

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

**APPLICATION TO CHANGE WATER RIGHT)
NO. 40S 30126841 BY GIBBS LAND LLC } PRELIMINARY DETERMINATION TO
GRANT TEMPORARY CHANGE**

On September 12, 2019, Gibbs Land LLC (Applicant) submitted Application to Change Water Right No. 40S 30126841 to change Water Right Claim No. 40S 8614-00 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 16, 2020. The Applicant responded with information dated April 13, 2020. The Application was determined to be correct and complete as of May 19, 2020. An Environmental Assessment for this Application was completed on June 2, 2020.

INFORMATION

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

Application as filed:

- Application to Change Water Right, Form 606
- Attachments
- Maps: Aerial photographs, topographic maps, and Water Resource maps showing the historic use, new proposed place of use, new secondary point of diversion, and proposed service area.
- Water Marketing Purpose Addendum
- Change in Purpose Addendum
- Temporary Change Addendum
- Contract with TransCanada Keystone Pipeline LP

Information Received after Application Filed

- Condition agreement letter received June 15, 2020

Information within the Department's Possession/Knowledge

- Environmental Assessment dated June 2, 2020 by DNRC Water Resource Specialist Todd Netto.

- Technical Report dated May 19, 2020 by DNRC Water Resource Specialist Todd Netto.
- Information contained in the active file of Statement of Claim 40S 8614-00.
- Water Resources Survey; USGS Map, Study, USGS flow records, etc.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents.
 - Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration March 14, 2018

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

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant is proposing to change the place of use and purpose for the Statement of Claim No. 40S 8614-00. Statement of Claim 40S 8614-00 is for the stock watering of 400 animal units (AU) by means of an onstream reservoir. The reservoir has an estimated storage capacity of 30 AF. The appropriation has a diverted volume of 42.7 acre-feet (AF) from an Unnamed Tributary of the East Fork of Prairie Elk Creek with a priority date of May 31, 1946. The period of diversion is January 1 through December 31 and the historic period of use is January 1 through December 31. The places of use are in the S2SWNW and NENSW of Section 2 Township 21N Range 46E McCone County.
2. The historic place of use is generally located 16 miles north-west of Circle, MT.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant is proposing to temporarily change part of the place of use and add a purpose for Statement of Claim No. 40S 8614-00. The temporary change will be for 2 years. The Applicant proposes to retire 200 animal units and add the point of sale as a place of use in the S2SWNW Section 2, Township 21N, Range 46E, McCone County. The purpose of Water Marketing will be added. The means of diversion is an onstream dam that historically diverted year-round.

4. The new proposed place of use will be the point where water is marketed and diverted from the reservoir. The Applicant is proposing a general service area that includes the entire length of Keystone XL's Spread 2 and associated access roads. Water will be pumped from the reservoir by the purchaser and marketed at that point. The buyer will be responsible for conveying/transporting the water.

5. The water marketed under this Application will be used for industrial purposes. Water sales will be dependent on the purchaser needs throughout the temporary project. The Applicant is proposing to market 50 percent of the 13.6 AF historic consumed volume per annum of the livestock (6.8 AF). Water Marketing is 100 percent consumptive.

6. In order to substantiate the beneficial use criteria and ensure that the requested flow rate and volume is not exceeded, monitoring and flow rate reporting is necessary. The Applicant's design plans include the use of a totalizing flow meter installed at the place of use. It is the responsibility of the Applicant to report to the Department how much water is marketed in each year.

7. The Applicant provided a contract stating that water purchased will not be used or transported outside the State of Montana. Depot access will be limited to valid contract holders through landowner-controlled access.

8. The Applicant has agreed to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE

APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.

WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.

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. In addition to the §85-2-402(2), MCA, an applicant for a temporary change authorization must comply with the requirements and conditions set forth in §§ 85-2-407, MCA.

11. 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).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

12. Statement of Claim 40S 8614-00 is a Statement of Claim for livestock use for 400 AU by means of an onstream reservoir.

13. The dam is located in the S2SWNW Sec 2, T21N, R46E, McCone County and the impoundment extends into the NENWSW Sec 2, T21N, R46E, McCone County. The primary fill typically occurs during the spring runoff. The Applicant provided reservoir information identified a surface area of 5 acres, a depth of 15 feet and capacity of 30 AF. This reservoir has historically been used to water 400 AU from January 1 to December 31. The historical place of use has not had any extended periods of non-use. Onstream livestock reservoirs are not decreed with flow rates or volumes.

Historic Consumptive Volume: 26.3 AF

14. The historic consumptive use volume was calculated by the Department in accordance with historic consumption of the livestock and evaporation. The historic consumptive use volume is the volume that is not returned to the source.

15. The March 14, 2018 technical memorandum Pond and Wetland Evaporation/Evapotranspiration set forth that the evaporation of ponds is the net evaporation. Net Evaporation is calculated by subtracting average precipitation from gross evaporation. Per the Evaporation Pond Design for Agricultural Wastewater Disposal, USDA Soil Conservation Service, Montana Technical Note: Environment No. 7, February 1974, the gross evaporation of McCone County near Circle is 44 inches per year. The gross evaporation of the

reservoir is calculated as 18.3 AF (5 AC * 44 IN * 1/12 IN/FT = 18.3 AF). Per the Western Regional Climate Center, the average annual precipitation in Circle MT is 13.38 inches. Therefore, the average annual precipitation in the reservoir is 5.6 AF (13.38 IN * 1/12 FT * 5 AC = 5.6 AF). The net evaporation is 12.7 AF (18.3 AF – 5.6 AF = 12.7).

16. The livestock's consumptive use is based on 400 cattle with year-round access to the reservoir. Livestock use is 100 percent consumptive. Cattle are assigned 1 AU per head (400 cattle = 400 AU). The water right was decreed with 30 gallons per AU per day. (400 AU * 30 Gal/AU/Day * 366 days / 325851 Gal/AF = 13.6 AF)

Historic Diverted Volume: 42.7 AF

17. The historical diverted volume for storage reservoir is the capacity plus net evaporation. The Department estimated a surface area of 5 acres, a depth of 15 feet and capacity of 30 AF. David Gibbs concurred with the Departments estimates on December 1, 1993. The Applicant submitted these measurements as historic use. The net evaporation is 12.7 AF One fill of the reservoir plus the net evaporation is 42.7 AF (30 AF + 12.7 = 42.7 AF).

FINDINGS OF FACT – Adverse Effect

18. The Applicant is proposing to temporarily add a place of use and purpose. The point of diversion and place of storage will not change.

19. The place of storage will not change and therefore the historic diverted and consumed volumes of the storage reservoir will not change. The onstream reservoir will continue to divert, store water and evaporate at the same rate as it historically has.

20. Changing the purpose from stock to water marketing will not create an adverse effect to other users on the source because it won't increase the diverted or consumed volumes. Water marketing use is considered by the Department to be 100 percent consumptive. The Applicant is proposing to retire 200 AU with a historic consumptive volume of 6.8 AF. The Applicant is proposing to market 6.8 AF per annum from the storage reservoir, 6.8 AF remaining in use by livestock, and 12.7 AF lost to evaporation. The Applicant will be consuming 26.3 AF.

21. The means of diversion is an onstream reservoir. Onstream reservoirs divert water year-round. The reservoir has never released or bypassed water at any point as part of the historical use. The Applicant will be using water legally stored and not using more than the historical consumed.

22. The Applicant will not market more water from the source than has historically been consumed by the 200 AU. Because the Applicant is not changing the storage, they will not have greater access water as a result of this change. The Applicant will not have the ability to make call on users it couldn't previously make call on.

23. The water marketed under this Application will be used for industrial purposes. Water sales will be dependent on the purchaser needs throughout the temporary project. In order to substantiate the beneficial use criteria and ensure that the requested volume is not exceeded in a single year, monitoring and reporting is necessary. The Applicant's design plans include the use of a totalizing flow meter installed at the diversion. The Applicant has agreed to submit annual measurement reports and upon the request of the Department.

BENEFICIAL USE

FINDINGS OF FACT

24. Applicant proposes to temporarily add Water Marketing as a purpose to 40S 8614-00. Water Marketing is recognized a beneficial use by the Department. The Applicant is proposing to market 6.8 AF and use 6.8 AF for stock per annum from the onstream storage reservoir on Unnamed Tributary of the East Fork of Prairie Elk Creek. Specific flow rates and volumes are not decreed to onstream livestock reservoirs on Statement of Claims. This change will not result in an increased diverted flow rate, diverted volume or consumed volume.

25. In accordance with §85-2-310(9)(c)(v), MCA, the Applicant has a contract with TransCanada Keystone Pipeline LP (purchaser) for half of the 12,000 gallons historically consumed per day (13.6 AF/year) by the Applicant ($13.6 \text{ AF} \times 0.5 = 6.8 \text{ AF}$).

ADEQUATE DIVERSION

FINDINGS OF FACT

26. The primary point of diversion will remain the onstream storage reservoir. The reservoir has an estimated capacity of 30 AF. The reservoir is and has been in working order since its construction in 1946.

27. The Applicant plans to divert water from the storage reservoir at a secondary diversion point. The Applicant is only providing the purchaser access to the point of withdrawal from the reservoir. It is the responsibility of the purchaser to construct or improve the access point, supply their own equipment for

diverting, measure the purchased water, and convey the purchased water within the service area. It is the responsibility of the Applicant to report to the Department how much water is sold in each year.

28. The purchaser submitted a basic design plan for typical diversion operations used by the purchaser. The design plan details the general equipment and a typical layout of a system to fill water trucks. The typical system included a floating screened intake, a low-head pump inside a plastic enclosure, 4-inch minimum diameter hose and up to two fill trucks.

29. The diversion works are capable of diverting the amount of water requested to accomplish the proposed use without unreasonable losses through design or operation. The diversion is adequate for the water marketing purpose.

POSSESSORY INTEREST

FINDINGS OF FACT

30. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802. 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. (Department file)

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

31. 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. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

32. 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

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).

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

34. 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. 41I 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

35. 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

P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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).

their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

36. 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).

37. 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.

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

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

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

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

40. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 40S 8614-00 of 42.7 diverted volume and with a consumptive use of 26.3 acre-feet. (FOF Nos. 12-17)

41. Based upon the Applicant’s comparative analysis of historic water use , the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights

of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 18-23)

BENEFICIAL USE

42. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) 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).

43. Applicant seeks a change authorization to market water to others for beneficial use, which is a recognized beneficial use. § 85-2-102(5), and -310(9)(c)(v), MCA; Mont. Const. Art. IX, § 3(2) (1972). The Montana Legislature enacted additional requirements upon applicants seeking permits to market water to others for use, codified at § 85-2-310(9)(c)(v), MCA, which provides:

- (v) except as provided in subsection (10), if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:
 - (A) each person who will use the water and the amount of water each person will use;

- (B) the proposed place of use of all water by each person;
- (C) the nature of the relationship between the applicant and each person using the water;
- and
- (D) each firm contractual agreement for the specified amount of water for each person using the water;

Failure to satisfy these criteria mandates that “the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. . . .” § 85-2-310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(5), and - 311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

44. The legislative purpose of § 85-2-310(9)(v), MCA was to prohibit the appropriations of water based upon a speculative intent. Chapter 399, Laws of Montana 1985. To that end § 85-2-310(9), MCA, includes express criteria for the DNRC to consider when evaluating an application for a permit or change authorization to market water to others for use. See DNRC Written Testimony, HB No. 396 (Mar. 25, 1985). These criteria ensure that other water users are committed to the beneficial use of the full quantity of water requested by the applicant. The terms of a "firm contractual agreement" must include sufficient certainty to ensure that a specific volume of water will actually be put to beneficial use by the contracting party in order to comply with the anti-speculation doctrine and satisfy the requirement of bona fide intent to put the water to beneficial use. See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566 (Colo. 1979) (applicant failed to prove intent to appropriate water for beneficial use where it did not have firm contractual commitments or other evidence of privity between the applicant and the actual beneficial user of the water).

45. Applicant proposes to use water for Water Marketing which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence Water Marketing is a beneficial use and that 6.8 acre-feet of consumptive volume from the reservoir requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 24-25)

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. 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 Nos. 26-29)

POSSESSORY INTEREST

48. 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

49. 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.

The place of use for sale or marketing is the point at which the ownership of the use of the water transfers. *In the Matter of Application Nos. 42B-30011045 and 42B-30014358 for Beneficial Water Use Permit by Fidelity Exploration and Production Company* (DNRC 2007), *rev'd on other grounds, Northern Plains Resources Council et al. v. Montana Department of Natural Resources et al.*, Cause No. CDV-2007-425, Montana First Judicial District Court *Memorandum*

and Order on Petition for Judicial Review (December 15, 2008); see also *Masters Report*, Water Court Case No. 76HE-166 (“place of use” for water marketing at State-owned Painted Rocks Reservoir is the dam because the ownership of the water transfers at the dam). In this case, this point is the depot where the water trucks are filled. The ultimate place of use of the water is represented in the contracts for sale of the water. The Applicant has provided a general service area to further describe where the water will ultimately be used for oil field production. This water may only be used in the State of Montana.

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 Nos. 30)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Temporary Change Water Right No. 40S 30126841 should be granted subject to the following.

The Department has determined that the Applicant may temporarily change the place of use and purpose for the Statement of Claim No. 40S 8614-00. The change will be for period of 2 years. The point of sale in the S2SWNW Section 2, Township 21N, Range 46E, McCone County will be added. The purpose of Water Marketing will be added. The Applicant can market up to 6.8 AF per annum and continue to water 200 AU with a consumptive volume of 6.8 AF. The point of diversion and place of storage are not being changed.

The application will be subject to the following conditions, limitations or restrictions.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.

WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.

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 6th day of August 2020.

/Original signed by Steven B Hamilton/
Steven B Hamilton, Deputy Regional Manager
Glasgow Water Resource 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 6th day of August 2020, by first class United States mail.

Gibbs Land, LLC
904 Weldon Road
Circle, MT 59219

Notified by Email: TransCanda Keystone Pipeline, LP Attn: Gayle Konik

Regional Office, (406) 228-2561