

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

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APPLICATION TO CHANGE WATER	)	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
RIGHT NO. 40A 30072825 BY	)	
MCFARLAND WHITE RANCH INC	)	

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On March 30, 2015, McFarland White Ranch Inc. (Applicant) submitted Application to Change Water Right No. 40A 30072825 to change Water Right Claim Nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of 9-17-2015. An Environmental Assessment for this Application was completed on June 24, 2015.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606

Information Received after Application Filed: None

Information within the Department's Possession/Knowledge

- Stipulation filed with Montana Water Court on February 11, 2004 regarding statements of claim 40A 145872-00, 40A 145873-00 and 40A 145874-00.
- Decree of water rights on American Fork from the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Sweet Grass dated March 30, 1908.
- Water Master Report by Kathryn Lambert dated April 22, 2004, replacing water volumes with standard historic and beneficial use language, altering the source for 40A 145872-00 from unnamed tributary of O'Hearn Creek to American Fork and documenting other aspects of the 2004 stipulation as McFarland White Ranch Inc. objections.
- Memo dated June 25, 2015, detailing telephone conversation on June 24, 2015, between John Oiestad, NRCS and Mark Elison, DNRC, regarding hydrology of American Fork.

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. **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; AU means animal unit; and POD means point of diversion.

**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

1. Applicant seeks to change Statements of Claim no. 40A 145872-00 for 1.5 CFS flow and 163.0 AF diverted volume from an unnamed tributary to O’Hearn Creek for the purpose of flood irrigation with a priority date of May 31, 1899. The place of use is 50.3 acres in N2 Section 10 T5N R12E, Sweet Grass County. The point of diversion is NESWNW Section 10 T5N R12E, supplemental Water Right Claims 40A 145873-00 and 40A 145874-00 for 1.0 and 7.0 CFS, respectively, and 330.2 AF total diverted volume from North Fork American Fork for the purpose of flood irrigation on 101.9 acres in SW and W2E2 Section 10 T5N R12E, Sweet Grass County. The period of diversion and period of use for all three water rights is April 15 through October 4. The place of use is approximately 14 miles NW of Melville, Montana. Details of the water rights to be changed are given in Table 1.

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

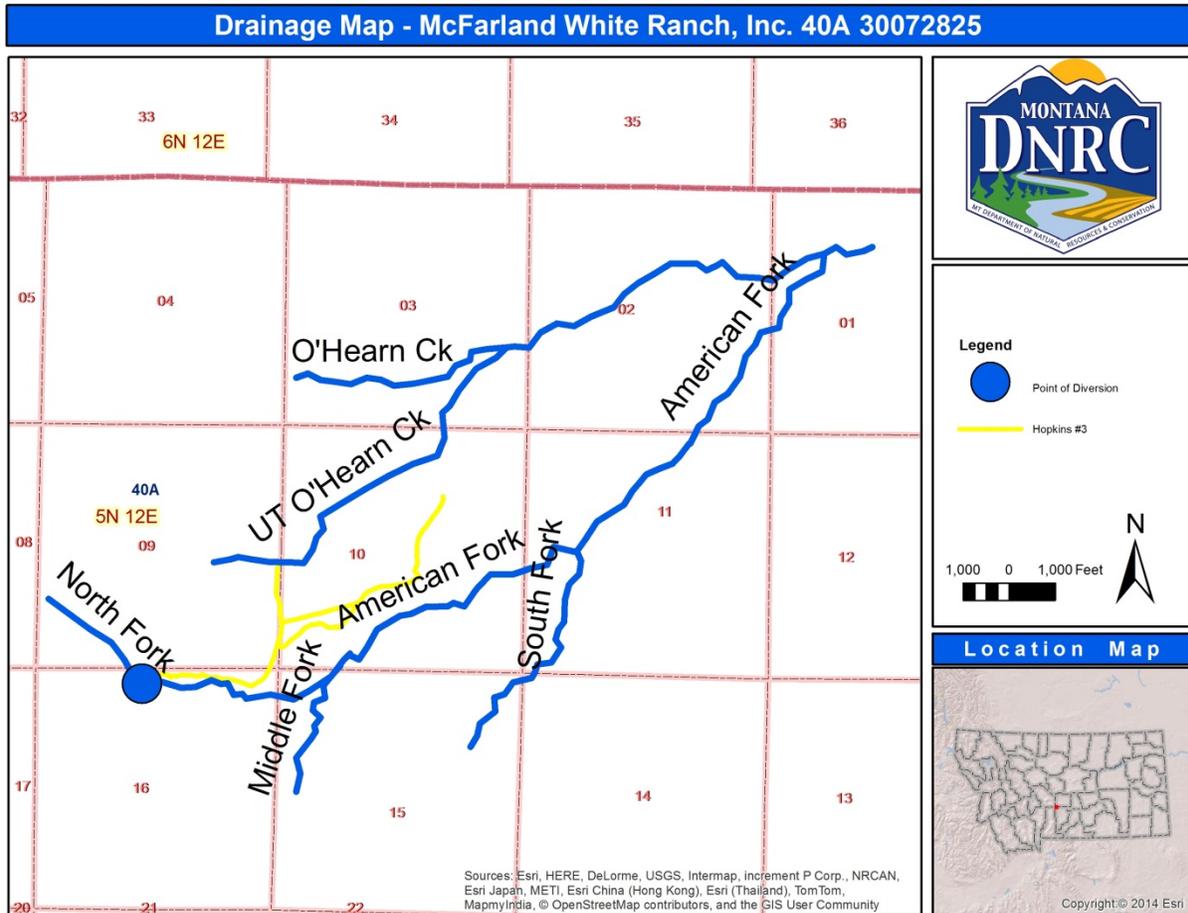
<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Volume</b>	<b>Period of Use</b>	<b>Point of diversion</b>	<b>Place of use</b>	<b>Priority date</b>	<b>Acres</b>
40A 145873-00	Irrigation	1.0 CFS	330.20 AF	4/15 - 10/4	NENENW Section 16 T5N R12E	SW and W2E2 Section 10 T5N R12E	5/31/1887	101.9
40A 145874-00	Irrigation	7.0 CFS	330.20 AF	4/15 - 10/4	NENENW Section 16 T5N R12E	SW and W2E2 Section 10 T5N R12E	6/1/1896	101.9
40A 145872-00	Irrigation	1.5 CFS	163.00 AF	4/15 - 10/4	NESWNW Section 10 T5N R12E	N2 Section 10 T5N R12E	5/31/1899	50.30

2. Claim nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 were decreed by the Sixth Judicial District Court of the State of Montana, Sweet Grass County in 1908, with the flow rates and priority dates listed on the claim abstracts and shown in Table 1 above.

3. Claim nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 were included in Case No. 40A-81A before the Montana Water Court. On February, 11, 2004, a stipulation and agreement (stipulation) was filed by McFarland White Ranch, Inc. That stipulation was subsequently signed by objectors. The stipulation lists the same source (American Fork, North Fork) and point of diversion for all three claims and cites the same place of use on 201.6 acres in Section 10 T5N R12E, Sweet Grass County. The stipulation gives the point of diversion as SWSWSE Section 9 T5N R12E but on aerial photographs and topographical maps the point of diversion is NENENW Section 16 T5N R12E in agreement with the statements of claim. The point of diversion has remained in the same historic location.

4. A Master's Report by Senior Water Master, Kathryn Lambert, dated April 22, 2004, changes the volume quantification to historical and beneficial use and the source to American Fork on claim no. 40A 145872-00. Although the Master's report specifies American Fork, the report references the stipulation which specifies North Fork, American Fork. All other changes to claim nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 included in the stipulation were deemed and docketed as a late objection filed by McFarland White Ranch, Inc. The late objection will be addressed after proper notice on the Objection List for the Preliminary Decree.

5. As presented in the stipulation, claim nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 are supplemental sharing a single point of diversion from North Fork, American Fork, the same historical ditch (Hopkins #3) and the identical place of use on 201.6 acres. Historic use (ARM 36.12.1902) for these water right claims is based upon those aspects of the stipulation. For clarification, the drainage pattern for American Fork and O'Hearn Creek is shown in the map below.



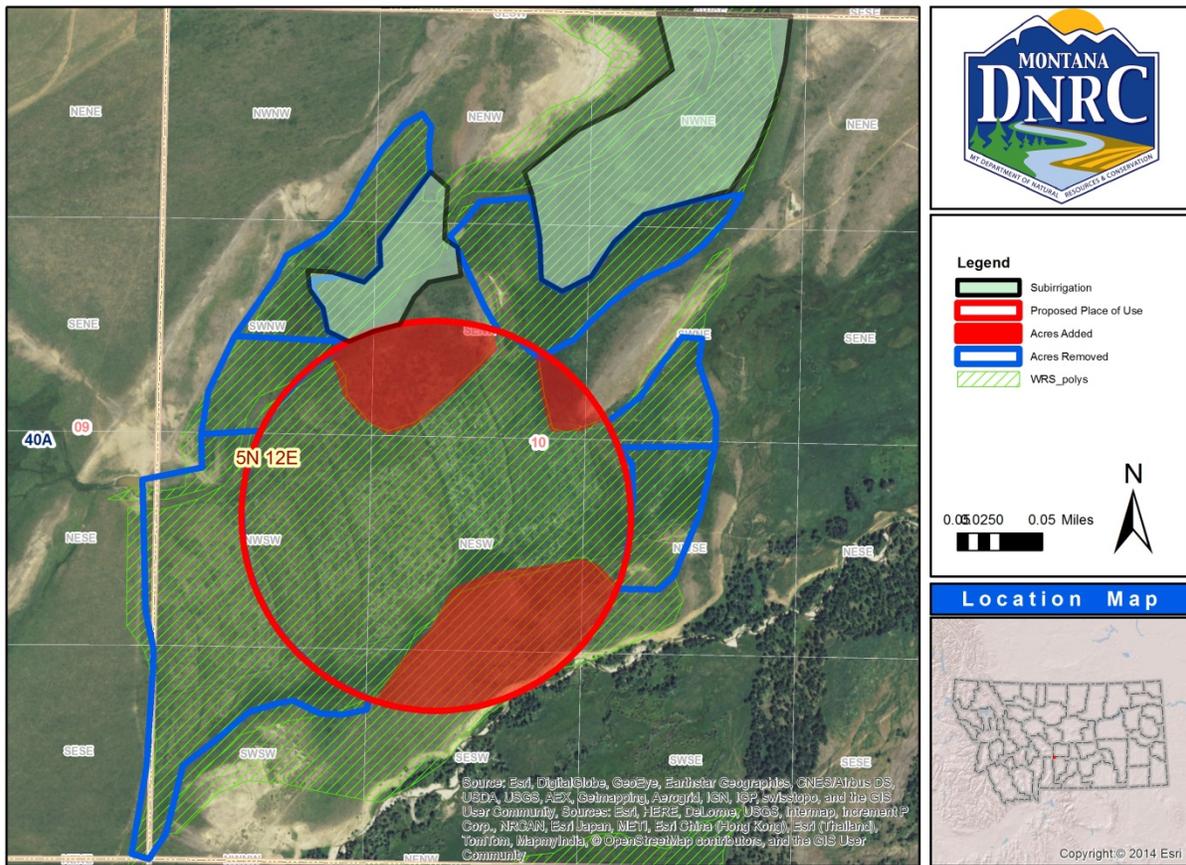
Drainage map of American Fork and tributaries

**CHANGE PROPOSAL**

**FINDINGS OF FACT**

6. Applicant proposes to install a 114.4 AC center pivot sprinkler system centered on the existing place of use. The center pivot covers some acres (30.4 AC) not included in the place of use of the existing water rights to be changed and some acres (84 AC) within the existing place of use. Applicant proposes to take 87.0 acres out of irrigation. The proposed pivot would add 30.4 acres not within the historical place of use; 16.6 acres in SW, 11.9 acres in NW, 1.6 acres in SE and 0.3 acres in NE Section 10 T5N R12E.

**Figure 1. Historic and Proposed Place of Use. McFarland White Ranch, Inc. 40A 30072825**



**Figure 1. Map showing historic and proposed place of use for change application 40A 30072825.**

7. The center pivot would cover:

76 AC SW Section 10 T5N R12E, Sweet Grass County

29 AC S2NW Section 10 T5N R12E, Sweet Grass County

1.4 AC SWSWNE Section 10 T5N R12E, Sweet Grass County

8 AC W2NWSE Section 10 T5N R12E, Sweet Grass County

Total acres irrigated would decrease from 171 to 114.4.

8. The point of diversion for the water rights will not change, however, the conveyance will be by pipe rather than open ditch.

**§85-2-402, MCA, CRITERIA**

## GENERAL CONCLUSIONS OF LAW

9. 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.

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

11. 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).

12. Montana's change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

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

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

Historic consumptive use varies greatly with the circumstances of use.

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

(italics added).

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

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be

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

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

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

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 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.

13. 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)028708-411 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*).

14. 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.

15. 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).

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

17. 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.

18. 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).

19. 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**

20. The 1950 Water Resources Survey (WRS) for Sweet Grass County shows two regions of irrigated lands that include the claimed acres and lie north and south of an unnamed tributary to O'Hearn Creek. The northern region is 60.7 AC and the southern region is 168.7 AC. Both of the regions shown in the WRS extend northward past the boundary of Section 10 T5N R12E into Section 3 T5N R12E. Claimed acres as well as acres listed in the stipulation are exclusively in Section 10. Subtracting acres in Section 3 leaves 45.4 AC in the northern region and 166.9 AC in the southern region. There are substantial areas within the northern half of Section 10 that appear to be subirrigated and are shown on USGS quadrangle maps and United States Fish and Wildlife Service National Wetlands Inventory as wetlands. When the subirrigated acres are removed from the WRS regions, there are 35.7 AC in the northern region and 134.7 AC in the southern region.

The irrigated acres in Section 10, excluding subirrigation, shown on the WRS total 170.4 AC. This is 18.2 acres more than claimed (152.2 AC).

21. The 2004 stipulation, docketed as a late objection by McFarland White Ranch Inc. lists 201.6 AC irrigated by the three water rights. There are two apparent errors in the acreage listed on the stipulation. First, the stipulation lists 88.6 AC in N2SW, a legal description that contains only 80 AC. Second, the stipulation lists 36 AC in W2NE, an area containing subirrigated acres. Based on the location of historic ditches and recent aerial photos (GWRAT) there should be 70.8 AC in N2SW and 23.0 AC in W2NE. With those corrections, the stipulated acres total 170.8 AC; the 1950 Water Resource Survey shows 170.4.

22. The maximum historic irrigated acres are 171 AC.

23. The land has been continuously in use and produces 2 to 3 tons per acre of hay. There are no periods of non-use and production indicates full service irrigation. The Applicant's father worked on the ditch and headgate as early as the 1950's.

24. The flow rates of these water rights were decreed by the District Court in 1908. All of these water rights are from the same source (North Fork American Fork). They share a point of diversion in NENENW Section 16 T5N R12E and use the same ditch (Hopkins #3) as primary conveyance. Applicant states that the ditch generally ran at 5-7 CFS up to a maximum of 10 CFS. This estimate is based upon observations from a 4 foot wide rectangular weir that was periodically operational. A four foot rectangular weir can accommodate up to 23.8 CFS. Based on a 2 foot wide by 2 foot deep ditch with a slope of 0.0467, Manning's equation indicates a ditch capacity of up to 50 CFS. Water Commissioner, Dale Mager, estimated the flow through the McFarland White Ranch, Inc. headgate at 450 inches (11.25 CFS) on June 27, 2000. Based on the headgate and ditch capacities and estimates by the water commissioner and by the Applicant based on the weir, the decreed flow rates are deemed to be the historic flow rates.

25. All supplemental rights for the place of use are included in this change application.

26. Based on an IWR for flood irrigation in Melville, Sweet Grass County of 12.83 inches, 171 irrigated acres and a county management factor of 44.7%, the consumptive use based on ARM 36.12.1902 for this water right is 81.7 AF ( $171 \text{ AC} * 12.83/12 \text{ AF/AC} * 0.447 = 81.7 \text{ AF}$ ). The Department adds 5% of field applied volume to account for irrecoverable losses in flood

irrigation systems. Using a 45% efficiency, the irrecoverable losses are  $81.7 \text{ AF} / 0.45 \times 0.05 = 9.1 \text{ AF}$ . Total historic consumptive volume is  $81.7 \text{ AF} + 9.1 \text{ AF} = 90.8 \text{ AF}$ .

27. The Department calculates historic diverted volume as historic consumptive use divided by on-field efficiency plus conveyance losses. The consumptive use of this water right not including irrecoverable losses is 81.7 AF. Using a flood irrigation efficiency of 45%, and adding irrecoverable losses, the field applied volume is 190.7 AF. Conveyance losses include seepage, vegetation losses and evaporation. The ditch is 2 feet wide by 2 feet deep, 3000 feet long and was in operation for 40 days per year. The seepage losses are  $(6 \text{ ft} \times 3000 \text{ ft} \times 1 \text{ ft}^3/\text{ft}^2/\text{day} \times 40 \text{ days}) / 43560 = 16.5 \text{ AF}$ . The vegetation losses are  $0.0075 \text{ per mile} \times 9.5 \text{ CFS} \times 40 \text{ days} \times 0.57 \text{ miles} \times 2 \text{ AF}/\text{day}/\text{CFS} = 3.2 \text{ AF}$ . Using an evaporation rate of 3.37 ft/year from Potts (1988), or 0.64 ft adjusted for the number of days the ditch was in use, evaporation losses are  $(2 \text{ ft} \times 3000 \text{ ft} \times 0.64 \text{ ft}) / 43560 \text{ ft}^3/\text{AF} = 0.1 \text{ AF}$ . Total historic diverted volume calculated from the total of field applied volume including irrecoverable losses and conveyance losses is  $190.7 + 16.5 + 3.2 + 0.1 = 210.5 \text{ AF}$ .

28. The historic use for each individual water right is based upon decreed and claimed flow rate, number of days the water right was used (40) and full service irrigation on 171 AC. The proportion of water attributed to each water right is based on priority date. Statement of Claim 40A 145873 has the earliest priority date of 5/31/1887 and a flow rate of 1.0 CFS. Given 1.0 CFS over 40 days, the diverted volume for this water right is 79.2 AF. All conveyance losses are attributed to this water right. Therefore, the consumed volume is diverted volume minus conveyance loss times on-farm efficiency  $(79.2 \text{ AF} - 19.8 \text{ AF}) \times .45 = 26.7 \text{ AF}$ . Statement of Claim 40A 145874-00 has a priority date of 6/1/1896 and a flow rate of 7.0 CFS. Over 40 days, 7.0 CFS would divert 554.4 AF. Therefore the total historic diverted volume of 210.5 AF would be provided by 40A 145873-00 (79.2 AF) and a part of 40A 145874-00 (131.3 AF). The consumptive use attributable to this water right is 64.1 AF. Sufficient flow rate and diverted volume to provide irrigation on 171 acres are provided by these two rights and no flow rate or volume is attributed to 40A 145872 with a priority date of 5/31/1899.

29. Table 2 shows the historic use of the three supplemental water rights proposed for change.

**Table 2. Historic Use of Statements of Claim 40A 145872-00, 40A 145873-00 and 40A 145874-00.**

<b>WR Claim #</b>	<b>Priority Date</b>	<b>Diverted Volume</b>	<b>Flow Rate</b>	<b>Purpose (Total Acres)</b>	<b>Consump. Use</b>	<b>Place of Use</b>	<b>Point of Diversion</b>
40A 145873-00	5/31/1887	79.2 AF	1.0 CFS	Irrigation 171 acres (Suppl. with both other rights)	26.7 AF	Section 10, T5N, R12E	NENENW Section 16 T5N R12E (Hopkins #3 Ditch)
40A 145874-00	6/1/1896	131.3 AF	7.0 CFS	Irrigation 171 acres (Suppl. with both other rights)	64.1 AF	Section 10, T5N, R12E	NENENW Section 16 T5N R12E (Hopkins #3 Ditch)
40A 145872-00	5/31/1899	0.0	0.0 CFS	Irrigation 171 acres (Suppl. with both other rights)	0.0	Section 10, T5N, R12E	NENENW Section 16 T5N R12E (Hopkins #3 Ditch)
<b>TOTAL</b>	----	210.5 AF	8.0 CFS	171 AC	90.8 AF	----	----

**CONCLUSIONS OF LAW**

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 no changes could have been made to those rights after that date without the Department’s approval. §85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions, *citing Featherman v.*

Hennessy, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

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

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

33. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in

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

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

35. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

36. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights*

in Rio Grande County, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

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

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

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

Hohenlohe ¶ 71.

39. Applicant may proceed under ARM. 36.12.1902, the Department’s historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902.

40. The Applicant has proven by a preponderance of the evidence the historic use of claims nos. 40A 145872-00, 40A 145873-00 and 40A 145874-00 is 9.5 CFS, 210.5 AF diverted volume and consumptive use of 90.8 acre-feet. (FOF 20 - 29)

### **Adverse Effect**

### **FINDINGS OF FACT**

41. The Applicant proposes to add 30.4 AC of previously unirrigated land and retire 87 AC of previously irrigated land. 84 AC of historically irrigated land would continue to be irrigated.

The 84 AC of historically flood irrigated land that would continue to be irrigated by the center pivot sprinkler is not being changed and is not used in a comparison of historic to proposed use pursuant to a policy memorandum dated December 2, 2015.

42. The proposed diverted volume and consumptive use numbers cited below are different from those included in the technical report dated September 17, 2015, due to the policy change on December 2, 2015, that excludes irrigation method changes within the historic place of use from consideration.

43. Based on an IWR for center pivot sprinkler irrigation in Melville, Sweet Grass County of 15.49 inches and a proposed use county management factor of 49.4%, the proposed consumptive use for the new acres under center pivot irrigation is 19.39 AF ( $30.4 \text{ AC} * 15.49/12 \text{ AF/AC} * 0.494 = 19.39 \text{ AF}$ ). The Department adds 10% of field applied volume to account for irrecoverable losses in sprinkler irrigation systems. Using a 70% efficiency, the irrecoverable losses are  $19.39 \text{ AF}/0.70 * 0.10 = 2.77 \text{ AF}$ . Total proposed consumptive volume for the acres added is  $19.39 \text{ AF} + 2.77 \text{ AF} = 22.16 \text{ AF}$ .

44. The historic consumptive use for 87 AC retired is 41.58 AF ( $87 * 12.83/12 * .447 = 41.58 \text{ AF}$ ) plus irrecoverable losses of 4.62 AF ( $41.58/.45 * .05 = 4.62 \text{ AF}$ ) or  $41.58 + 4.62 = 46.2 \text{ AF}$ .

45. The proposed consumptive volume is 24.04 AF less than the historic consumptive volume. No changes to source, purpose or point of diversion are included in this application.

46. The proposed diverted volume is the consumptive use divided by the on-field efficiency plus conveyance losses. Using a sprinkler irrigation efficiency of 70%, diverted volume for the 30.4 AC of new irrigation under the center pivot sprinkler is 27.7 AF ( $19.39 \text{ AF}/.70 = 27.7 \text{ AF}$ ). Conveyance loss is zero because water would be conveyed in pipes.

47. The historic diverted volume for the 87 AC retired is consumptive use divided by the on-field efficiency plus conveyance losses. All conveyance losses are attributed to the retired acres because the proposed conveyance is by pipe and has no conveyance loss. The historic diverted volume of the 87 retired acres is  $41.58/.45 + 19.8 = 112.2 \text{ AF}$ . The proposed diverted volume for 30.4 added acres is 84.5 AF less than historic diverted volume for the 87 retired acres. ( $112.2 - 27.7 = 84.5 \text{ AF}$ ) Total proposed diverted volume is 126.0 AF.

48. The change in method of irrigation from flood to center pivot sprinkler will decrease the amount of water applied to the field relative to the consumptive use and decrease return flows. Based on distance between the field and the source and low transmissivity estimates by Department hydrogeologists, return flows would be evenly spread over all months for both flood and sprinkler systems. No change in pattern or timing of return flow is expected.

49. The sources potentially affected by reduced return flow are North Fork, American Fork in the reach between the point of diversion and the confluence with the main stem and O'Hearn Creek between the point of diversion and its confluence with American Fork. There are no active water rights on either source in the affected reaches.

50. The decrease in return flow would be offset by the reduction in diverted volume from American Fork during the irrigation season. American Fork loses water to groundwater to the point that it goes dry in reaches (see memo dated 6/25/2015 by Mark Elison detailing conversations with Ken Frazier from Montana Fish Wildlife and Parks and John Oiestad from the United States Natural Resource Conservation Service.) and reappears downstream. Because the source recharges groundwater in the same way as return flows and downstream reaches are dependent on groundwater input, there would be no adverse effect to the source.

51. The three water rights proposed for change are supplemental rights and all of these rights will be changed.

52. The period of diversion and point of diversion are not proposed for change. The Applicant will not be able to call water rights it couldn't previously and has no greater access to water. Major water rights holders downstream of the point of diversion, including American Fork Ranch Inc. and Two Dot Land & Livestock Company, filed signed copies of the McFarland White Ranch Inc. stipulation in case 40A – 81A with the Montana Water Court.

#### CONCLUSIONS OF LAW

53. 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).

54. 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).

55. 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.

56. 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).

57. 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.

58. 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.

59. 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 41 - 52)

## **Beneficial Use**

### **FINDINGS OF FACT**

60. Applicant proposes to use water for center pivot sprinkler irrigation. Irrigation is a recognized beneficial use under the Montana Water Use Act.

61. Applicant proposes to use 1.6 CFS flow rate up to 126.0 AF diverted volume. The flow rate is based upon sprinkler requirements given by Watson Irrigation Specialists, Inc. The volume is supported by efficiency and consumptive use calculations in DNRC rule.

### **CONCLUSIONS OF LAW**

62. 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.

63. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion*

*for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

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

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

65. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 1.6 CFS and 126.0 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 60, 61)

### **Adequate Diversion**

### **FINDINGS OF FACT**

66. The proposed system uses the existing headgate to a sump pit with a 10 inch PVC pipe. The pipe drops 117 feet over a 3300 foot distance to the pivot which will be gravity driven so that no pump is required.

67. The center pivot sprinkler system uses a Nelson brand model E2065-G/57 pivot with 7 156 foot spans and an end boom of 61 feet. Total diameter of the system including end gun is 1259.7 feet rated at 100 psi and designed to operate at 700 GPM (1.6 CFS).

68. The system was designed by Watson Irrigation Specialists Inc.

#### CONCLUSIONS OF LAW

69. 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.

70. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1) (a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston

(1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

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

71. 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. §85-2-402 (2)(b), MCA. (FOF 66 - 68).

### **Possessory Interest**

#### **FINDINGS OF FACT**

72. 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.

#### **CONCLUSIONS OF LAW**

73. 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.

74. 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.

75. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. §85-2-402(2)(d), MCA. (FOF 72)

### **Salvage Water**

This Application does not involve salvage water.

### **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. 40A 30072825 should be **granted** subject to the following.

The Department determines that the Applicant may change 1.0 CFS up to 79.2 AF of Statement of Claim 40A 145873-00 and 0.6 CFS up to 46.8 AF of Statement of Claim 40A 145874-00 for center pivot irrigation from April 15 to October 1 in each year on 114.4 AC as shown below;

76 AC SW Section 10 T5N R12E, Sweet Grass County

29 AC S2NW Section 10 T5N R12E, Sweet Grass County

1.4 AC SWSWNE Section 10 T5N R12E, Sweet Grass County

8 AC W2NWSE Section 10 T5N R12E, Sweet Grass County.

**NOTICE**

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

DATED this \_\_18th\_ day of \_December\_\_ 2015.

/Original signed by Kimberly Overcast/  
Kimberly Overcast, Manager  
Billings Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this \_\_21\_\_ day of \_\_Dec\_\_ 2015\_, by first class United States mail.

MCFARLAND WHITE RANCH, INC.  
BOX 235  
TWO DOT, MT 59085

LINDA HORNE

311 BIG ELK RD  
TWO DOT, MT 59085

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MARK ELISON

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DATE