

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

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**APPLICATION TO CHANGE WATER  
RIGHT NO. 40S 30105096 BY RICHLAND  
COUNTY CONSERVATION DISTRICT  
(JOANN FOSS)** ) **PRELIMINARY DETERMINATION TO  
GRANT  
CHANGE OF WATER RIGHT**

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On January 20, 2016, Richland County Conservation District (Applicant) submitted Application to Change Water Right No. 40S 30105096 (Producer – JoAnn Foss) to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application is to change a portion of the Richland County Conservation District Water Reservation by adding a point of diversion and place of use. The Application was determined to be correct and complete on May 5, 2016. An Environmental Assessment for this Application was completed on May 11, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606CD, Conservation District Application to Change Water Reservation
- Attachments
- Map: USGS Topo map showing POD & POU

Information within the Departments possession/knowledge:

- DNRC Water Right Database records
- USGS gaging station records for the Missouri River near Culbertson (06185500)

The Department has fully reviewed and considered the Environmental Assessment and Application and has determined pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) the change application can be granted as shown below. **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/AC means acre-feet per acre; CD means conservation district; and producer means the applicant who applied to the CD to use a portion of the CD water reservation water right.

**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

<b>WR TYPE</b>	<b>WR NUMBER</b>	<b>WR PRIORITY DATE</b>	<b>WR SOURCE</b>
Water Reservation	40S 84500-00	7/1/1985 8:00 am	Missouri River
CD Record	40S 30104412 (RI-028M)	3/27/2015 9:00 am (internal priority date)	Missouri River

**CHANGE PROPOSAL**

**FINDINGS OF FACT**

1. This application is to add a point of diversion in the SENESE Section 2, T27N, R53E, Richland County, and place of use in the S2SE Section 2, NENW Section 11, and W2NE Section 11, T27N, R53E, Richland County, to the Richland County Conservation District Water Reservation water right (40S 84500-00).
2. A flow rate of 1.10 CFS up to a volume of 161 AF of the Richland County Conservation District water reservation will be used for sprinkler irrigation on 70 AC (7.0 GPM/AC and 2.3 AF/AC).
3. The 1.10 CFS will be diverted from The Missouri River, for sprinkler irrigation.
4. There are no supplemental water rights for the 70 AC to be irrigated.

5. The Richland County CD has 76.22 CFS and 15,423 AF remaining in their water reservation prior to this application.

6. The CD granted the producers (JoAnn Foss) a right to use a portion of their water reservation on January 11, 2016. The CD granted the approval subject to the installation of a water measuring device. As such the DNRC will add the following condition.

**WATER MEASUREMENT RECORDS REQUIRED**

THIS RIGHT IS SUBJECT TO THE TYPE OF WATER USE MEASURING DEVICE OR WATER USE ESTIMATION TECHNIQUE REQUIRED BY THE CONSERVATION DISTRICT. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

**§85-2-402, MCA, CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

7. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under this 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.

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

9. 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); 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).

10. 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:

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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).

[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 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.

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

### **Historic Use**

#### **FINDINGS OF FACT**

12. The Board of Natural Resources and Conservation granted the Richland County Conservation District a water reservation (40S 84500-00) for 186.9 CFS up to 25,349 AF for use on 11,141 acres for future irrigation development out of the Missouri River. The water reservation was granted in the Lower Missouri River Basin Final Order dated December 30, 1994 with a priority date of July 1, 1985.

13. This application is to change a portion of the water reservation not yet put to use and therefore no historic use for the amount of water being changed exists.

#### CONCLUSIONS OF LAW

14. There is no historic use because the water being changed in this application is for future irrigation development pursuant to §85-2-316, MCA. (FOF 12-13)

#### Adverse Effect

#### FINDINGS OF FACT

15. An authorization for change is required in §85-2-316(12), MCA, because the producer's proposed point of diversion and place of use are outside the project areas identified in the original water reservation application public notice.

16. Richland County CD is proposing to add a new irrigation project to their water reservation. The new project will add a new point of diversion and place of use.

17. Water is still available under the Richland County CD water reservation.

18. The CD published notice of this proposed project on November 15, 2015, in the Sidney Herald Leader and set a deadline for objections.

19. The CD sent individual public notices to water users downstream of the proposed point of diversion and to the entities on the DNRC standardized list of entities to notice.

20. No objections were received by the CD to this project.

21. The Richland County CD requires the water user to keep written records of the flow rate and volume of all water diverted and to submit the report to the Conservation District annually by November 15. The method of water flow measurement will be by flow meter.

22. The Richland County CD water reservation is senior to the Dept. of Fish, Wildlife and Parks water reservation.

23. Based upon ARM 36.12.1902, the IWR for sprinkler irrigation (25.45 inches) of 70 acres in Richland County with a proposed use Management Factor of 88.4%, the irrigation will consume 131.3 AF. The Department assigns an additional consumptive use of 10% of the

volume applied to the field as irrecoverable losses from pivot operation for sprinkler systems. The proposed consumptive use is (131.3 + 16.1) 147.4 AF. There is no historic return flow because this is a water reservation. Based on a diverted volume of 161 AF and a consumptive volume of 147.4 AF, 13.6 AF will eventually return to surface waters.

24. This application represents a non-perfected portion of the Richland County CD water reservation. Therefore, both senior and junior water rights must be considered in order to determine whether this proposed application would have adverse effect. USGS gaging station #06185500, Missouri River near Culbertson, was used when calculating flow rate physically available. Water physically available was calculated by taking the median of the mean monthly flows (CFS) for the Culbertson gaging station and adding in all water rights between the requested POD and the gaging station. The Culbertson gaging station is approximately 23 river miles downstream of the POD.

25. The area of potential impact for this application is approximately 5 miles downstream from the requested POD. Water legally available was calculated by subtracting the existing water rights within the area of potential impact from the flow and volume physically available.

26. The following tables list the physical availability, existing demands, FWP instream flow reservation, and available flow; calculated as described above.

<b>Legal Availability of Flow (CFS)</b>				
<b>Month</b>	<b>Flow Physically Available</b>	<b>Existing Legal Demands</b>	<b>FWP Instream Flow Reservation</b>	<b>Flow Legally Available</b>
Apr	8092	27	5178	2887
May	8521	34	5178	3309
Jun	9322	34	5178	4110
Jul	9437	34	5178	4225
Aug	8796	34	5178	3583
Sep	7938	34	5178	2726
Oct	7570	23	5178	2369

Legal Availability of Volume (AF)				
Month	Volume Physically Available	Existing Legal Demands	FWP Instream Flow Reservation	Volume Legally Available
Apr	476655	390	307573	168693
May	518238	648	317826	199765
Jun	549169	648	307573	240948
Jul	574440	648	317826	255967
Aug	535065	648	317826	216591
Sep	466940	648	307573	158720
Oct	460317	291	317826	142201

27. The least amount of flow legally available in any month during the period of diversion is 2369 CFS and the Applicant is requesting 1.10 CFS, therefore, the proposed change will not have an adverse effect on other users.

#### CONCLUSIONS OF LAW

28. The Applicant bears the affirmative burden of proving 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)(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.*, Proposal for Decision, adopted by DNRC Final Order (2005).

29. 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, whereupon 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 absolutely deprived the plaintiff of his subsequent right).

30. The Applicant has proven by a preponderance of the evidence 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 15-27)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

31. The producer will be adding a new center pivot which will cover a half circle of 70 acres of irrigation. The pivot will consist of six 185 foot spans and one 64 foot overhang that use Nelson R3000 Rotators on hose drops with 6ft ground clearance.

32. The water will be diverted from the Missouri River to the pivot by a 100 hp Cornell 5HH centrifugal floating pump capable of producing a total of 2.83 CFS. The flow will be split at a point 820 feet from the point of diversion where this application will receive 1.10 CFS and 40S 30072700 will receive 1.73 CFS. Water will be delivered to the pivot via the first 820 feet of 10 inch buried PVC pipeline before it is split and then 1900 feet of 8 inch buried PVC pipeline will

convey the 1.10 CFS of water to the center pivot. The system was designed by Agri-Industries and design specifications for the pivot were provided.

33. The proposed period of diversion is between April 1<sup>st</sup> and October 15<sup>th</sup>.

34. The diversion and conveyance are typical of those used for sprinkler irrigation and the system efficiency is approximately 91.5%.

35. A Micrometer flow meter will be installed on the supply line at the pump site to measure the total amount of water diverted from the Missouri River.

### CONCLUSIONS OF LAW

36. 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.

37. 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).

38. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 31-35)

### **Beneficial Use**

#### **FINDINGS OF FACT**

39. The change will benefit the CD by allowing them to authorize use of a portion of their water reservation. The Richland County Conservation District must authorize projects to fulfill the purpose of the reservation.

40. Applicant proposes to use water for irrigation on 70 AC. Applicant proposes to use 1.10 CFS up to 161 AF. The flow rate and volume were determined by the System Design Engineer using irrigation system standards to provide adequate water application rates and volumes based on center pivot irrigation system and crop needs. The volume and flow rate were agreed upon by the Conservation District and the producer and are within DNRC standards for sprinkler irrigation (ARM 36.12.115).

## CONCLUSIONS OF LAW

41. 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.

42. 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; Toohey. 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.

43. 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).

44. Applicant proposes to allow the producer to use water for irrigation which is a recognized beneficial use. §85-2-102(4), MCA.

45. Applicant has proven by a preponderance of the evidence that the proposed use of water is a beneficial use and that the flow rate of 1.10 CFS and 161 AF diverted volume are the amounts of water needed to sustain the proposed beneficial use. §85-2-402(2)(c), MCA. (FOF 39-40)

## Possessory Interest

### FINDINGS OF FACT

46. The affidavit on the Application to Change a Water Right form was signed by Dan Young, Conservation District treasurer, for the Richland County Conservation District. The submission of the Application for Reserved Water (Form 102) was signed by the producer and implies written consent.

### CONCLUSIONS OF LAW

47. 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.

48. 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.

49. 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 46)

### **Water Reservation Criteria**

#### **FINDINGS OF FACT**

50. The purpose for the water reservation was established by the Board of Natural Resources and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

51. The need for the water reservation was established by the Board of Natural Resources and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

52. The amount of water necessary for the purposes of the water reservation was established by the Board of Natural Resources and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

53. That the water reservation was in the public interest was established by the Board of Natural Resources and the conclusions are contained in the *Lower Missouri River Basin Final Order* dated December 30, 1994.

54. This change authorization proposal is consistent with the purpose, need, amount, and public interest established by the Board of Natural Resources.

#### **CONCLUSIONS OF LAW**

55. The Applicant has proven by a preponderance of the evidence that the purpose, need, amount, and public interest are consistent with the Lower Missouri River Basin Final Order dated December 30, 1994. §§85-2-316(12), 85-2-402(2)(d), MCA. (FOF 49 - 53)

## **Salvage Water**

This application does not involve salvage water.

## **DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department determines that this Application to Change Water Right No. **40S 30105096** should be **GRANTED** subject to the following.

The Applicant is authorized to add a point of diversion and place of use. A flow rate of 1.10 CFS up to 161 AF shall be diverted from the Missouri River from the SENESE Section 2 T27N R53E, Richland County. The place of use shall be 22 acres in the S2SE Section 2, 7 acres in the NENW Section 11, and 41 acres in the W2NE Section 11, T27N, R53E, Richland County. The period of diversion is from April 1 to October 15, inclusive of each year. This change authorization will be subject to the following conditions, limitations, or restrictions.

### **WATER MEASUREMENT RECORDS REQUIRED**

THIS RIGHT IS SUBJECT TO THE TYPE OF WATER USE MEASURING DEVICE OR WATER USE ESTIMATION TECHNIQUE REQUIRED BY THE CONSERVATION DISTRICT. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

**NOTICE**

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

DATED this 23<sup>rd</sup> day of June, 2016.

*Original Signed by Denise Biggar*  
Denise Biggar, Regional Manager  
Glasgow Water Resource Regional Office  
Department of Natural Resources  
and Conservation