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

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APPLICATION FOR TEMPORARY CHANGE OF EXISTING WATER RIGHT NO. 39E 30149182 BY GARDNER HOME PLACE LLC	**)**	**PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE**

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On June 26, 2020, Gardner Home Place LLC (Applicant) submitted Application to Change Water Right No. 39E 30149182 to change Water Right Claim No. 39E 26473-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of August 4, 2020.

The Department met with the Applicant on June 24, 2020, by Zoom for a pre-application meeting. Mark Elison and Jill Lippard were present for the Department. The Applicant was represented by Chad Barnes, consultant with SWCA Environmental Consultants, and by Rusty Shaw and Bill Atchison, representatives of Denbury Green Pipeline-Montana LLC. An Environmental Assessment for this Application was completed on August 5, 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

  Change in Purpose Addendum

  Temporary Change Addendum

  Water Marketing Purpose Addendum

  Letter dated March 5, 2020, from Carolyn Sime, Montana Sage Grouse Habitat Conservation Program Manager, to Rusty Shaw, representative of Denbury Onshore, LLC regarding steps for the project to remain consistent with the Sage Grouse Habitat plan.
- Maps:

  Aerial photograph showing the point of diversion and reservoir location for 39E 26473-00.

Map with 1:120,000 scale showing the proposed place of use for leased water along the Denbury Green Pipeline-Montana LLC right-of-way.

Information received after Application filed:

- Signed water purchase agreement between Gardner Home Place LLC, water right owners, and Denbury Green Pipeline-Montana LLC, lessee, for up to 4,240,000 gallons (13.01 AF) of volume from the reservoir located in the S2 Section 34, T6S, R56E and NE Section 3, T7S, R56E, Carter County, and used for Statement of Claim 39E 26473-00.
- Email from Chad Barnes, consultant with SWCA Environmental Consultants, dated September 22, 2020, confirming that Applicant agrees to reduce stock on pastures with access to the reservoir from January 1, 2021 to December 31, 2021.
- Updated water purchase agreement between Gardner Home Place LLC, water right owner, and Denbury Green Pipeline-Montana LLC, lessee, received by the Department on October 2, 2020.

Information within the Department's Possession/Knowledge

- Department file for Statement of Claim 39E 26473-00
- Technical Report prepared by the Department dated August 4, 2020
- USGS Phillippi Reservoir 7.5 minute topographic map
- USGS Aerial Photo dated August, 25 1973
- 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 Billings Regional Office at 406-247-4415 to request copies of the following documents.

  - Pond and Wetland Evaporation/Evapotranspiration Memo dated November 8, 2019
  - Potts, D.F., 1988. Estimation of Evaporation from Shallow Ponds and Impoundments in Montana. Montana Conservation Experiment Station, School of Forestry, University of Montana, Misc. Publication No. 48.
  - U.S. Department of Agriculture – Soil Conservation Service (SCS), 1974. Technical Note: Environment No. 7.

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). **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; AU means animal units; AF/YR means acre-feet per year; POU means place of use and POD means point of diversion.

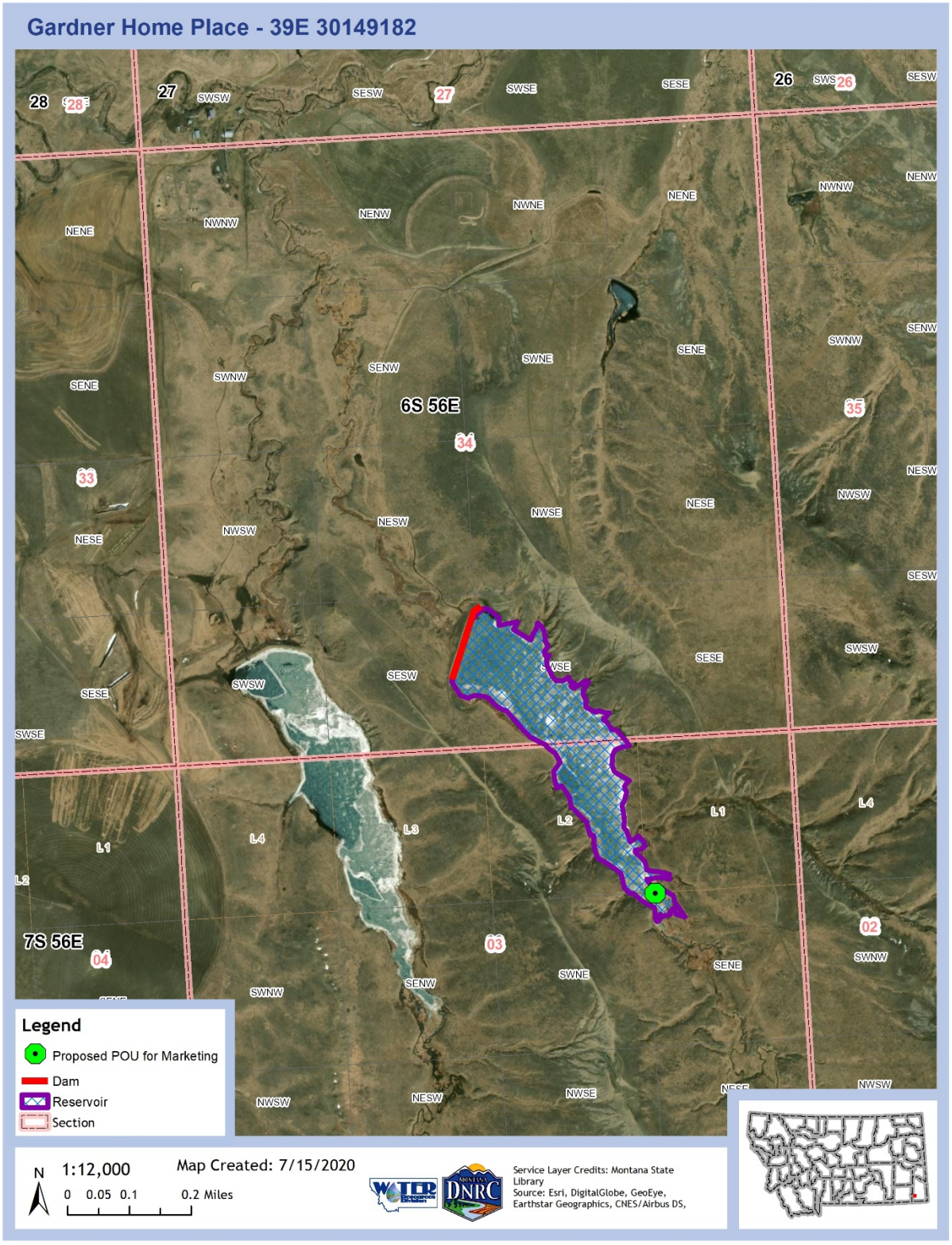
WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant proposes to temporarily change the purpose for 13.01 AF from stock to marketing on Statement of Claim No. 39E 26473-00. Claim 39E 26473-00 is for 244.88 AF diverted volume with a consumptive use of 21.43 AF from an on-stream reservoir for the purpose of stock use for 507.5 AUs with a priority date of July 19, 1957. The period of diversion and period of use are January 1 to December 31. The point of diversion is a dam on East Fork Groat Creek (also known as Little Groat Creek) that extends from the NESESW to the NESWSE of Section 34, T6S, R56E, Carter County. The place of use is the E2SESW and SWSE Section 34, T6S, R56E and the E2NWNE Section 3, T7S, R56E, Carter County, approximately 4.5 miles northeast of Hammond, MT.

2. There are no supplemental water rights for the place of use.

3. There are no previous change authorizations on Statement of Claim 39E 26473-00.


Gardner Home Place - 39E 30149182
6S 56E
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Legend
Proposed POU for Marketing
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Map Created: 7/15/2020
Service Layer Credits: Montana State Library
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS,

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the purpose on 13.01 AF of Statement of Claim 39E 26473-00 to marketing in order to market water to Denbury Green Pipeline-Montana LLC for a period of one year ending on December 31, 2021. The Applicant proposes to reduce the volume used for stock purpose by 13.01 AF by reducing the herd size in pastures with access to the reservoir on East Fork Groat Creek in Section 34, T6S, R56E and Section 3, T7S, R56E from 507.5 AU to 120 AU during the year of the lease period ending December 31, 2021.

5. The place of use for marketing is a secondary point of diversion where the buyer will pump water from the reservoir in the NWSENE of Section 3, T7S, R56E, Carter County.

6. Water right 39E 27587-00 is also served by the reservoir located in the S2 Section 34, T6S, R56E and NE Section 3, T7S, R56E. This irrigation water right is not considered supplemental to water right 39E 26473-00.

7. The service area proposed by Denbury Green Pipeline-Montana LLC is the right-of-way for the pipeline in Carter County as shown on the map included with the application file.

CHANGE CRITERIA

8. 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.

9. 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).

10. The application is subject to additional criteria if it involves marketing as per §85-2-310 and §85-2-311, MCA. This application involves an appropriation for marketing.

11. The application is subject to specific conditions under §85-2-407, MCA, because it involves a temporary change in an appropriation right.

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

12. The water right proposed for change is Statement of Claim 39E 26473-00 with a priority date of July 19, 1957.

13. Statement of Claim 39E 26473-00 was not decreed a specific flow rate or volume. The consumptive volume is the amount of water used for stock water purposes at the rate of 30 GPD

per AU. Animal Units shall be based on reasonable carrying capacity and historical use of the area serviced by this water source. The claimed use of this water right is for 507.5 AU which is within reasonable carrying capacity.

14. Stock use for 507.5 AU consumes 17.05 AF based on the Adjudication Supreme Court standard for pre-July 1, 1973, water rights of 30 GPD/AU (507.5 AU x 30 gallons x 365 days/325,851 gallons/AF = 17.05 AF).

15. The point of diversion is a dam on East Fork Groat Creek that extends from the NESESW to the NESWSE of Section 34, T6S, R56E, Carter County. The place of use is the E2SESW and SWSE Section 34, T6S, R56E and the E2NWNE Section 3, T7S, R56E, Carter County.

16. The reservoir capacity is estimated to be 240.5 AF based on historical aerial imagery, GIS mapping, USGS Phillippi Reservoir 7.5 minute topographic map and the Department standard formula which is surface area in acres times max depth in feet times slope factor of 0.4 for reservoirs. The surface area is estimated to be 32.5 acres based on GIS mapping of the reservoir surface using USGS Aerial Photo dated August 25, 1973, and ESRI basemap service center aerial imagery. The max depth was estimated based on the USGS quad with 20 foot contours. The length of the reservoir is approximately 0.92 times the length between the contour intervals above and below the reservoir indicating an approximate depth of 18.5 ft. The reservoir capacity is calculated as 32.5 AC x 18.5 ft x 0.4 = 240.5 AF.

17. The estimated mean annual evaporation at this location is 50 inches according to the USDA Soil Conservation Service, 1974. To determine net evaporation in inches, mean annual evaporation is multiplied by the percentage of annual lake evaporation per month from relative potential radiation as described in Potts, 1988. The monthly average total precipitation from the Western Regional Climate Center records from a nearby station in Broadus, Montana is then subtracted. A table showing the net evaporation by month can be found in the file. The annual net evaporation is 35.96 inches. The annual net evaporation for the reservoir is 97.39 AF (32.5 AC x 35.96 inches / 12 = 97.39 AF). When divided proportionately by volume among the two water rights served by the reservoir, 4.38 AF of net evaporation is attributed to the water right 39E 26473-00. Evaporation from the reservoir is not considered a beneficial use for this application. The evaporation from the reservoir will not change as a result of this proposed use. The Applicant is requesting to change a portion of the volume consumed by stock, not by evaporation.

18. The historic diverted volume for water right 39E 26473-00 is 244.88 AF. The diverted volume is calculated as reservoir capacity plus net evaporation (240.5 AF + 4.38 AF = 244.88 AF). The historic consumptive use is 21.43 AF calculated as the volume used by 507.5 AU at 30 gal/AU/day plus net evaporation (17.05 AF + 4.38 AF = 21.43 AF).

19. The evaporation, diverted volume, and historic consumptive use in this Preliminary Determination differ from the Technical Report dated 8/4/2020. The evaporation and diverted volume were re-calculated using the methods in the Pond and Wetland Evaporation/Evapotranspiration Memo dated November 8, 2019. Evaporation was added to the volume consumptively used by stock to calculate the historic consumptive use.

20. The Department finds the following historic use.

WR Number	Purpose	Flow Rate	Historic Consumptive Use Volume	Historic Diverted Volume	Period of Use	Point of Diversion	Place of Use	Priority Date
39E 26473-00	Stock	N/A (on-stream reservoir)	21.43 AF	244.88 AF	01/01-12/31	NESESW & NESWSE Section 34 T6S, R56E, Carter County	S2 Section 34 T6S, R56E, & NE Section 3 T7S, R56E, Carter County	7/19/1957

<u>FINDINGS OF FACT</u> – Adverse Effect

21. The water right proposed for change is Statement of Claim 39E 26473-00 with a priority date of July 19, 1957. A change application cannot increase the flow rate, diverted volume, or consumptive volume of the water right.

22. Water will be diverted from the reservoir with a pump by the buyer (Denbury Green Pipeline-Montana LLC) for industrial use including dust suppression and hydrostatic testing for a proposed pipeline segment in Carter County. No change to point of diversion, source or storage is proposed. The place for use for marketed water is the NWSENE Section 3, T7S, R56E, Carter County.

23. No increase in volume of water appropriated under 39E 26473-00 will occur. Water withdrawn from the reservoir for marketing will be measured. Water gauges and water logs will be maintained to document the quantity of water withdrawn by Denbury. The Applicant proposes to reduce consumptive volume by reducing stock from pastures with access to the reservoir from 507.5 AU to 120 AU during the year of the lease period ending December 31, 2021.

24. Stock and marketing are both considered 100 percent consumptive so no change in return flow will result from the proposed change.

25. There are no supplemental water rights.

26. The Applicants propose to reduce their stock use by the amount requested for marketing. Since both purposes are 100 percent consumed there will be no affect to other water rights on the reservoir. The Applicant is the owner of all water rights in the area of potential impact. No water rights will be impacted because the temporary change in purpose will not result in any changes to diverted volume, historic consumptive use, or the ability of water users to make call.

BENEFICIAL USE

FINDINGS OF FACT

27. Applicant proposes to change the purpose for a portion of water right 39E 26473-00 to marketing and continue to use the remainder for stock. Marketing and stock use are both recognized beneficial uses §85-2-102(5), MCA.

28. Applicant proposes to use 13.01 AF diverted and consumed volume for marketing. This volume is supported by the water lease agreement between the Applicant and Denbury signed and dated June 30, 2020.

ADEQUATE DIVERSION

FINDINGS OF FACT

29. There is no proposed change to the method of diversion. The dam and reservoir have been in place since 1957.

30. The water changed to marketing will be withdrawn from the reservoir from a secondary point of diversion in the NWSENE of Section 3, T7S, R56E, Carter County. The water used for hydrostatic testing will be transported to the construction right-of-way via a temporary 8 or 10 inch-pipeline approximately 0.17 miles in length and pumped straight into the pipeline at milepost 21 in the NESENE Section 3, T7S, R56E. During water filling of the pipeline sections for hydrostatic testing, pumps capable of injecting water into the test section at a rate of approximately 1 mile per hour will be used (2,500 GPM). The amount of water requested is enough to fill the entire 105.4 mile pipeline to complete the hydrostatic testing. The water used for dust suppression will be pumped into water tanks and water trucks via the same 8 or 10 inch pipe used for hydrostatic testing or by pumping directly from the reservoir if the pipeline isn't available. Water trucks will then spread the water as needed for dust suppression along the right-of-way and access roads within an area approximately 5 miles south of and 5 miles north of the point of diversion. The system was designed by licensed engineers.

POSSESSORY INTEREST

FINDINGS OF FACT

31. This application is to temporarily change a portion of the water right to the purpose of marketing. 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 place of use for marketing is the point at where water transfers (COL 49) which, in this case, is a secondary point of diversion in the NWSENE of Section 3, T7S, R56E, Carter County. The Applicant has possessory interest in the property where the point of diversion and place of use are located. The marketed water is for dust abatement and hydrostatic testing along the proposed pipeline right-of-way. No water can be used in the absence of right-of-way agreements which constitute written consent.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

32. 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]

33. 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

[1] DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.[2]

34. 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

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[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).

[3] A 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

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]

35. 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-G76I By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512

[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 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.)

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]

36. 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 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).

37. 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

[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).

> 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).

38. 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.

39. 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).

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. 39E 26473-00 of 244.88 AF diverted volume with a consumptive use of 21.43 AF. (FOF 12-20)

41. Based upon the Department's comparative analysis of historic water use and planned use under the proposed change, 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 21-26)

BENEFICIAL USE

42. 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).

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 marketing and stock which are recognized beneficial uses. §85-2-102(5), MCA. The volume of water for stock use is beneficial as documented by Statement of Claim 39E 26473-00. Applicant has proven by a preponderance of the evidence

marketing is a beneficial use and that 13.01 AF of diverted volume of water requested is the amount needed to sustain the beneficial use and is under firm contractual agreement. §85-2-402(2)(c) and 85-2-310(9)(c), MCA. (FOF 27, 28)

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 29, 30)

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. 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 secondary point of diversion where the water trucks are filled or where water is piped for hydrostatic testing. The ultimate place of use of the water is represented in the signed lease for the water. The Applicant has provided a general service area to further describe where the water will ultimately be used for dust abatement and hydrostatic testing. 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 31)

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. 39E 30149182 should be granted subject to the following.

The Applicant may temporarily change 13.01 AF of Statement of Claim 39E 26473-00 to the purpose of marketing. The secondary point of diversion and place of use for marketing are located in the NWSENE Section 3, T7S, R56E, Carter County. The period of diversion and period of use on the temporary change for marketing will be January 1, 2021 to December 31, 2021. This temporary change authorization will end on December 31, 2021.

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 5th day of October 2020.

/Original signed by Mark Elison/
Mark Elison, Regional Manager
Billings Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this ____ day of _____ 20__, by first class United States mail.

GARDNER HOME PLACE LLC
2770 HAMMOND RD
HAMMOND, MT 59332

SWCA ENVIRONMENTAL CONSULTANTS
ATTN: CHAD BARNES
PO BOX 801
SPEARFISH, SD 57783

_____
Billings Regional Office, (406) 247-4415