

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

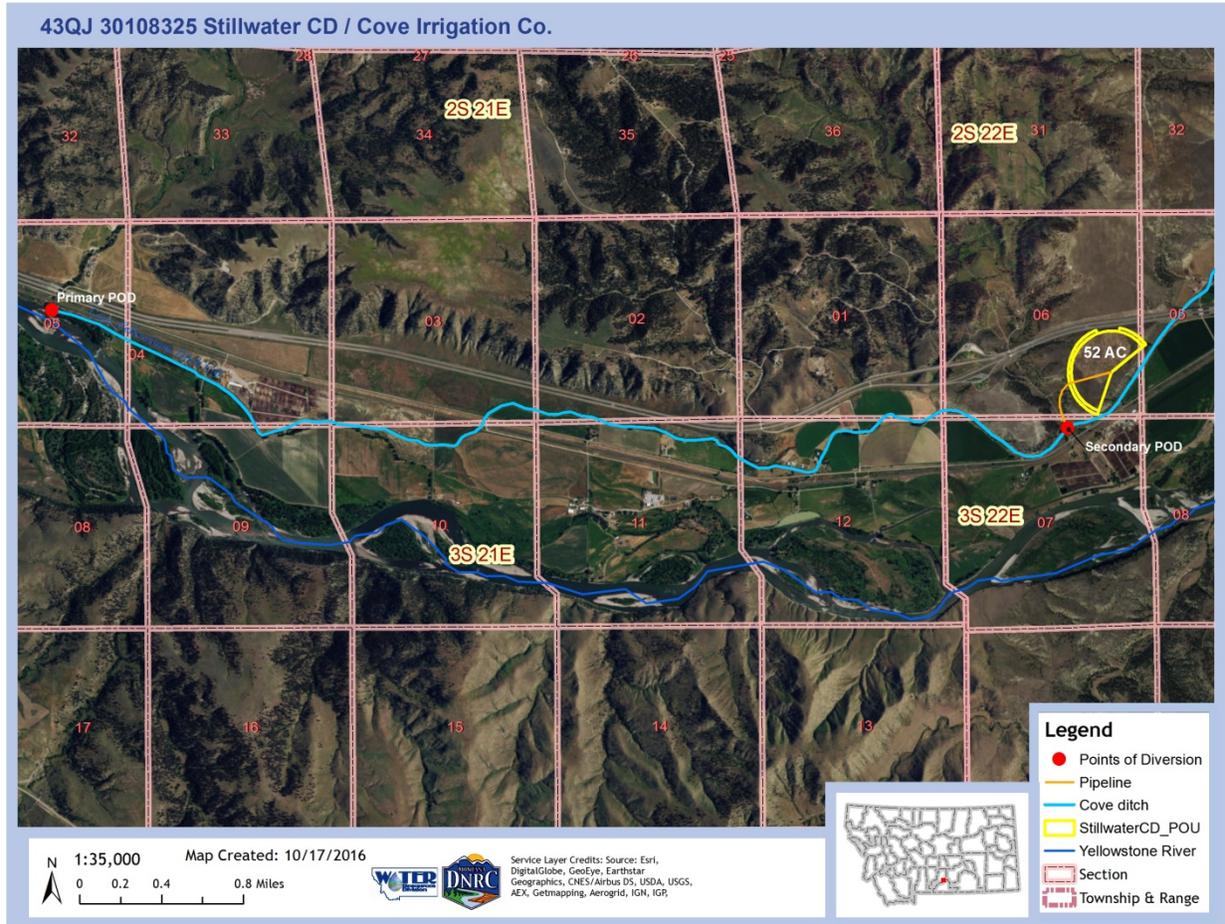
WR TYPE	WR NUMBER	WR PRIORITY DATE	WR SOURCE
Water Reservation CD Record	43QJ 9935-00 43QJ 30105763 ST1501	12/15/1978 4:18 pm 2/2/2015 2:35 pm (internal priority date)	Yellowstone River Yellowstone River

CHANGE PROPOSAL

FINDINGS OF FACT

1. This application is to add a point of diversion and place of use to the Stillwater Conservation District Water Reservation No. 43QJ 9935-00.
2. A maximum flow rate up to 1 CFS and a maximum volume up to 203 AF/YR of the Stillwater CD water reservation will be used for center pivot irrigation on 52 acres (8.63 GPM/AC and 3.9 AF/AC) in the SE Sec. 6, T3S, R22E, Stillwater County. The volume includes 2.35 AF/AC for field application and 1.55 AF/AC for conveyance loss. The Cove Irrigation Co water right has a 1909 priority date and delivers irrigation water to about 6900 acres. The Conservation District adds an amount for conveyance loss to account for a portion of the losses in the ditch.

3. The proposed place of use is located between Interstate 90 and US HWY 10 approximately 10 miles east of Columbus.



4. One CFS will be diverted from the Yellowstone River at the existing Cove Irrigation Company headgate located in the SESWNE Sec. 5, T3S, R21E, Stillwater County. At a secondary diversion located in the N2NWNE Sec. 7, T3S, R22E, Stillwater County, a Cornell model 2.5 YH centrifugal or vertical turbine pump powered by a 50 HP electric motor will deliver the 1 CFS through a 6" buried PVC pipeline to the 52 AC partial circle center pivot sprinkler irrigation system. Without the existing carriage water, the flow rate of 1 CFS would not be able to be delivered to the secondary diversion site.

5. This project will use the existing Cove Irrigation Company headgate and will therefore be associated to water right nos. 43QJ 30104955, 43QJ 30016204, 43QJ 19149-00, 43QJ 45735-00, 43QJ 195780-00, 43QJ 195781-00, 43QJ 195782-00, 43QJ 195783-00, 43QJ 28749-00 and 43QJ 28750-00 which share the diversion.

6. There is no overlap in the places of use for these rights.

7. The Stillwater Conservation District has 104.39 CFS and 15,298.20 AF remaining in their water reservation prior to this application.

8. The CD granted this producer (Cove Irrigation Co) a right to use a portion of their water reservation on September 6, 2016 under application number SG 1501 (43QJ 30105763). 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 – MEETS CONSERVATION DISTRICT REQUIREMENT

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 ACURATELY.

CONCLUSIONS OF LAW

CHANGE CRITERIA

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

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

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

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

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

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

10. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

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

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

12. The Board of Natural Resources granted the Stillwater Conservation District water reservation No. 43QJ 9935-00, 122.10 CFS and 16,755 AF for use on approximately 5,290 acres for future irrigation development out of the Yellowstone River. The Board chairman signed the Order of Board of Natural Resources Establishing Water Reservations on December 15, 1978. The following water reservations were a priority date of December 15, 1978, and a priority time as shown below.

Reservant	Purpose	Location	Time
Municipalities	Municipal		12:30 PM
State Agencies Federal Agencies	Instream	Above mouth of Bighorn River	4:13 PM
Conservation Districts State Agencies Federal Agencies	Irrigation		4:18 PM
Conservation Districts Federal Agencies	Instream	Below mouth of Bighorn River	4:21 PM
State Agencies Federal Agencies	Multi-Purpose		4:23 PM

13. This application is to change a portion of the water reservation not yet put to use, therefore there is no historic use.

FINDINGS OF FACT – Adverse Effect

14. An authorization for change is required in §85-2-316(12), MCA, because the producer's proposed place of use is outside the project areas identified in the original 1976 water reservation application public notice.

15. Stillwater Conservation District is proposing to add a new irrigation project to their water reservation. The new project will add a point of diversion and place of use.

16. Water is still available under the Stillwater Conservation District water reservation.

17. The CD published notice of the Conservation District Record ST1501 (DNRC CD Record 43QJ 30105763) on March 10, 2016 in the Stillwater News and set a deadline for objections.

18. 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. No objections were received. DNRC will also publish a public notice for this change application.

19. The Stillwater Conservation District Authorization 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 1.

20. The proposed consumptive use volume, including irrecoverable losses is 91 AF. Based on the IWR for sprinkler irrigation at Columbus (25.09 inches) of 52 acres in Stillwater County with a proposed management factor of 72.5%, the irrigation will consume 78.82 AF. Duane Claypool of the Department estimated conveyance losses at 40%. Given 203 AF diverted volume and conveyance loss of 81.2 AF (203 x 0.4), the field applied volume is 121.8 AF. Using 10% of the volume applied to the fields (121.8 AF), for sprinkler, the irrecoverable loss estimate requires an additional 12.18 AF. The proposed consumptive use is 91 AF (78.82 + 12.18).

21. There is no historic return flow because this is a water reservation which has not been perfected. Based on an applied volume of 121.8 AF and a consumptive volume of 91 AF, 30.8 AF will return to surface water.

22. This application represents a non-perfected portion of the Stillwater Conservation District water reservation granted by the Order of the Board of Natural Resources Establishing Water Reservations. The DNRC will not analyze physical and legal availability for this application because the point of diversion is within the original public notice area identified in the Yellowstone Reservation proceedings in July of 1977. It is understood that the Board of Natural Resources would not have granted this water reservation unless water was physically and legally available.

BENEFICIAL USE

FINDINGS OF FACT

23. Applicant proposes to use water for irrigation of 52 acres. Irrigation is a recognized beneficial use under the Montana Water Use Act. §85-2-102, MCA
24. This change will benefit the CD by allowing them to authorize use of a portion of their water reservation. The Stillwater Conservation District must authorized projects to fulfill the purpose of the reservation.
25. Applicant proposes to use 1 CFS up to 203 AF for irrigation. This flow rate and volume were agreed upon by the Conservation District and the producer (Cove Irrigation Co). The requested flow rate (8.6 GPM/AC) was determined by Watson Irrigation Specialists using irrigation system design standards based on the irrigation system type (center pivot) and the flow needed to clean pump screens. The requested volume (3.9 AF/AC) was determined by the Conservation and Resource Development Division (CARDD) using USDA NRCS irrigation guide standards (IWR) for crop water requirements, application efficiency and includes 40% additional volume for conveyance loss from the Cove Ditch. The applied volume will be 2.35 AF/AC while the conveyance loss will be approximately 1.55 AF/AC.

ADEQUATE DIVERSION

FINDINGS OF FACT

26. Water will be diverted from the Yellowstone River using the existing Cove Irrigation Company diversion structure which has operated effectively for decades. Cove Irrigation Company personnel manage the irrigation system to distribute water to the new acres along with the existing acres in the system without increasing the diverted amount and therefore not exceeding the capacity of the diversion works. This will work because various crops within the system require different amounts of water at different times.
27. The secondary diversion will be a Cornell model 2.5 YH centrifugal or vertical turbine pump powered by a 50 HP electric motor which will divert and deliver up to 1 CFS through approximately 2,460 feet of 6" buried PVC pipe to the 52 AC partial circle center pivot sprinkler irrigation system.
28. The sprinkler was designed by Watson Irrigation Specialists, a Reinke sprinkler dealer. Any water not consumed by the crops will return to the Cove Ditch or the Yellowstone River.

POSSESSORY INTEREST

FINDINGS OF FACT

29. The affidavit on the Conservation District Application to Change Water Reservation was signed by Steven Story, Conservation District Chairman, for the Stillwater Conservation District. The submission of the Application for Reserved Water (Form 500) was signed by the producer, Ed Robertus (Director) for Cove Irrigation Co, William and Carla Mohr (landowners), and implies written consent.

WATER RESERVATION CRITERIA

FINDINGS OF FACT

30. The purpose for the water reservation was established by the Board of Natural Resources and the conclusions are contained in the Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978.

31. The need for the water reservation was established by the Board of Natural Resources and the conclusions are contained in the Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978.

32. 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 Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978.

33. That the water reservation was in the public interest was established by the Board of Natural Resources and the conclusions are contained in the Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978.

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

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

35. 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)

36. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598,

605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

37. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

38. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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

(recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

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

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande

39. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

40. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who

County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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

seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

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

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

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

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

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

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

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

43. 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 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 14 - 22)

BENEFICIAL USE

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

45. 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 203 acre-feet of diverted volume and 1 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 23 - 25)

ADEQUATE MEANS OF DIVERSION

46. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion

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

47. 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);

48. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 26 - 28)

POSSESSORY INTEREST

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

50. The Applicant **has proven** by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF 29)

WATER RESERVATION CRITERIA

49. The Applicant has proven by a preponderance of the evidence that the purpose, need, amount, and public interest are consistent with the 1978 Yellowstone River Order of Board of Natural Resources Establishing Water Reservations. §§85-2-316(12), 85-2-402(2)(d), MCA (FOF 30 - 34)

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. 43QJ 30108325 should be **granted** subject to the following.

Authorization is GRANTED to add a point of diversion and place of use. A flow rate of 1 CFS up to a maximum volume of 203 AF shall be diverted from the Yellowstone River by means of the Cove Irrigation Company existing headgate located in the SESWNE Section 5, T3S, R21E, Stillwater County. The place of use shall be 52 acres in the SE Sec. 6, T3S, R22E, Stillwater County

The period of diversion and period of use shall be from April 1 to October 1, inclusive of each year. The application will be subject to the following conditions, limitations or restrictions.

WATER MEASUREMENT-MEETS CONSERVATION DISTRICT REQUIREMENT

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 1st day of November 2016.

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