitted Application to Change Water Right No. 41I 30110489 to change Water Right Claim No. 41I 17090-00 to the Department's Helena Regional Office. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated August 21, 2017. The Applicant's consultant, Kyle Mace (WGM Group), responded with information dated September 1, 2017, and February 13, 2018. The Application was determined to be correct and complete as of June 19, 2018 and an Environmental Assessment was completed the same day. (PDG)

The Department issued the PDG on October 17, 2018, and published notice of that determination on November 1, 2018, in the Broadwater Reporter. The Department also provided notice to interested individuals on October 31, 2018. The deadline for objections to be filed was December 17, 2018. The Application received one valid objection. Albert Bodle Jr., Mary Huth, and Thomas Huth (Objectors) objected to the Application on the grounds of adverse effect and adequacy of the diversion works pursuant to § 85-2-402(2)(a) and (b), MCA. (File)

A contested case hearing was scheduled for April 10, 2019. On March 15, 2019 counsel for the Applicant filed a Motion for Summary Judgment and Brief in Support (Motion). Pursuant to ARM 36.12.213(1)(b) the Objectors deadline for filing a response to the Motion was March 29, 2019. No response was filed. On March 29, 2019 this Hearing Examiner vacated the April 10, 2019 hearing in order to rule on the Motion. (File)

By this Order the Hearing Examiner rules on the Motion for Summary Judgment. This Order must be read in conjunction with the PDG which is incorporated by reference.

### **PROPOSED CHANGE AND OBJECTION**

Applicant seeks to add a point of diversion to Water Right Claim No. 411 17090-00, with a priority date of April 1, 1878. The Montana Water Court Temporary Preliminary Decree for Basin 411, issued on March 8, 1995, identified a flood irrigation use of 70.10 acres for 411 17090-00 in the N2 of Sec.12, Township 8 North (T8N), Range 2 East (R2E), Broadwater County. This water right has a claimed flow rate of 1.13 cubic feet per second (CFS) and an unquantified volume. The historical point of diversion (POD), located in the NWNWSW of Sec. 6, T8N, R3E, is a headgate on Duck Creek. The claimed period of use and period of diversion is from April 15 to October 19, annually. (PDG ¶ 1)

The Applicant proposes to add an additional pump POD to Statement of Claim No. 411 17090-00. The additional POD would be approximately 1.0 mile downstream from the existing POD. The proposed POD is located in the NWNENW of Sec. 12, T8N, R2E. The new diversion will utilize a pump and pipeline system to irrigate approximately 32 acres of the 70.10 acre place of use in rotation with the existing POD. (PDG ¶ 3)

If approved, the Applicant will install a new pump, pipe, and sprinkler system that will be used in rotation with the existing POD. Applicant plans to divert 155.77 AF through the pump and pipeline system in rotation with the historic point of diversion that consisted of a headgate and ditch system. Historically the Applicant would divert 520.76 AF through the headgate and ditch system. (PDG ¶ 4)

The place of use will not change, but the method will change in part from flood irrigation to a pivot system irrigating 32-acres utilizing the pump and pipeline system. The remaining acres in the POU will continue to be flood irrigated utilizing both PODs in rotation with one another. (PDG ¶ 5)

The Hearing Examiner notes that there is only one objection to this Application and that Objection was signed by three individuals. Those three individuals use the same address. The original objection only objected to the criteria of adverse effect. A single deficiency letter was sent to those individuals at that address prompting them if they also meant to include the criteria of adequacy of diversion. A response was received, signed by all three objectors, simply stating “. . . we would like to amend our original objection so that it will include Diversion Works as a valid objection.” No further supporting materials were included. The Department subsequently determined the objection valid as to the criteria of adverse effect and adequacy of diversion. (Objection; Response to Deficiency Letter)

The basis for the objection is that Objectors believe that the existing POD and ditch have not been used for 10 years and that the ditch requires extensive maintenance. Objectors also contend that the existing headgate leaks a great deal of water and that there is no way to accurately measure the water entering the ditch. Objectors “feel that the ability for Blue Box Ranch LLC to exceed their flow rate is too great with two POD’s” and only one POD should be approved. Objectors contend that if both POD’s are approved the existing headgate needs to be fixed and have an adequate measuring device. (Objection)

#### **APPLICABLE LAW**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Capital One v. Guthrie*, 2017 MT 75, ¶11; 387 Mont. 147; 392 P.3d 158 (*citing*: M. R. Civ. P. 56(c)(3); *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1; 221 P.3d 1200).

The moving party has the burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *In re Estate of Harmon*, 2011 MT 84A, ¶ 14, 360 Mont. 150, 253 P.3d 821. Once established, the non-moving party must then present substantial evidence that raises a genuine issue of material fact essential to one or more elements of the case. *Apple Park LLC v. Apple Park Condos LLC*, 2008 MT 284, ¶ 11, 345 Mont. 359, 192 P.3d 232.

Rule 56(e)(2), M.R.C.P. provides “[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own

pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”

The Hearing Examiner is authorized to rule on motions filed in a contested case proceeding, including motions for summary judgment. ARM 36.12.203(2)(b); ARM 36.12.213(1)(a).

### **ANALYSIS**

Applicant’s Motion asks that this Hearing Examiner grant summary judgment on the issues of adequacy of diversion and adverse effect. Applicant also requests a determination that this Hearing Examiner does not have jurisdiction to grant the relief that the Objectors request.

#### **Summary Judgment**

Applicant supports its Motion with the Objectors’ responses to its “First Discovery Requests to Albert Bodle Jr. and Thomas and Mary Huth.” Applicant argues that those responses show that there are no genuine issues of material fact as to either the adequacy of diversion or adverse effect criteria.

While Objectors’ responses to the First Discovery Requests is unsigned by the Objectors and appears to be filed out by one individual, the Hearing Examiner notes that the Requests were addressed and sent to all three individuals at the address they provided, and given the history of correspondence with these individuals in this matter, it is reasonable to conclude that the responses provided represent the viewpoint of all the individuals listed on the Objection. (Motion, Exhibit A)

Request for Admission No. 2 states “[p]lease admit that the proposed means of diversion, construction, or operation of the proposed diversion works associated with the change application are adequate.” Response: “yes.” (Motion, Exhibit A)

Interrogatory No. 13 asks “[p]lease identify by paragraph number each and every finding of fact or conclusion of law contained under the Preliminary Determination to Grant Change which you contend is incorrect or not accurate.” Answer: “none.” (Motion, Exhibit A)

Interrogatory No. 14 asks “[f]or each finding of fact or conclusion of law identified in your answer to Interrogatory No. 13, please state the factual basis for any contention you have that

the finding or conclusion is incorrect or not accurate.” Answer: “none.” (Motion, Exhibit A).

There is no indication in either the Objection or Response to Deficiency Letter that Objectors contend that the new POD in and of itself will create an adverse effect or that the new means of diversion are inadequate. (Objection; Response to Deficiency Letter)

Based upon the Objectors’ discovery responses, they have admitted that the proposed means of diversion, construction or operation of the proposed diversion works associated with the change application are adequate. Under Rule 36(b), M.R.C.P., a matter admitted under a request for admission is deemed to be conclusively established.

In answering Interrogatory Nos. 13 and 14, which are specific to the findings and conclusions contained in the PDG, the Objectors state they could identify no finding of fact or conclusion of law which they contend is inaccurate or incorrect.

As stated above, Objectors did not file a response to the Motion. In failing to respond to the Motion Rule 56(e)(2) is applicable.

The PDG establishes that the criteria for adequacy of diversion and adverse effect have been met.

As for adequacy of diversion the PDG states “[t]he additional point of diversion will be approximately 1 mile downstream and west of the existing POD, located in the NWNWNW of Section 12, T8N, R2E. The Applicant will install a Cornell 2.5YH or similar pump with an in-line flow meter. The system will be built to ensure that the flow rate will not exceed the historical use of 1.13 CFS and a maximum diverted volume of 155.77 AF.” (PDG ¶21) Based on this finding the PDG concludes that the criteria for adequacy of diversion, § 85-2-402(2)(b), MCA, has been met. (PDG ¶ 40)

As for adverse effect, the PDG finds, *inter alia*, [t]he Applicant will not use both points of diversion simultaneously, and more water will be left instream from the existing POD to the pump system when the pump system is active. The proposed pump system will be designed to ensure that the maximum flow rate of 1.13 CFS will not be exceeded. The pump system can be shut down and the operators can cease to divert water to ensure that the proposed use will not exceed historical practices or affect senior water users.” (PDG ¶ 15) The PDG concludes that the criteria of adverse effect, § 85-2-402(2)(a), MCA, has been met. (PDG ¶ 36)

Objectors’ admissions support a conclusion that the PDG is accurate and correct.

This Hearing Examiner finds that summary judgment is appropriate and concludes that there are no genuine issues of material fact concerning the Mont. Code Ann. § 85-2-402(2)(a) or (b) criteria. The PDG should be affirmed by summary judgment on the issues of adverse effect and adequacy of diversion.

### **Jurisdiction**

Applicant also contends that Objectors' sole concern with the Application are related to the existing point of diversion in that the existing headgate leaks and that there is not an adequate measuring device at the existing diversion. Applicant contends that this Hearing Examiner lacks jurisdiction over the Objectors' concerns and that the instant proceeding is not the proper forum to provide the relief that the Objectors desire. This Hearing Examiner agrees.

Responding to Interrogatory No. 9 and Request for Production No. 9 regarding how the Objectors may be adversely affected, the Objectors provided photos of the existing headgate structure situated at the existing POD and provided a narrative answer that "photos showing holes in original POD."

Interrogatory No. 11 goes on to ask "[p]lease state the basis in fact for any contention you have that the existing headgate at the existing point of diversion for Water Right 41I 17090-00 does not function adequately." Response: "it has holes and leaks." When asked about issues Objectors had with the existing headgate at the existing POD Objectors responded, "it has holes and leaks."

Interrogatory No. 12 asks "[p]lease state the basis in fact for any contention you have that water cannot be properly measured at the existing point of diversion for Water Right 41I 17090-00 and also at the proposed additional point of diversion under the application." Response: "no measuring scale & not a measuring device by definition [at the] existing POD."

It is clear to this Hearing Examiner that the Objectors' concerns are related to the adequacy of the existing headgate and not to this change application per se. This Hearing Examiner notes that the Applicants water right, 41I-17090-00, is not the only water right utilizing the existing headgate. There are at least twelve other water rights that are diverted through the existing headgate. The existing headgate will continue to be utilized as authorized by Water Right No. 41I 17090-00 and the other water rights with or without the instant change proceeding. The Objectors' concerns can be properly characterized as a potential water distribution controversy.

“The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973.” Mont. Code Ann. § 85-2-406(1). “A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered [through the general stream adjudication] . . .” The Applicant points out, “[a]s the existing water rights of the Objectors, and the Applicant under 41I 17909-00 [sic] are the subject of a prior decree on Duck Creek, and the subject of an enforceable Water Court decree issued for Basin 41I, the district court has authority on the issues related to the adequacy of the existing headgate to which Objectors complain in this proceeding . . .” Motion p. 6, citing. § 85-5-101, MCA (appointment of water commissioners) and § 85-5-302, MCA (requirement for suitable headgate and water measurement devices).

Because Objectors concerns regarding the adequacy of the existing diversion is a potential water distribution controversy within the jurisdiction of the district court which could involve multiple parties (including parties not party to the instant proceeding) this Hearing Examiner concludes that he lacks jurisdiction to address Objectors’ objection on adverse effect on the issues alleged and cannot provide relief to the Objectors concerning their allegations in this proceeding.

### **CONCLUSION**

For the foregoing reasons Blue Box Ranch LLC’s Motion for Summary Judgment on the issues of adverse effect and adequacy of diversion (§ 85-2-402(2)(a) and (b)) is **GRANTED**.

In addition, this Hearing Examiner does not have jurisdiction to address the Objectors’ concerns regarding the existing headgate. To the extent that Objectors’ objection regarding adverse effect is related to the existing headgate, said objection is **DISMISSED**.

Application to Change an Existing Irrigation Water Right No. 41I 30110489 by Blue Box Ranch LLC is **GRANTED** as provided in the Preliminary Determination to Grant Change dated October 17, 2018.

IT IS SO ORDERED.

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**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.

Dated this 28<sup>th</sup> day of June 2019.

/Original signed by David A. Vogler/

David A. Vogler, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER ON MOTION FOR SUMMARY JUDGMENT was served upon all parties listed below on this 28<sup>th</sup> day of June 2019 by first class United States mail.

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**COPY**

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

\*\*\*\*\*

**APPLICATION TO CHANGE WATER RIGHT )  
NO. 411 30110489 BY BLUE BOX RANCH )  
LLC ) PRELIMINARY DETERMINATION TO  
GRANT CHANGE**

\*\*\*\*\*

On February 27, 2017 Blue Box Ranch LLC (Applicant) submitted Application to Change Water Right No. 411 30110489 to change Water Right Claim No. 411 17090-00 to the Helena 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 §85-2-302, Montana Code Annotated (MCA), dated August 21, 2017. The Applicant's consultant, Kyle Mace (WGM Group), responded with information dated September 1, 2017, and February 13, 2018. The Application was determined to be correct and complete as of June 19, 2018 and an Environmental Assessment was completed the same day.

**INFORMATION**

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

**Pre-Application:**

- Pre-Application meeting with Abigail St. Lawrence of Bloomquist Law, Jim Foster, Robert Boswell and Lisa Boswell (Blue Box Ranch LLC), held June 24, 2016.
- Pre-Application Meeting Expired December 24, 2016

**Application as filed:**

- Application to Change Water Right, Form 606, received February 27, 2017.
- Attachments
- Location Map

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Information Received after Application Filed

- Response to the Department's deficiency letter, by Kyle Mace, dated September 1, 2017
- Additional information received from Kyle Mace, dated February 13, 2018

Information within the Department's Possession/Knowledge

- Pre-Application meeting checklist
- Aerial photos and topographic maps
- Water right records, including files for the Statement of Claim proposed to be changed
- DNRC Technical Report
- Montana Natural Heritage Program Species of Concern List
- USGS Streamflow Data
- Statute and administrative rules
- 1956 Broadwater Co. Water Resource Survey
- Environmental Assessment dated June 19, 2018

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.

- Return Flow Memo, dated September 13, 2012
- Consumptive Use Methodology Memo, dated December 7, 2012
- Policy Memo- change in method of irrigation, dated December 2, 2015

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

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

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1. Applicant seeks to add a point of diversion to Water Right Claim No. 411 17090-00, with a priority date of April 1, 1878. The Montana Water Court Temporary Preliminary Decree for Basin 411, issued on March 8, 1995, identified a flood irrigation use of 70.10 acres for 411 17090-00 in the N2 of Sec.12, Township 8 North (T8N), Range 2 East (R2E), Broadwater County. This water right has a claimed flow rate of 1.13 cubic feet per second (CFS) and an unquantified volume. The historical point of diversion (POD) is located in the NWNWSW of Sec. 6, T8N, R3E, a headgate on Duck Creek. The claimed period of use and period of diversion is from April 15 to October 19, annually.

**Table 1: WATER RIGHT PROPOSED FOR CHANGE**

| WR Number    | Purpose    | Source     | Flow Rate | Period of Use   | Point of diversion      | Place of use        | Priority date | Acres |
|--------------|------------|------------|-----------|-----------------|-------------------------|---------------------|---------------|-------|
| 411 17090-00 | Irrigation | Duck Creek | 1.13 CFS  | Apr 15 – Oct 19 | NWNWSW Sec. 6, T8N, R3E | N2 Sec. 12 T8N, R2E | Apr. 1, 1878  | 70.10 |

2. The Applicant's share of Water Right No. 411 17090-00 is part of an undivided interest with Jason L. Greene, Nikia D. Greene, Rick Knapp and Randy Knapp (owners of record).

### **CHANGE PROPOSAL**

#### **FINDINGS OF FACT**

3. The Applicant proposes to add an additional pump point of diversion (POD) to Statement of Claim No. 411 17090-00. The additional point of diversion would be approximately 1.0 mile downstream from the existing POD. The proposed POD is located in the NWNENW of Sec. 12, T8N, R2E. The new diversion will utilize a pump and pipeline system to irrigate 70.10 acres in rotation with the existing POD located in the NWNWSW of Sec. 6, T8N, R3E, Broadwater County

4. The Applicant will install a new pump, pipe, and sprinkler system that will be used in rotation with the existing POD. Applicant plans to divert 155.77 AF through the pump and pipeline system in rotation with the historic point of diversion that consisted of a headgate and ditch system. Historically the Applicant would divert 520.76 AF through the headgate and ditch system.

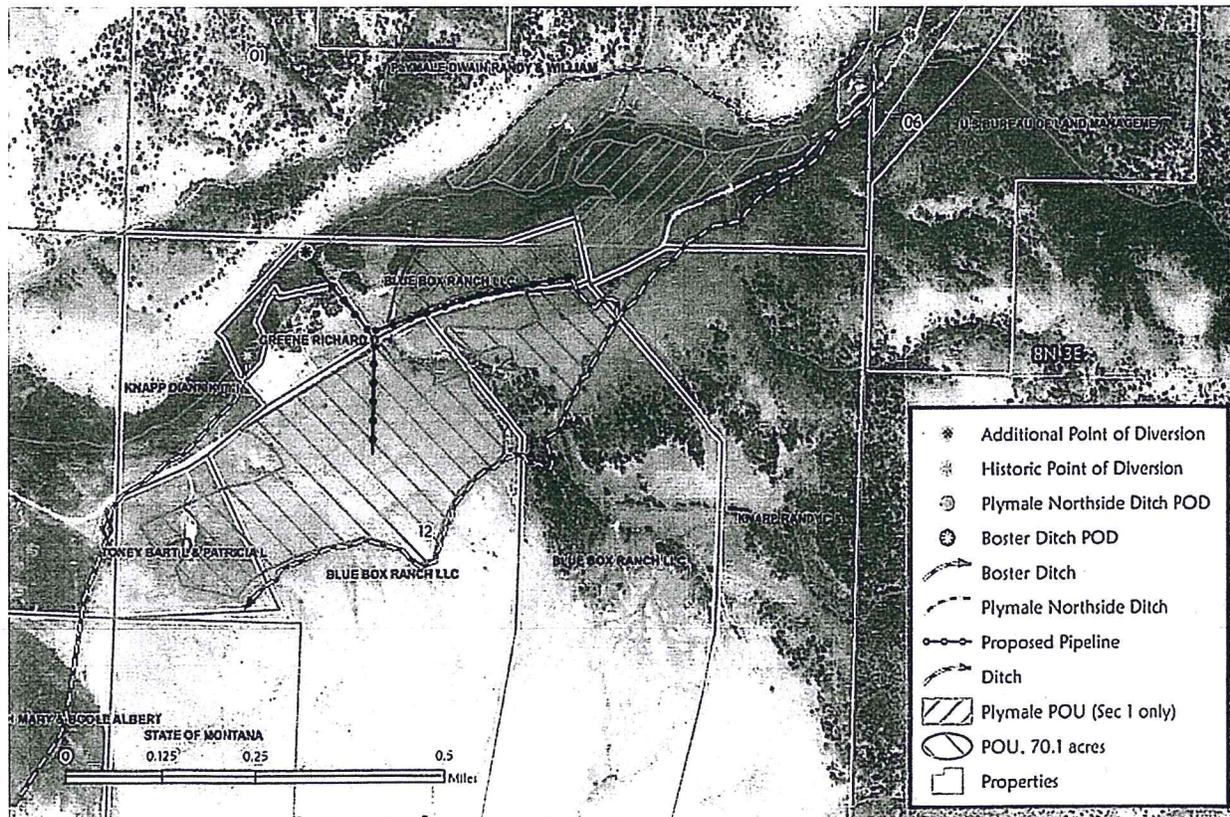
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5. The POU will not change, but the method will change in part to a pivot system irrigating 32-acres utilizing the pump and pipeline system. The remaining acres in the POU will continue to be flood irrigated utilizing both PODs in rotation with one another.

6. The Applicant will be subject to the following measurement condition under the proposed change authorization for the new pump and pipeline system:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE SUPPLY LINE FOR THE IRRIGATION SYSTEM. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS 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 AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

Figure 1: MAP OF PROPOSED PROJECT AREA (DEPARTMENT FILE)



**CHANGE CRITERIA**

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

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

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

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

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

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

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In*

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*the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).*

## **HISTORIC USE AND ADVERSE EFFECT**

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

9. Statement of Claim 41I 17090-00 was decreed in the Basin 41I Temporary Preliminary Decree by the Montana Water Court with a flow rate of 1.13 CFS and an unquantified volume, not to exceed the amount put to historical and beneficial use. This flow rate is supported by USGS Water-Resources Investigations Report 89-4082 (Estimates of Monthly Streamflow Characteristics in the Upper Missouri River Basin, by Parrett, Johnson, and Hull).

10. The place of use of Statement of Claim 41I 17090-00 was historically supplied via a ditch and a headgate, on Duck Creek, located in the NWNWSW of Section 6, T8N, R3E, Broadwater County. From there water was diverted approximately 1.5 miles via a 3 feet-deep and 5 feet-wide supply ditch to the place of use located in the N2 of Section 12, T8N, R3E, Broadwater County. From the ditch water was applied to the fields via flood irrigation utilizing parallel and lateral ditches. The flood irrigation would typically start in mid-April until grass was harvested in late June, then irrigated again until mid-October. Depending on need, water was diverted from the main ditch via a culvert under the county road for irrigation of a smaller field on the north side of the road.

11. There are no supplemental water rights to Statement of Claim No. 41I 17090-00

12. The Applicant has chosen to use the Department's administrative rules for defining historic consumptive use, found in ARM 36.12.1902. The Townsend weather station most closely resembles the place of use in elevation and climatic conditions. The historic consumptive use of 94.21 AF on 70.10 acres is based on this methodology. The calculations were based on a finding of 70.10 historically irrigated acres, determined through the Department's analysis of historical Water Resource Survey aerial photography. See the Department's Technical Report for additional information on the historical use calculations.

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13. The Department finds the following historic use from April 15<sup>th</sup> – October 19 of each year based on information provided in the application and the Department's analysis.

| WR Claim #   | Priority Date | Diverted Volume | Flow Rate | Purpose (Total Acres) | Consump. Use | Place of Use           | Point of Diversion           |
|--------------|---------------|-----------------|-----------|-----------------------|--------------|------------------------|------------------------------|
| 411<br>17090 | 4/1/1878      | 520.76 AF       | 1.13 CFS  | Irrigation<br>70.10   | 94.21 AF     | N2 SEC 12,<br>T8N, R2E | NWNWSW<br>SEC 6,<br>T8N, R3E |

*FINDINGS OF FACT – Adverse Effect*

14. The proposed change in appropriation of water will not increase or expand the use of Claim No. 411 17090-00 per the Department's policy memorandum regarding changes in method of irrigation, dated December 2, 2015. The Department's December 2, 2015 memo states that if the POU is not to be changed the Department "will assume for purposes of the comparison of the historic use to the new use that there is no change consumption or return flow resulting from the post 1973 change in method". Therefore, the historic consumptive use amount (94.21 AF) is assumed to equal the proposed use per the Department's adverse effect analysis.

15. The additional point of diversion will be approximately 1 mile downstream and west of the existing POD located in the NWNWNW of Section 12, T8N, R2E. There are twelve existing water rights owned by the Plymale family that share the same historic POD and/or an un-named ditch between the historic POD and the proposed POD. The Applicant will not use both points of diversion simultaneously, and more water will be left instream from the existing POD to the pump system when the pump system is active. The proposed pump system will be designed to ensure that the maximum flow rate of 1.13 CFS will not be exceeded. The pump system can be shut down and the operators can cease to divert water to ensure that the proposed use will not exceed historical practices or affect senior water users.

16. Claim No. 411 17090-00 was used regularly, with short periods of non-use, until 2012. Sporadic use since 2012 is attributed to changes in ownership, and calls from senior water users.

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17. Return flows are not analyzed in this change because there is not a change in place of use. Per a Department memo from Russell Levens, Hydrologist for the DNRC's Water Management Bureau, dated September 13, 2012, return flows do not need to be modeled for changes in POU where the distance to the affected surface water remains effectively unchanged.

18. The Applicants will not be able to call water rights they could not previously call. There will be no greater access to the water as a result of the proposed change.

### **BENEFICIAL USE**

#### **FINDINGS OF FACT**

19. Applicant proposes to use water for irrigation which is recognized as a beneficial use under §85-2-102(2)(4), MCA

20. Applicant proposes to continue to use 520.76 AF diverted volume when using the historic POD. When the headgate is closed and water is left instream to the secondary POD, 155.77 AF will be diverted. The flow of 1.13 CFS will not be exceeded when using the historic POD or the new POD. This amount is supported by USGS Water-Resources Investigations Report 89-4082 (Estimates of Monthly Streamflow Characteristics in the Upper Missouri River Basin, by Parrett, Johnson, and Hull).

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

21. The additional point of diversion will be approximately 1 mile downstream and west of the existing POD, located in the NWNWNW of Section 12, T8N, R2E. The Applicant will install a Cornell 2.5YH or similar pump with an in-line flow meter. The system will be built to ensure that the flow rate will not exceed the historical use of 1.13 CFS and a maximum diverted volume of 155.77 AF.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

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22. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

## **CONCLUSIONS OF LAW**

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

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

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*Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

24. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

25. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historic use" of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

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

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

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

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

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26. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

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

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

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

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

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

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

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

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

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

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30. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

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

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

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

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., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald,

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220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

33. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF No.9-13).

34. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water").

35. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41I 17090 of 520.76 acre-feet diverted volume and 1.13 CFS flow rate with a consumptive use of 94.21 acre-feet. (FOF Nos. 9-13)

36. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 14-18)

### BENEFICIAL USE

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37. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

38. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. The Applicant will install a Cornell 2.5 YH or similar pump that will have an approximate capacity of 500 GPM. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 520.76 acre-feet diverted volume and 1.13 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 19-20)

#### ADEQUATE MEANS OF DIVERSION

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

40. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF No. 21)

#### POSSESSORY INTEREST

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

42. 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. (FOF No. 22).

#### PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41I 30110489 should be granted subject to the following. An additional point of diversion will be located in the NWNENW of Section 12, T8N, R2E, Broadwater County. The new/additional means of diversion will be a pump system, with an in-line flow meter, constructed as to not exceed the historic flow rate of 1.13 CFS and diverted volume of 520.76 AF. The new pump system will be used in rotation with the existing POD and will not be used simultaneously.

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The Applicant will be subject to the following measurement condition under Change Authorization No. 411 30110489:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE SUPPLY LINE FOR THE IRRIGATION SYSTEM. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD OF TIME. RECORDS OF APPROPRIATIONS 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 AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

### **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 17<sup>th</sup> day of OCTOBER 2018.



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Bryan Gartland, Deputy Regional Manager  
Helena Regional Office  
Department of Natural Resources  
and Conservation

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**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 17 day of oct, 2018, by first class United States mail.

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