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

*** * * * * * ***

APPLICATION TO CHANGE A WATER RIGHT NO. 41Q 30071031 BY MONTANA PRAIRIE NEST II	)))	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

*** * * * * * ***

On December 29, 2014, Montana Prairie Nest II (Applicant or Prairie Nest) submitted Application to Change a Water Right No. 41Q 30071031 to change Provisional Permit No. 41Q 30026974 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 §85-2-302, Montana Code Annotated (MCA), January 15, 2015. Applicant responded on February 20, 2015. The Application was determined to be correct and complete on April 16, 2015. An Environmental Assessment for this Application was completed on July 14, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606, addendums and attachments

Information Received after Application Filed:

- Applicant's deficiency response received on February 23, 2015

Information within the Department's Possession/Knowledge

- Publically available aerial photos and topographic maps
- Water right records, including the file for the Provisional Permit proposed to be changed
- Pre-Application meeting notes
- Statute and administrative rules
- Irrigation Change Application Technical Report

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 underlying water right proposed to be changed, Permit No. 41Q 30026974, was issued by the Department in 2010. The source of the Permit is groundwater (Madison Aquifer). The permitted purpose is irrigation and the amount of water to be appropriated is 350 gallons per minute (GPM) and a volume of 564.6 acre-feet (AF). The place of use includes irrigation of 892.0 acres in Sections 5, 6, 7, and 8, T20N, R6E, and Sections 29, 31, and 32, T21N, R6E, all in Cascade County. The period of appropriation is January 1 through December 31, and the period of use is April 1 through October 31. The project is located about 10 miles east of Great Falls, Montana. To date, no water has been appropriated under Permit No. 41Q 30026974, and it remains unperfected.

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
41Q 30026974	Irrigation	Groundwater	350 Gal Per Minute (GPM)	Apr 1 – Oct 31	SWNWSE Sec. 6, T20N, R6E	Sections 5-8, T20N, R6E; and Sections 29, 31 and 32, T21N, R6E	Mar 5, 2007	892.0

CHANGE PROPOSAL

FINDINGS OF FACT

2. Applicant proposes to change/expand the place of use of the unperfected Provisional Permit from 892 acres to 2,234 acres. The Permit has a completion period of December 31, 2019. No changes to point of diversion, purpose of use, or place of storage are proposed. The

expansion of acres irrigated is proposed in conjunction with a permit application submitted by the Applicant on July 22, 2014, to appropriate a greater flow rate and volume of water than that initially permitted under this water right. The permit application process is running simultaneous with this change process. This proposal also includes a change in irrigation methods from center pivot to drain tile subirrigation. For purposes of this proposed change, the amount of water to be used on the expanded place of use is the same as that permitted – 350 GPM up to 564.6 acre-feet (AF). Table 1 below reflects the water right as proposed to be changed.

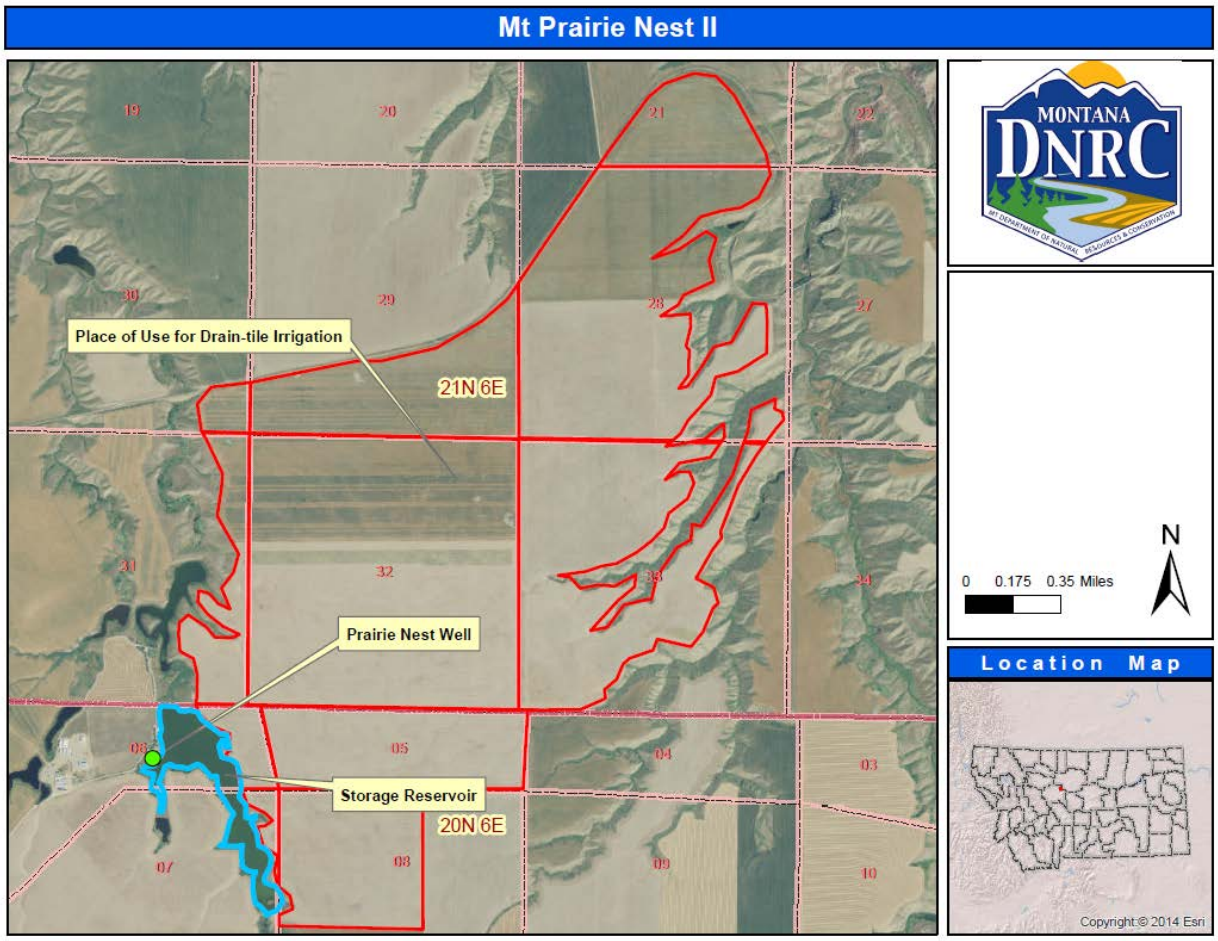
Table 1 – Water right as proposed to be changed.

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41Q 30026974	Irrigation	Groundwater	350 Gal Per Minute (GPM)	Apr 1 – Oct 31	SWNWSE Sec. 6, T20N, R6E	Sections 5-8, T20N, R6E; and Sections 21 & 28-33, T21N, R6E	Mar 5, 2007	2,234

3. In this proposal a conversion from center pivot irrigation to a system utilizing buried drain tile to subirrigate from below the soil surface (controlled subirrigation) will occur.

4. The existing, permitted appropriation includes discharge and impoundment of groundwater into a reservoir located on the East Fork Rogers Coulee. After water is impounded, design of the system includes diversion of water from the reservoir via a secondary pumping unit to the irrigated place of use. This part of managing appropriations of water will not change. The Permitee agrees to measure water that is discharged from the primary point of diversion (groundwater well) to the reservoir, as well as the volume of water diverted from the reservoir to the place of use. See the Conditions section for the specific language of the condition.

Application; Deficiency Response.



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

5. 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.

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

7. 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).

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

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[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.

> 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.

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*

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).

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.

9. 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).

10. 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.

11. 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).

12. 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.

13. 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).

14. 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

15. The underlying water right to change (Permit No. 41Q 30026974) has not been perfected, or even put to partial use, therefore, there is no historic use to analyze. The deadline for completion of the Permit (deadline to put water to use) is December 31, 2019. Application.

16. The Department finds the permitted elements of the underlying water right may be changed. The Permit was issued with no restriction on the volume of water that can be consumed, and therefore the full volume of water as permitted may be consumed. See Table 1 in Finding of Fact No. 1 for the permitted elements.

CONCLUSIONS OF LAW

17. Typically, 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)). In this case, however, proof of historic use is not critical because this is an unperfected permit.

19. The water right proposed for change is Beneficial Water Use Permit Number 41Q 30026974 (issued in 2010 with a priority date of March 5, 2007). The use has not been perfected on the permitted place of use. The Notice of Completion deadline is December 31, 2019. "A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change." §§ 85-2-402(12), MCA. See also In the Matter of the Applications for Change of Appropriation Water Rights 40G(P) 066271-00 … by Smith Farms, Inc. (U.S.A. v. DNRC and Smith Farms, Inc.), Cause No. CDV 99 – 28 (First Judicial District - decided Nov. 9, 1999) (where a water use permit has been granted, but not yet fully perfected, the Department has allowed, and the First Judicial District has upheld, a change of the permit up to the full amount granted by the permit).

20. The Applicant has proven by a preponderance of the evidence that the Applicant has an unperfected permit that can be changed and that the change of place of use will not increase the consumptive use granted in Beneficial Water Use Permit No. 41Q 30026974. (FOF 16)

Adverse Effect

FINDINGS OF FACT

17. Unperfected Permit No. 41Q 30026974 was issued in 2010 for an appropriation of 350 GPM up to 564.6 AF, the source being groundwater (Madison Aquifer). Under the proposed change, the appropriation of water will remain the same, including the consumed volume, as will the source of water and point of diversion. The only element being changed is the place of use, which includes the permitted place of use (892 acres) and additional acreage adjacent to the permitted place of use (total acres to be irrigated is 2,234).

18. There will be no difference in return flows between the proposed former and projected systems, as all water is expected to be consumed.

19. The Applicant will install measuring devices to measure appropriations from the well into the reservoir, and diversions from the reservoir to the controlled subirrigation system. To ensure compliance with the amount of water appropriated, records will be kept and submitted to the Department. See Conditions section for details.

20. In the 2010 decision to issue Permit No. 41Q 30026974, the Department found the proposed appropriation was hydrologically connected to the Missouri River and that the appropriation would deplete flows in the Missouri River. In order to mitigate impacts to existing water users in the river, the Permittee agreed to a plan to purchase a Water Service Contract from the U.S. Bureau of Reclamation, in the full volume of water permitted (564.6 AF). The Bureau would release contract water held in Canyon Ferry Lake upstream of the impacted area, and the water would flow through and provide a replacement for the depletions caused by the groundwater appropriation. The Department carries the mitigation plan imposed in 41Q 30026974 to the present water right change proceeding (Applicant has agreed to the purchase of a Water Service Contract). See Conditions section for details.

21. The Department finds the Applicant has proven the proposed change in appropriation right, as conditioned, 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. Purchasing contract water from the Bureau and measuring water and reporting to the Department will prevent the authorized appropriation from being exceeded and prevent adverse effects to other water users. To meet this Finding, Applicant must comply with the conditions imposed in this Order.

CONCLUSIONS OF LAW

22. 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).

23. 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).

24. 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.

25. 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*).*

26. 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.

27. 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.

28. 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. 21)

Beneficial Use

FINDINGS OF FACT

29. The proposed beneficial use is irrigation of agricultural crops. Application. Irrigation is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

30. The groundwater well proposed in this matter was previously permitted by the Department for a flow rate of 350 GPM and a volume of 564.6 AF, to irrigate 892 acres. The flow rate and volume of water in that matter were established as beneficial. The method of irrigation was to be a center pivot sprinkler system, but the system was not constructed and the appropriation was not perfected. Since 2007, the Permittee/Applicant decided to change its plans for the method of irrigation and number of acres irrigated. Applicant now proposes to irrigate 2,234 acres (an expansion from the 892 acres permitted in 2007) under a controlled subirrigation or drain-tile system. Simultaneous to this water right change proceeding, the Applicant has filed Application for Beneficial Water Use Permit No. 41Q 30068688 to expand its appropriation of water for the 2,234 acres by an additional 70 GPM and 112.9 AF. While the proposed Permit in the parallel proceeding will be combined with this existing Change Authorization to irrigate all acres, each water right is limited to the amount of water issued for the individual water right. In other words, the proposed appropriation under this Change Authorization is held to maximum of 350 GPM and a volume of 564.6 AF, while the appropriation may be increased to 420 GPM, and an additional volume of 112.9 AF, for Permit No. 41Q 30068688 (if the Permit is issued). Application; Application for Beneficial Water Use Permit No. 41Q 30068688.

31. The combined flow rate of this change authorization and Application for Beneficial Water Use Permit No. 41Q 30068688 is 420 GPM. The flow rate that may be changed in this matter is 350 GPM. The capacity of the groundwater well is 420 GPM, and therefore the well is capable of producing the combined flow.

32. The volume of water to be appropriated under this permit is 564.6 AF, while the combined appropriation is 677.5 AF. The Applicant understands that if all 2,234 acres are to be irrigated in any given year, the combined volume of water is insufficient for full-service irrigation. In that event, the per-acre volume will be 0.3 AF. During some years the Applicant may irrigate less acreage in order to expand its per-acre volume allocation. The determination will be made on a yearly basis, based on the type of crops grown, market conditions, and

growing conditions. Applicant intends on growing wheat, barley, oats, lentils, canola, alfalfa, and peas, all crops that are typically grown in Montana. Applicant asserts that whether the appropriation of water amounts to full-service irrigation or partial-service irrigation, the appropriation will increase crop production beyond those obtained under dryland farming. The Department agrees and finds the appropriation of water to be a beneficial use. Application; Department Technical Report.

CONCLUSIONS OF LAW

33. 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.

34. 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 32)

Adequate Diversion

FINDINGS OF FACT

35. The water well was constructed by a Montana licensed well driller. Application.

36. Water will be appropriated by a groundwater well completed into the Madison Aquifer at a depth of 800 feet. Department hydrogeologists modeled maximum drawdown to the pumping well of 251-262 feet following pumping throughout the period of appropriation at a rate of 420 GPM. Maximum drawdown of this magnitude will leave at least 104 feet of water above the production zone of the well (perforations). Department Aquifer Test Report.

37. Water will be diverted from the well using a 60 horsepower Goulds pump/motor. The pump has the capacity to deliver water at a combined flow rate (this changed Permit and the Proposed Permit) of 420 GPM to an existing 1,405.8 AF storage reservoir located on the East Fork Rogers Coulee via 100 feet of 4-inch pipeline. However, it is the responsibility of the

appropriator to limit its appropriations to 350 GPM when satisfying the allocation for this change authorization. The reservoir was constructed in 1952 and is permitted under other existing water rights. From the reservoir water will be pumped to the place of use using a Cornell 225 horsepower pump, at a rate of up to 5,000 gallons per minute (specifications for the pumping systems are located in the file). The method of irrigation will be controlled subirrigation or a drain-tile distribution system consisting of buried drain tile branching into zones throughout the 2,234 acre place of use. The subirrigation system is highly efficient (e.g. designed to allow no evaporation from the soil surface) and manages a shallow groundwater table to optimize crop consumption. System specifications are located in the file. Application.

38. 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

39. 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.

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).

40. 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. 38).

Possessory Interest

FINDINGS OF FACT

41. 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

42. 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.

43. 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.

44. The Applicants have 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. 41)

Salvage Water

This Application does not involve salvage water.

CONDITIONS

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41Q 30071031 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 A DEPARTMENT APPROVED IN-LINE

FLOW METER IN THE DELIVERY LINE OF THE GROUNDWATER WELL ASSOCIATED TO THIS WATER RIGHT. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. 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 INTO THE RESERVOIR, INCLUDING THE PERIOD OF TIME. THE RECORDS MUST DISTINGUISH THE APPROPRIATION OF WATER UNER THIS CHANGE AUTHORIZATION FROM THE DIVERSION OF WATER UNDER ANY OTHER WATER RIGHT.

FURTHER, THE APPLICANT SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE DELIVERY LINE OF THE PUMPING SYSTEM FROM THE RESERVOIR THAT CONVEYS WATER TO THE IRRIGATION SYSTEM. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED TO THE IRRIGATION SYSTEM UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE VOLUME OF ALL WATER DIVERTED FROM THE RESERVOIR AND INTO THE IRRIGATION SYSTEM, INCLUDING THE PERIOD OF TIME.

THE APPROPRIATOR SHALL KEEP RECORDS AND SUBMITT RECORDS 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

2. **MITIGATION PLAN
PRIOR TO COMMENCING DIVERSIONS UNDER THIS CHANGE AUTHORIZATION THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE FULL VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL REPLACE AN EQUIVALENT AMOUNT OF WATER TO THE MAINSTEM OF THE MISSOURI RIVER IN THE FOLLOWING MANNER: THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATER AND PROVIDE FOR LEGAL AVAILABILITY OF SURFACE WATER UNDER THIS PERMIT THROUGH THE PURCHASE OF A U.S. BUREAU OF RECLAMATION (BOR) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE AT LEAST 564.6 ACRE-FEET PER YEAR. ACTUAL DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATOR'S CONTRACT WITH THE BOR MAY PROVIDE THAT IN THE CALENDAR

YEARS SUBSEQUENT TO THE FIRST CALENDAR YEAR IN WHICH WATER IS TO BE PUT TO BENEFICIAL USE, THE CONTRACT VOLUME DELIVERED MAY BE EQUAL TO BUT NOT LESS THAN THE VOLUME OF WATER ACTUALLY DIVERTED BY THE APPROPRIATOR IN THE PREVIOUS CALENDAR YEAR. A DELIVERY SCHEDULE ALLOWED BY THE BOR AND WHICH RESULTS IN THE FULL REPLACEMENT OF THE PRIOR CALENDAR YEARS DIVERSION VOLUME DURING THE FOLLOWING CALENDAR YEAR SHALL BE DEEMED SUFFICIENT UNDER THIS PERMIT. APPLICANT SHALL SUBMIT TO THE DEPARTMENT'S LEWISTOWN REGIONAL OFFICE, WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR, PROOF OF THE WATER SERVICE CONTRACT WITH BOR AS DESCRIBED ABOVE. DIVERSION UNDER THIS CHANGE AUTHORIZATION MAY NOT COMMENCE UNTIL A WATER SERVICE CONTRACT WITH THE BOR IS EXECUTED. DIVERSION UNDER THIS CHANGE AUTHORIZATION MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES.

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. 41Q 30071031 should be **GRANTED**. The Applicants are authorized to change the place of use to 2,234 acres located in Sections 5, 6, 7, and 8, T20N, R6E; and Sections 21, 28, 29, 30, 31, 32, and 33, T21N, R6E. The water users shall monitor, record and report on water use, and comply with the mitigation plan, 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.