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

*** * * * * * ***

APPLICATION TO CHANGE WATER RIGHT NO. 43D 30152080 BY BOTTRELL FAMILY INVESTMENTS	**)** **)** **)**	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

*** * * * * * ***

On April 27, 2021, Bottrell Family Investments (Applicant) submitted Application to Change Water Right No. 43D 30152080 to change Water Right Claim Nos. 43D 44585-00, 43D 44586-00, 43D 44587-00, 43D 44588-00, and 43D 44589-00 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. No pre-application meeting was held. The Application was determined to be correct and complete as of September 21, 2021. An Environmental Assessment for this Application was completed on September 21, 2021.

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: Undated aerial photograph showing location of proposed center pivot sprinkler.
  Five 2015 USDA aerial photographs showing historical acres and acres to be retired.
  Undated aerial photograph showing proposed conveyance means.
  USGS topographic map showing point of diversion and O'Conner Ditch.

Information Received after Application Filed

- E-mail from Pat Riley, Consultant, to Mark Elison, Regional Manager, dated July 12, 2021, amending the application to include a previous change in place of use and bring an existing center pivot sprinkler system into compliance.
- E-mail from Pat Riley, Consultant, to Mark Elison, Regional Manager, dated July 4, 2021, providing documentation of notice to other ditch users.

Information within the Department's Possession/Knowledge

- Department water right records
- Files for Statements of Claim 43D 44585-00, 43D 44586-00, 43D 44587-00, 43D 44588-00, and 43D 44589-00
- Estimation of Evaporation from Shallow Ponds and Impoundments in Montana, Donald F. Potts (1988)
- 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.
    - Development of standardized methodologies to determine historical Diverted Volume, dated September 13, 2012
    - Technical Memorandum: Distributing Conveyance Loss on Multiple User Ditches, dated February 14, 2020
    - Historic diverted volume determinations for changes to existing rights decreed with no volume, dated August 4, 2020
    - Return Flow Memo, dated April 1, 2016
    - Change in Method of Irrigation Memo, dated December 2, 2015

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; AC means acres; AF/YR means acre-feet per year; POU means place of use and POD means point of diversion.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Water Right Claim Nos. 43D 44585-00, 43D 44586-00, 43D 44587-00, 43D 44588-00, and 43D 44589-00. These water rights are completely supplemental to each other. They share the same source (Bluewater Creek), point of diversion, conveyance means and irrigate the same acres. In approximately 1970, the Applicant installed pumps and two center pivot sprinkler systems. This pre-1973 expansion of the water rights resulted in a claimed

place of use of 578.9 AC. The Statement of Claims were objected to by the United States Bureau of Indian Affairs and the Crow Tribe on March 1, 1994. A stipulation filed on August 16, 1996 was accepted by the Montana Water Court on November 15, 1996 and increased acres to 596.20. The place of use is approximately 2 miles southeast of Fromberg.

Water right numbers proposed for change:

WR Number	Purpose	Flow Rate	Claimed Volume	Period of Use	Point of Diversion	Place of Use	Priority Date	Acres
43D 44585-00	Irrigation	3.13 CFS	937.5 AF	04/15-10/15	NWNWNW Section 6, T6S, R24E, Carbon County	SESE Section 22, S2SW and SE Section 23, N2 and SW Section 26, N2 and SE Section 27, t5S, R23E, Carbon County	6/15/1903	596.2
43D 44586-00	Irrigation	170.54 GPM	112.5 AF	04/15-10/15	NWNWNW Section 6, T6S, R24E, Carbon County	SESE Section 22, S2SW and SE Section 23, N2 and SW Section 26, N2 and SE Section 27, t5S, R23E, Carbon County	7/17/1894	596.2
43D 44587-00	Irrigation	1.50 CFS	450 AF	04/15-10/15	NWNWNW Section 6, T6S, R24E, Carbon County	SESE Section 22, S2SW and SE Section 23, N2 and SW Section 26, N2 and SE Section 27, t5S, R23E, Carbon County	6/1/1896	596.2
43D 44588-00	Irrigation	2.25 CFS	1000 AF	04/15-10/15	NWNWNW Section 6, T6S, R24E, Carbon County	SESE Section 22, S2SW and SE Section 23, N2 and SW Section 26, N2 and SE Section 27, t5S, R23E, Carbon County	7/2/1893	596.2
43D 44589-00	Irrigation	3.90 CFS	1170 AF	04/15-10/15	NWNWNW Section 6, T6S, R24E, Carbon County	SESE Section 22, S2SW and SE Section 23, N2 and SW Section 26, N2 and SE Section 27, t5S, R23E, Carbon County	7/2/1893	596.2

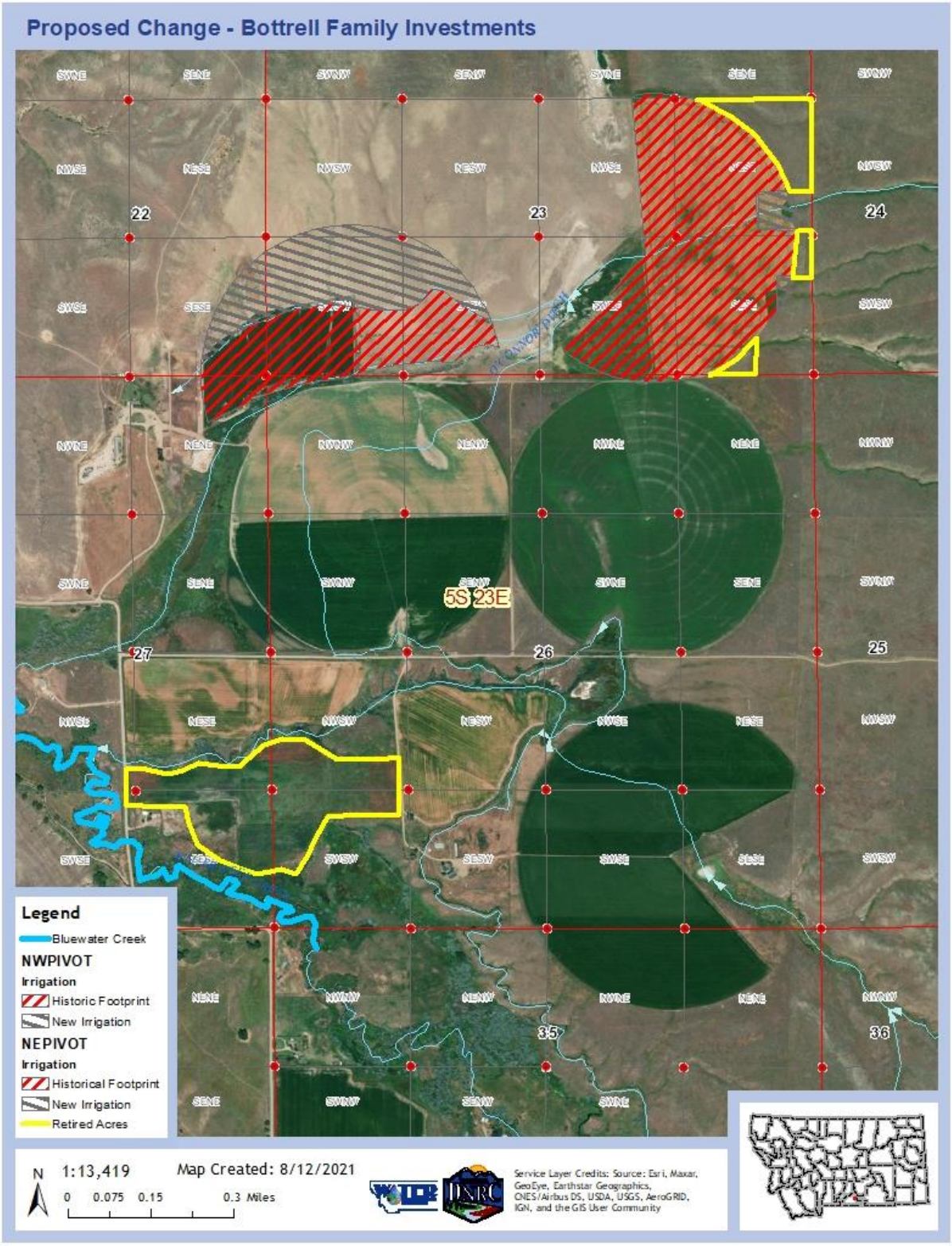
The Montana Water Court removed the claimed volume from these statements of claim and limited the volume to historical and beneficial use.

2. These water rights are not supplemental to any other water rights. None of these water rights has been the subject of previous change authorizations.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant installed a center pivot sprinkler in SE Section 23 sometime after 1980 and prior to the present. The Applicant proposes to add 2.99 AC of center pivot sprinkler irrigation in NESE and .66 AC in SESE Section 23 and retire 11.39 AC of wheel line sprinkler irrigation in NWSE and 4.91 AC in SESE Section 23 to accurately describe the changed place of use due to that installation. The Applicant also proposes to add a new center pivot sprinkler system in the SW Section 23 and SESE Section 22 that will include 35.81 AC within the footprint of historical irrigation and 39.19 AC of new irrigated land. The Applicant proposes to retire 42.9 AC of historical irrigation in E2SE Section 27 and W2SW Section 26 to account for the new irrigated AC. In total, 59.2 AC of wheel line irrigation will be retired and 42.84 AC of center pivot irrigation outside the historical footprint added. No change in point of diversion, flow rate, purpose or place of storage is proposed.


Proposed Change - Bottrell Family Investments
22
23
24
27
26
25
35
36
5S 23E
Legend
Bluewater Creek
NWPIVOT
Irrigation
Historic Footprint
New Irrigation
NEPIVOT
Irrigation
Historical Footprint
New Irrigation
Retired Acres
N
1:13,419
Map Created: 8/12/2021
0 0.075 0.15 0.3 Miles
Service Layer Credits: Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

CHANGE CRITERIA

4. 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.

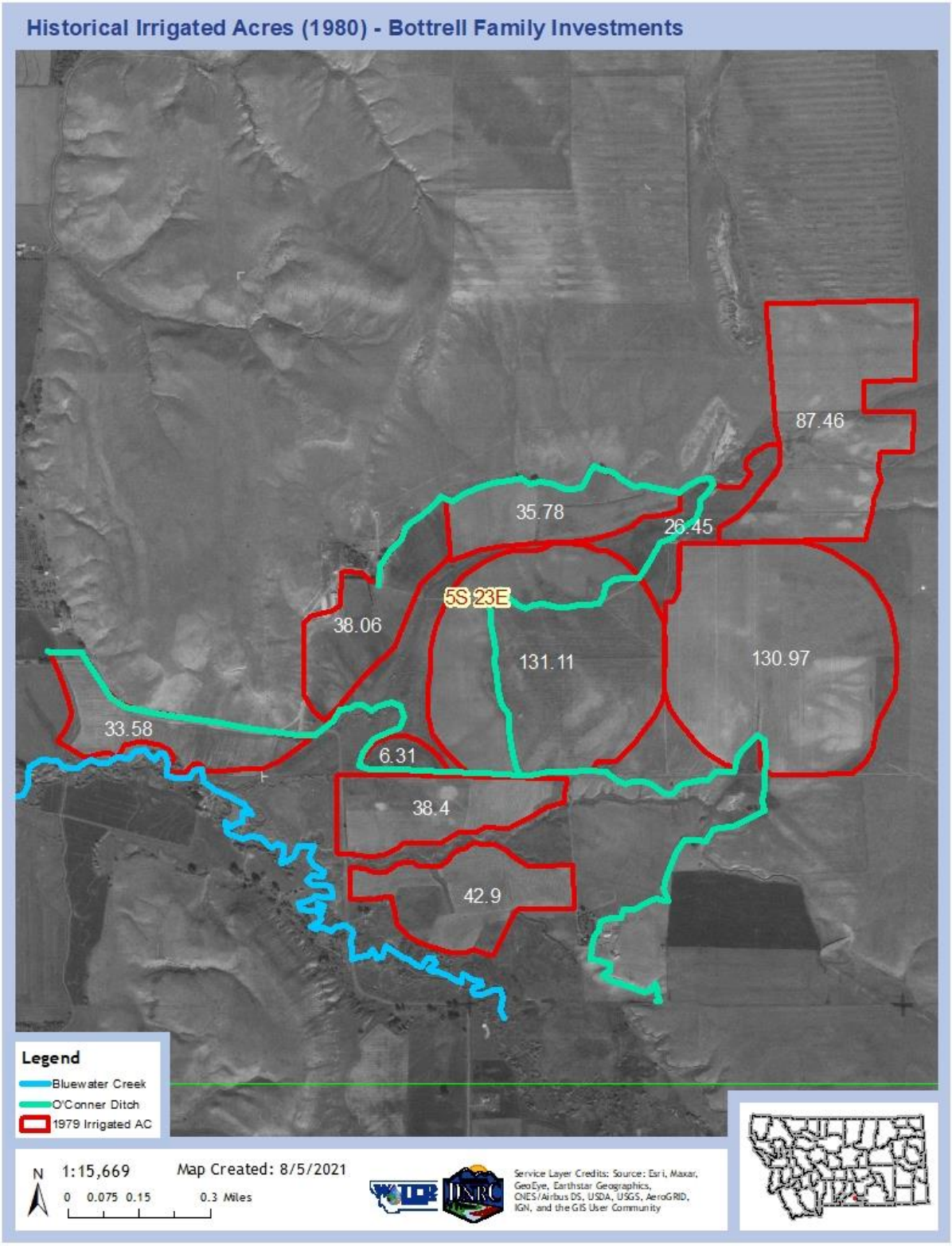
5. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of 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

6. The historical use was from a headgate on Bluewater Creek for a combined 11.15 CFS. The period of diversion and period of use was 4/15 to 10/15. The historical use analysis below is for the acres claimed identically on all five water rights. The water rights are then considered individually in terms of flow rate and portion of the historical use attributable to each.

7. The irrigated acres were expanded in 1970. During examination it was found that the 1944 and 1966 Carbon County Water Resources Survey showed 243.2 AC irrigated. Based on USDA Aerial Photo 279-86, dated 10/3/1980**,** the examination found 590.6 AC irrigated. The Department revisited the irrigated acres using multiple photographs in the 1979 aerials layer in the Department's geographical information system and found 571.02 AC irrigated. The Department finds that the maximum historically irrigated acres for these water rights is 571.02 AC. The stipulation, claim map, and examination report generalized portions of the irrigated place of use. Particularly in the NE Section 27 and across the SW Section 26 and SE Section 27, there are streams and substantial riparian environment not amenable to irrigation. When these areas are removed from acres considered irrigated, there are 571.02 AC of historically irrigation as shown on the map below. There were historically 308.94 acres of wheel line irrigation and 262.08 acres of center pivot sprinkler irrigation.


Historical Irrigated Acres (1980) - Bottrell Family Investments
87.46
35.78
26.45
5S 23E
38.06
131.11
130.97
33.58
6.31
38.4
42.9
Legend
Bluewater Creek
O'Conner Ditch
1979 Irrigated AC
N
1:15,669
0 0.075 0.15 0.3 Miles
Map Created: 8/5/2021
Service Layer Credits: Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

8. The historical consumptive use (volume) for all five water rights is 750.0 AF**.** The Department used the consumptive rules in ARM 36.12.1902. Statements of Claim 43D 44585-00, 43D 44586-00, 43D 44587-00, 43D 44588-00 and 43D 44589-00 claim the same irrigated acres and are entirely supplemental. The historical consumptive volume and diverted volume are determined below for the total acreage. The totals are then divided between the individual Statements of Claim based on the flow rate of each claim. Because the consumptive use calculations vary for wheel line and center pivot irrigation, the two types of irrigation are considered separately below.

9. The historical consumptive use (volume) for wheel line irrigation is 336.36 AF. Based on 308.94 AC of wheel line irrigation with an Irrigation Water Requirement for wheel line irrigation in Carbon County at Joliet of 22.41 inches and a county management factor of 58.3%, the historic consumptive use is 336.36 AF (308.94 x 22.41/12 x 0.583 = 336.36). The Department adds 10 % of field applied volume to account for irrecoverable losses in sprinkler systems. Using 70% efficiency, the field applied volume is 480.51 AF (336.36/0.70 = 480.51) and the irrecoverable losses are 480.51 x 0.10 = 48.1 AF. Total consumptive use including irrecoverable losses for the wheel line irrigation under these water rights is 384.46 AF (336.36 + 48.1 = 384.46).

Carbon County (Joliet) Wheel Line ET *(Inches)*	Carbon County 1964-1973 Management Factor *(Percent)*	Historic Acres	Historic Consumed Volume (AF) *(without IL)*	On-farm Efficiency (*Percent*)	Field Application AF	Historic Irrecoverable Losses *(IL) Sprinkler 10%:*	HCV AF *(Including IL)*
22.41	58.3%	308.94	336.36	70%	480.51	48.1	384.46

10. The historic consumptive use (volume) for center pivot irrigation is 365.54 AF. Based on 262.08 AC of center pivot irrigation with an Irrigation Water Requirement for center pivot irrigation in Carbon County at Joliet of 25.12 inches and a county management factor of 58.3%, the historic consumptive use is 319.85 AF (262.08 x 25.12/12 x 0.583 = 319.85). The Department adds 10 % of field applied volume to account for irrecoverable losses in sprinkler systems. Using 70% efficiency (very early center pivot system), the field applied volume is 456.93 AF (319.85/0.70 =

456.93) and the irrecoverable losses are 456.93 x 0.10 = 45.69 AF. Total consumptive use including irrecoverable losses for center pivot irrigation under this water right is 365.54 AF.

Carbon County (Joliet) Center Pivot ET *(Inches)*	Carbon County 1964-1973 Management Factor *(Percent)*	Historic Acres	Historic Consumed Volume (AF) *(without IL)*	On-farm Efficiency (*Percent*)	Field Application AF	Historic Irrecoverable Losses *(IL) Sprinkler 10%:*	HCV AF *(Including IL)*
25.12	58.3%	262.08	319.85	70%	456.93	45.69	365.54

11. The combined historical consumptive use including irrecoverable losses for both wheel line and center pivot acres is 750.0 AF (384.46 AF + 365.54 AF = 750.0 AF). This equates to 1.31 AF/AC (750.0 AF/571.02 AC = 1.31 AF/AC). Combined applied volume is 937.44 AF (480.51 AF + 456.93 AF = 937.44 AF).

12. The historic diverted volume for these water rights is 1484.32 AF. The Department used the historic diverted volume rules in ARM 36.12.1902. The Department uses the following formula to determine historic diverted volume: Historic Diverted Volume = (Volume $_{\text{historic consumptive use}}$/On-farm efficiency) + Volume $_{\text{conveyance loss}}$. The historic consumptive use, not including irrecoverable losses is 656.21 AF. Using an irrigation efficiency of 70%, the field applied volume is 656.21/0.70 = 937.44 AF. Conveyance loss is defined as the portion of water diverted at the headgate that does not arrive at the irrigated place of use due to seepage and evapotranspiration from the ditch. In this case, there are multiple water rights using the same diversion and conveyance facilities.

13. The Department broke the ditch down into 3 segments based on the locations where the two upditch water rights are taken out of the ditch. The segments are 3732 feet, 4332 feet and 7255 feet long respectively. The Applicant's flow rate was then divided by flow remaining in the ditch for each segment to determine their percent of flow in each segment. The Applicant has 84.47%, 89.56% and 100% respectively in the three ditch segments. These percentages were then applied to the conveyance losses for each segment to determine the portion attributable to the Applicant. A spreadsheet containing calculations of the Applicant's percentage of flow and conveyance losses attributable to the Applicant is in the file.

14. Parameters used in calculating conveyance loss are: ditch length = 15319 feet (2.9 miles), wetted perimeter = 12.49 feet, width = 6 feet, flow rate = 13.2 CFS (total diverted flow rate in the ditch), days irrigated = 184, ditch loss rate (clay loam, silty clay loam) = 0.6, annual evaporation at Bridger, MT from Potts (1988) = 43 inches (3.58 feet) and period adjusted evaporation = 2.71 feet. Evaporation was adjusted from annual evaporation based on the percentage of evaporation by month over the period of diversion. Because the ditch serves multiple users and because the flow rate is low for the number of acres irrigated (8.77 GPM/AC) the historic number of days the ditch was operational was taken as the period of diversion (184 days) in calculation of conveyance losses.

15. Seepage loss calculated as (wetted perimeter)(ditch length)(loss rate)(days)/43560 ft^2/AC is 484.92 AF ((12.49 x 15319 x 0.6 x 184)/43560). The Applicant's portion of the seepage loss is 452.26 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

16. Vegetative loss calculated as (% loss per mile)(flow rate)(days)(ditch length)(unit conversion factor) is 96.23 AF (0.0075 x Flow Rate Varies by Segment x 184 x 2.9 x 2). The Applicants' portion of vegetative losses is 89.29 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

17. Evaporation calculated as (ditch width)(ditch length)(adjusted evaporation rate)/(square feet per acre) is 5.72 AF ((6 x 15319 x 2.71)/43560). The Applicants' portion of evaporation losses is 5.33 AF which is the sum of the losses for each segment based on the Applicants' percent of flow in each segment.

18. Total conveyance losses attributable to the Applicant are 546.88 AF (452.26 + 89.29 = 5.33 = 546.88) and the historic diverted volume is 1484.32 AF (937.44 + 546.88 = 1484.32).

19. Based upon ditch measurements provided by the Applicant and the Mannings flow equation, the O'Conner Ditch is capable of conveying 107 CFS. The Applicant states that the ditch capacity was measured around 2002 at 23 CFS. The Department used the measured capacity of 23 CFS which is greater than the flow rate of all water rights carried by the ditch.

20. The maximum historic flow rate for water right number 43D 44585-00 is the claimed flow rate of 3.13 CFS. The claimed flow rate equates to 2.46 GPM/AC. The historical consumptive use (volume) for this water right is 210.75 AF. The historic diverted volume for this water right is

417.09 AF. This water right provides 28.1% of the flow rate of all five water rights combined and the consumptive use and diverted volume are taken as 28.1% of the total.

21. The maximum historic flow rate for water right number 43D 44586-00 is the claimed flow rate of .38 CFS (170.54 GPM). The claimed flow rate equates to .30 GPM/AC. The historic consumptive use (volume) for this water right is 25.5 AF. The historic diverted volume for this water right is 50.47 AF. This water right provides 3.4% of the flow rate of all five water rights combined and the consumptive use and diverted volume are taken as 3.4% of the total.

22. The maximum historic flow rate for water right number 43D 44587-00 is 1.50 CFS. The claimed flow rate equates to 1.18 GPM/AC. The historic consumptive use (volume) for this water right is 100.5 AF. The historic diverted volume for this water right is 198.9 AF. This water right provides 13.4% of the flow rate of all five water rights combined and the consumptive use and diverted volume are taken as 13.4% of the total.

23. The maximum historic flow rate for water right number 43D 44588-00 is 2.25 CFS. The claimed flow rate equates to 1.77 GPM/AC. The historic consumptive use (volume) for this water right is 151.5 AF. The historic diverted volume for this water right is 299.83 AF. This water right provides 20.2% of the flow rate of all five water rights combined and the consumptive use and diverted volume are taken as 20.2% of the total.

24. The maximum historic flow rate for water right number 43D 44589-00 is 3.9 CFS. The claimed flow rate equates to 3.06 GPM/AC. The historic consumptive use (volume) for this water right is 261.75 AF. The historic diverted volume for this water right is 518.03 AF. This water right provides 34.9% of the flow rate of all five water rights combined and the consumptive use and diverted volume are taken as 34.9% of the total.

The Department finds the following historical use:

WR Number	Purpose	Flow Rate	Consumptive Volume	Diverted Volume	Priority Date	Acres
43D 44585-00	Irrigation	3.13 CFS	210.75 AF	417.09 AF	6/15/1903	571.02
43D 44586-00	Irrigation	170.54 GPM	25.5 AF	50.47 AF	7/17/1894	571.02

43D 44587-00	Irrigation	1.50 CFS	100.5 AF	198.90 AF	6/1/1896	571.02
43D 44588-00	Irrigation	2.25 CFS	151.5 AF	299.83 AF	7/2/1893	571.02
43D 44589-00	Irrigation	3.90 CFS	261.75 AF	518.03 AF	7/2/1893	571.02

FINDINGS OF FACT – Adverse Effect

25. The Applicant proposes to retire 59.2 acres of wheel line irrigation and add 42.84 acres of center pivot sprinkler irrigation. No changes to purpose, point of diversion or storage are proposed. The Applicant proposes to add 2.99 AC of center pivot sprinkler irrigation in NESE and .66 AC in SESE Section 23 and retire 11.39 AC of wheel line sprinkler irrigation in NWSE and 4.91 AC in SESE Section 23 to accurately describe the current place of use. The Applicant also proposes to add a new center pivot sprinkler system in the SW Section 23 and SESE Section 22 that will include 35.81 AC within the footprint of historical irrigation and 39.19 AC of new irrigated land. The Applicant proposes to retire 42.9 AC of historical irrigation in E2SE Section 27 and W2SW Section 26 to account for the new irrigated AC. In total, 59.2 AC of wheel line irrigation will be retired and 42.84 AC of center pivot irrigation outside the historical footprint added.

26. Pursuant to a memo dated December 2, 2015, changes to method of irrigation within the historic footprint of irrigated acres are not considered by the Department in the comparison of historic to proposed consumptive use for the Department's analysis of adverse effect.

27. Based on 59.2 AC of wheel line irrigation with an Irrigation Water Requirement for wheel line irrigation in Carbon County at Joliet of 22.41 inches and a county management factor of 58.3%, the consumptive use on retired acres is 64.45 AF (59.2 x 22.41/12 x 0.583 = 64.45). The Department adds 10 % of field applied volume to account for irrecoverable losses in sprinkler systems. Using 70% efficiency, the field applied volume for the retired acres is 92.07 AF (64.45/0.70 = 92.07) and the irrecoverable losses are 92.07 x 0.10 = 9.21 AF. Total consumptive

use including irrecoverable losses for the retired wheel line irrigation is 73.66 AF (64.45 + 9.21 = 73.66).

28. Based on 42.84 AC of new center pivot irrigation with an Irrigation Water Requirement for center pivot irrigation in Carbon County at Joliet of 25.12 inches and a proposed use county management factor of 70.8%, the new consumptive use is 63.49 AF (42.84 x 25.12/12 x 0.708 = 63.49). The Department adds 10% of field applied volume to account for irrecoverable losses in sprinkler systems. Using 80% efficiency, the field applied volume is 79.36 AF (63.49/0.80 = 79.36) and the irrecoverable losses are 79.36 x 0.10 = 7.94 AF. Total consumptive use including irrecoverable losses for new center pivot irrigation is 71.43 AF (63.49 + 7.94 = 71.43).

29. The new consumptive use (71.43 AF) is less than the historical consumptive use (73.66 AF) by 2.23 AF (73.66 – 71.43 = 2.23).

30. The Applicant proposes no change to diverted volume. The diverted volume spread over the reduced acres equates to 2.65 AF/AC (1484.32 AF/560.96 AC = 2.65 AF/AC).

31. Bluewater Creek is the hydraulically connected surface water to which return flows would accrue under both historical and proposed practices.

32. The historic field applied volume was 937.44 AF of which 750.0 AF was consumed. The difference (187.44 AF) returned to Bluewater Creek annually. The timing and amount of return flows to Bluewater Creek will change as a result of the conversion from flood to sprinkler irrigation. The applied volume will decrease by 12.71 AF and the consumed volume will decrease by 2.23 AF. The annual return flow will decrease by 10.48 AF/YR.

33. According to Department policy, under the changed conditions return flows will only be reviewed under a limited adverse effect analysis absent a valid objection. For purposes of this application, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, <u>or</u> the historically-diverted water that will be left instream after the change is available during the period of diversion either below the point of diversion or where return flows accrued to the source (Department Policy Memorandum on Return Flows, April 1, 2016). In this instance, the first criterion is met. Return flows under the proposed change will enter back into Bluewater Creek prior to the next appropriator, in generally the same location as historically. The policy directs no further detailed analysis to be undertaken by the Department prior to receiving a valid objection, provided there will be no

enlargement of the amounts of water historically diverted or consumed. That has been determined to be the case here. If any other water right holder believes they will be adversely affected by a change in the timing and amount of return flows, they may file a valid objection to the proposed project and further analysis will occur.

BENEFICIAL USE

FINDINGS OF FACT

34. Applicant proposes to use water for irrigation which is a recognized beneficial use under the Montana Water Use Act. §85-2-102 (4), MCA.

35. Applicant proposes to use 1484.32 AF diverted volume and 11.15 CFS flow rate. This amount is supported by historical use (ARM 36.12.1902). The flow rate is 8.92 GPM/AC. The diverted volume is 2.65 AF/AC which is also within Department standards for irrigation use in climate area I (ARM 36.12.115; Sprinkler Irrigation = 2.63 – 3.04 AF/AC).

ADEQUATE DIVERSION

FINDINGS OF FACT

36. No change is proposed to the headgate that is the diversion from Bluewater Creek or the the O'Conner Ditch. Water for the new center pivot sprinkler system will be diverted from the ditch at a secondary point of diversion using the existing pump for the pivot in the NW of section 26 T5S, R23E. The pump is a 4HH-60 pump with a 14.38-inch impeller. The water would be pumped through 1436 feet of new 10-inch PIP piping to the new pivot. Because the pivots use the same pump, the use of the pivots would alternate.

37. The system was designed by Big Sky Irrigation in Billings, MT.

POSSESSORY INTEREST

FINDINGS OF FACT

38. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

39. 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]

40. 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

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

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]

41. 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);

---

[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

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]

42. 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);

[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.)

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-G76l 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]

43. 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).

44. 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

[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).

> 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).

45. 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.

46. 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).

47. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

48. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

49. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF 8 & 12).

50. 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").

51. 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. 43D 44585-00 of 417.09 AF diverted volume and 3.13 CFS flow rate with a consumptive use of 210.75 AF, Water Right Claim No. 43D 44586-00 of 50.47 AF diverted volume and 170.54 GPM flow rate with a consumptive use of 25.5 AF, Water Right Claim No. 43D 44587-00 of 198.90 AF diverted volume and 1.50 CFS flow rate with a consumptive use of 100.5 AF, Water Right Claim No. 43D 44588-00 of 299.83 AF diverted volume and 2.25 CFS flow rate with a consumptive use of 151.5 AF, and Water Right Claim No. 43D 44589-00 of 518.03 AF diverted volume and 3.90 CFS flow rate with a consumptive use of 261.75 AF. (FOF 6 - 24)

52. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows 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 25 - 33)

BENEFICIAL USE

53. 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).

54. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 1,484.32 acre-feet of diverted volume and 11.15 CFS flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF 34 - 35)

ADEQUATE MEANS OF DIVERSION

55. 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).

56. 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 36 - 37)

POSSESSORY INTEREST

57. 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

58. The Applicant has proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (FOF 38)

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. 43D 30152080 should be granted subject to the following.

The Applicant may change the place of use to add 2.99 AC of center pivot sprinkler irrigation in NESE, 0.66 AC in SESE Section 23 and add a new center pivot sprinkler system in the SW Section 23 and SESE Section 22 that will include 35.81 AC within the footprint of historical irrigation and 39.19 AC of new irrigated land. The Applicant will retire 11.39 AC of wheel line sprinkler irrigation in NWSE, 4.91 AC in SESE Section 23 and 42.9 AC of historical irrigation in E2SE Section 27 and W2SW Section 26. Following this change, the new place of use will be:

87.96 AC	SE	Section 23	T5S R23E	Carbon County
1.98 AC	S2NWSW	Section 23	T5S R23E	Carbon County
71.70 AC	S2SW	Section 23	T5S R23E	Carbon County
13.02 AC	SESE	Section 22	T5S R23E	Carbon County
130.97 AC	NE	Section 26	T5S R23E	Carbon County
123.34 AC	NW	Section 26	T5S R23E	Carbon County
64.31 AC	NE	Section 27	T5S R23E	Carbon County
22.98 AC	NW	Section 27	T5S R23E	Carbon County

14.4 AC	SW	Section 26	T5S R23E	Carbon County
24.0 AC	SE	Section 27	T5S R23E	Carbon County

554.66 AC Total

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 12th day of October 2021.

/Original signed by Mark Elison/
Mark Elison, 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.

BOTTRELL FAMILY INVESTMENTS
PO BOX 80284
BILLINGS, MT 59108

PAT RILEY
201 CANYON RD
ROUNDUP, MT 59072

_____
Billings Rgional Office, (406) 247-4415