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

APPLICATION TO CHANGE WATER RIGHT
NO. 41I 30149922 BY MARKS RANCH INC.

PRELIMINARY DETERMINATION TO
GRANT CHANGE

On September 18, 2020, Marks Ranch Inc. (Applicant) submitted Application to Change Water Right No. 41G 30149922 to change Water Right Claim No. 41I 118281-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department held a pre-application meeting with the Applicant on September 1, 2020. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated March 1, 2021. The Applicant responded with information dated April 27, 2021. The Application was determined to be correct and complete as of February 11, 2022. An Environmental Assessment for this Application was completed on April 29, 2022.

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-IR
• Attachments
• Maps: ESRI Map with existing and proposed point of diversion (POD), and location of irrigated acres, existing and proposed place of use (POU).

Information Received after Application Filed

• Deficiency letter response dated April 27, 2021

Information within the Department’s Possession/Knowledge

• Aerial photos and topographic maps
• Water right records, including file for the Statement of Claim proposed to be changed
• USDA Web Soil Survey
• DNRC Technical Report February 11, 2022
• Montana Natural Heritage Program Species of Concern List
• Environmental Assessment dated April 29, 2022
• 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 Helena Regional Office at 406-444-6999 to request copies of the following documents.
  o Return Flow Memo, dated April 1, 2016
  o Consumptive Use Methodology Memo, dated March 17, 2010
  o Historic Diverted Volume Memo, dated September 13, 2012
  o Efficiency Policy Memo-change in method of irrigation, dated December 2, 2015
  o Assessment of New Consumptive Use and Irrecoverable Losses Associated With Change Applications Memo, dated April 15, 2013

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) as follows.

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

1. The Applicant seeks to change the point of diversion, and place of use (POU) for the irrigation portion of Statement of Claim No. 41I 118281-00. Claim No. 41I 118281-00 has a flow rate of 445.66 GPM, and a maximum volume of 101.88 AF from Clancy Creek, tributary to Prickly Pear Creek for the purpose of mitigation and flood irrigation of 8.2 acres located in the SWNE and the W2SE of Section 4, T8N, R3W, Jefferson County. The periods of diversion and use for both purposes is April 15 to October 31, with a priority date of April 1, 1865. The irrigation points of diversion are located on Clancy Creek in the SWNWNW and the NENENW both of Section 9, T8N, R3W, Jefferson County. Water is diverted via two headgates, one at each historical point of diversion (POD) location and conveyed in Haynes Ditch to the historical POU located in the SWNE and the W2SE of Section 4, T8N, R3W, Jefferson County, north of Clancy, Montana. Claim No. 41I 118281-00 was severed from its historical POU and split, creating child right 41I 30069692 by the Montana Water Court on January 21, 2015. Claim No. 41I 30069692 was severed from its historical POU on April 28, 2018.
### Table 1: WATER RIGHT PROPOSED FOR CHANGE

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Purpose</th>
<th>Flow Rate</th>
<th>Volume</th>
<th>Period of Use</th>
<th>Point of diversion</th>
<th>Place of use</th>
<th>Priority date</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 118281</td>
<td>Mitigation</td>
<td>21.32 GPM</td>
<td>58.37 AF</td>
<td>04/15 – 10/31</td>
<td>SWNWNW Sec. 9, T8N, R3W; N2NWNE Sec. 9, T8N, R3W; NWNW Sec. 9, T8N, R3W; W2SE Sec. 4, T8N, R3W; NENESE Sec. 4, T8N, R3W</td>
<td>SWNWNW Sec. 9, T8N, R3W, N2NWNE Sec. 9, T8N, R3W, NWNW Sec. 9, T8N, R3W, W2SE Sec. 4, T8N, R3W, NENESE Sec. 4, T8N, R3W</td>
<td>4/1/1865</td>
<td></td>
</tr>
<tr>
<td>41I 118281</td>
<td>Irrigation</td>
<td>424.32 GPM</td>
<td>43.51 AF</td>
<td>04/15-10/31</td>
<td>SWNWNW Sec. 9, T8N, R3W; NENESE Sec. 4, T8N, R3W</td>
<td>SWNE Sec. 4, T8N, R3W, W2SE Sec. 4, T8N, R3W</td>
<td>4/1/1865</td>
<td>8.2</td>
</tr>
</tbody>
</table>

### CHANGE PROPOSAL

**FINDINGS OF FACT**

2. The Applicant proposes to change the PODs and POU of the irrigation portion of Claim No. 41I 118281-00. The two Haynes Ditch PODs located in Clancy Creek and associated with the irrigation portion of Claim No. 41I 118281-00 will be retired, and the remaining instream PODs and POU for mitigation will remain unchanged. Water will continue down Clancy Creek to Prickly Pear Creek, and Prickly Pear Creek will be used as a natural carrier to the proposed PODs located on Prickly Pear Creek in the SENWSE, SESWNE, NWSENE, and the SENENE of Section 4, T8N, R3W, Jefferson County (four diversions), and the NWNWNW of Section 3, T8N, R3W, Jefferson County (one diversion).

3. After this change, 43.5 AF of water historically diverted from Clancy Creek with Claim No. 41I 118281-00 to flood irrigate 8.2 acres will be used to provide a portion of the total volume required to irrigate 46.1 acres that will also be supplementally irrigated in varying configurations
with Claim Nos. 41I 89633, 41I 89636, and 41I 30069692. Of the 46.1 acres that will be supplementally irrigated with Claim No. 41I 118281-00 after this change, 8.9 acres that were not historically irrigated will also be supplementally irrigated with Claim No. 41I 30069692 only. Table 2 provides a breakdown of the post-change irrigation place of use for Claim No. 41I 118281-00 and 41I 30069692. Table 3 provides a breakdown of the acres in the post-change POU that will be irrigated with the other supplemental water rights.

4. Water will supplement 29.0 acres of the POU with Claim No. 41I 30069692 and of Marks Ranch historical water rights from Lump Gulch Creek (41I 89633-00), and Prickly Pear Creek (41I 89636-00) located in the W2NWNW of Section 3 and the NENE, SENWNE, W2SENE of Section 4, T8N, R3W, Jefferson County. (See Figure 1. below)

5. An 8.9-acre portion of the proposed 46.1-acre POU located in the E2SWNE will be supplementally irrigated with Claim No. 41I 30069692. (See Figure 1 below)

6. This application as well as Change Application No. 41I 30149735 (changing Claim 41I 30069692) were submitted together as Claim No. 41I 30069692 is a child right of Claim No. 41I 118281-00. The Claims will also share the same proposed PODs and will be used together to supplementally irrigate the same 46.1-acre POU. Of the five new PODs that will be listed on these two water rights, POD #1 will also be used to divert irrigation water for Claim No. 41I 89636-00. Figure 1 shows the elements of the proposed change and post-change supplemental relationships related to Claim No. 41I 118281-00 and described in this Preliminary Determination.
Figure 1: MAP OF PROPOSED PROJECT AREA AND SUPPLEMENTAL RELATIONSHIP
7. Claim Nos. 41I 89634-00 and 41I 89635-00 are listed as supplemental water rights. Both claims are natural overflow rights and will not be considered as they are incidental with no diversion control structure.
8. The Applicant will be subject to the following measurement condition under the proposed change authorization:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE SUPPLY LINE FOR THE IRRIGATION SYSTEM. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT AND UPON REQUEST AT OTHER TIMES DURING THE YEAR THEREAFTER. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.

CHANGE CRITERIA

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

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
(c) The proposed use of water is a beneficial use.
(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written
special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

HISTORIC USE AND ADVERSE EFFECT
FINDINGS OF FACT - Historic Use

11. Statement of Claim No. 41I 118281-00 was decreed in the Temporary Preliminary Decree for Basin 41I by the Montana Water Court on March 8, 1995, with a flow rate of 1.5 CFS and an unquantified volume not to exceed the amount put to historical and beneficial use for the flood irrigation of 90-acres located in the W2SE of Section 4, and the NWNE, and NENW both of Section 9, all of T8N, R3W, Jefferson County.

12. The Temporary Preliminary Decree was issued with acres irrigated issue remarks unresolved. A Motion to Split Claim 41I 118281-00 was filed on May 2, 2012, and the Department determined that the POU issue remark should be resolved before splitting the claim. A Master’s Report filed by the Montana Water Court on December 16, 2014, and adopted on January 21, 2015, reduced the acres irrigated, and split Claim No. 41I 118281-00. The acres irrigated were reduced from 90 acres to 29 acres total. The split of Claim No. 41I 118281-00 resulted in a flow rate of 445.66 GPM for irrigation of 19.2 acres located in the SWNE and the W2SE of Section 4, T8N, R3W, Jefferson County. The split created an associated child right (41I 3006969) that identified a flow rate of 227.54 GPM for irrigation of 9.8 acres located in the SWSE of Section 4, the NENW and the NWNE of Section 9, all of T8N, R3W, Jefferson County. Both rights were for an unquantified volume, not to exceed historical and beneficial use from Clancy Creek for the purpose of flood irrigation for a period of diversion and use of April 15 to October 31.
13. The 19.2-acre POU of Statement of Claim No. 41I 11821-00 was historically supplied water diverted from Clancy Creek via two headgates located in the SWNWNW (POD #1), and the NENENW (POD #2) of Section 9, T8N, R3W, Jefferson County. From there water was diverted approximately 3,250 feet from POD #1, and approximately 3,870 feet from POD #2 both via Haynes Ditch to the 19.2-acre POU located in the NWSE and SWSE of Section 4 and the NENW and NWNE of Section 9, T8N, R3W, both of Jefferson County.

14. A previous change authorization was issued on January 4, 2016 (Change Authorization No. 41I 30069327) that authorized a portion of irrigation (11.0 acres) to be retired from Claim No. 41I 118281-00 and changed to the purpose of mitigation to offset depletions to Clancy Creek resulting from Beneficial Use Permit No.41I 30068548.

15. This application as well as Change Application No. 41I 301449735 were submitted together as Claim Nos. 41I 118281-00 (parent) and 41I 30069692 (child) will share the same proposed PODs and supplementally irrigate a total of 46.1 acres.

16. There are no historical supplemental rights associated with Claim No 118281-00. Claim No. 41I 30069692 (child right) was owned by multiple homeowners of the Red Cliff Estates; this configuration of ownership triggered the need to split Claim No. 41I 118281-00 (parent). Claim 41I 30069692 has since been obtained by the Applicant during a request for an Ownership Update Sever received by the Department on April 28, 2017.

17. Per ARM 36.12.1902(1)(a), if a water right proposed to be changed was subject to a previous change, historic use will be assessed for the date of completion of the previous change. The previous change (Authorization No. 41G 30069327) was issued on January 4, 2016, and Certified by the Department on March 21, 2022, with a flow rate of 445.66 GPM, a consumed volume of 32.57 AF and a diverted volume of 101.88 AF for mitigation and irrigation of 19.2 acres.
Table 4: Total Historic Volume for the irrigation portion of 41I 118281

<table>
<thead>
<tr>
<th>County</th>
<th>Weather Station</th>
<th>Helena WSO IWR Flood Irrigation Seasonal ET</th>
<th>Management Factor (Based on Return Flow Report by Russ Levens &amp; Change No. 41I 30069327)</th>
<th>Adjusted Crop Consumptive Volume after Inclusion of Management Factor</th>
<th>Historic Acres Irrigated</th>
<th>Total Calculated ET per rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lewis &amp; Clark</td>
<td>Helena</td>
<td>18.79</td>
<td>100%</td>
<td>1.57 feet</td>
<td>8.2</td>
<td>12.83</td>
</tr>
</tbody>
</table>

18. A management factor of 100% was based on findings made for the active change of Claim No. 41I 118281-00. Per a Historical Use Addendum submitted with the previous change authorization, the Department found that the Applicant provided adequate information to support full-service irrigation of the entire historical POU. This finding was affirmed in a Return Flow Report completed by Russell Levens, DNRC Water Management Bureau Groundwater Hydrologist, dated May 14, 2015. The Department calculated an additional 1.1 AF for non-crop related evaporative losses (irrecoverable evaporative losses for flood irrigation are assumed to be 5% of the historic volume applied to the field). The Department finds the historical crop consumptive use including irrecoverable losses for the 8.2 irrigated acres proposed for change is 13.9 AF. See Table 5 below for a breakdown of the variables used in the Department’s assessment of historic use for the 8.2-acre irrigation POU being changed in this application.

Table 5: Total Historic Consumptive Volume Including Irrecoverable Losses for the irrigation portion of 41I 118281-00

<table>
<thead>
<tr>
<th>Helena WSO Flood IWR (Inches)</th>
<th>Management Factor (Percent based on Return Flow Report by Russ Levens)</th>
<th>Historic Acres</th>
<th>HCV (AF)</th>
<th>On-farm Efficiency (Percent)</th>
<th>Field Application AF</th>
<th>Historic Irrecoverable Losses (IL) Flood 5%:</th>
<th>HCV AF (Including IL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>18.79</td>
<td>100%</td>
<td>8.2</td>
<td>12.83</td>
<td>60%</td>
<td>21.38</td>
<td>1.1</td>
<td>13.9</td>
</tr>
</tbody>
</table>

19. In Change Authorization No. 41I 30069327, the conveyance loss volume for the Haynes Ditch was found by the Department to be 47.6 AF, and the historic diverted volume was
determined to be 101.88 AF for 19.2 acres (Preliminary Determination to Grant Combined Application Nos. 41I 30068548, 41I 30069327, 41I 30070581, FOF Nos. 90-92). Based on that information the Department finds the conveyance loss volume associated with the diversion requirements to irrigate the 8.2 acres being changed in this application are 20.3 AF, and the historic diverted volume required to irrigate 8.2 acres is determined to be 43.51 AF.

Historic Diverted Volume = (Historic Consumptive Vol./On-farm efficiency) + Vol. conveyance loss

\[(13.93 \text{ AF}/0.60) = 23.22 \text{ AF} + 20.3 \text{ AF} = 43.5 \text{ AF}\]

20. The Department finds the historical use for the 8.2 acres to be 13.9 AF consumed volume and a diverted volume of 43.5 AF, with a flow rate of 424.32 GPM for the irrigation portion of Claim No. 41I 118281.

FINDINGS OF FACT – Adverse Effect

21. Water will continue down Clancy Creek to Prickly Pear Creek which will be used as a natural carrier to the five proposed points of diversion located on Prickly Pear Creek in the SENWSE, SESWNE, NWSENE, and the SENENE of Section 4, T8N, R3W, Jefferson County, and the NWNWNW of Section 3, T8N, R3W, Jefferson County. Water diverted with Claim 41I 118281-00 will be used to supplementally irrigate 46.1 acres. Of the entire 46.1-acre POU, 29.0 of those acres will be supplemented with Marks Ranch historic water rights from Lump Gulch Creek (41I 89633-00), and Prickly Pear Creek (41I 89636-00); the POU for both of these water rights is located in the W2NWNW of Section 3 and the NENE, SENWNE, W2SENE of Section 4, T8N, R3W, Jefferson County. Of the 46.1 acre POU, Claim 41I 118281-00 will also be used to supplementally irrigate 8.9 acres located in the E2SWNE, and 8.2 acres in the W2SE both of Section 4, T8N, R3W that are currently irrigated with Claim No. 41I 118281 and will now be supplemented with Claim No. 41I 30069692 (currently being changed in Application No. 41I 30149735) (see Figure 1 and Table 3 above for information on the elements of the supplemental water rights).

22. The proposed total consumptive volume for the 46.1 acres was erroneously calculated using 5% for irrevocable loses in the Technical Report dated February 11, 2022. This Preliminary Determination takes into account the 8.9 acres of new sprinkler irrigation that calculates
irrecoverable losses at 10% of the volume applied to the field, and 5% for the remaining 37.2 acres that have been historically flood irrigated by the Applicant (See Tables 6 & 7 below).

23. The weather station used for calculating post-change consumptive use is the Helena station in Lewis and Clark County, which is the closest station to the POU identified. The method of irrigation on the Applicant’s entire POU will be wheel-or hand-line sprinkler irrigation. The estimated on-farm efficiency of this type of sprinkler irrigation system is 70%. On-farm efficiency refers to the percent of the water delivered to the field that is used by the crop. When considering the 79.7% county management factor percentage (1997-2006 proposed use), and the applicable weather station IWR data, the annual irrigation water requirement for the POU is approximately 20.23 inches. Therefore, the post-change crop consumptive use for the 37.2 irrigated acres is 49.98 AF (37.2 acres x 20.23 inches/12 x 79.7% = 49.9 AF), and 11.9 AF for the additional 8.9-acre POU (8.9 acres x 20.23 inches/12 x 79.7% = 11.9 AF).

24. The Department calculated an additional 3.5 AF for irrecoverable losses on the field. The irrecoverable loss percentages for flood irrigation are assumed to be 5% of the historic volume applied to the field, therefore applying the Efficiency Memo, the change in irrigation method for the 37.2 acres of Marks historical irrigation will not change. Table 6 below provides a breakdown of the variables considered in the Department’s assessment of post-change consumptive use.

Table 6: Post-Change consumptive use (volume) for the 37.2-acre post-change POU

<table>
<thead>
<tr>
<th>Supplemental Water Rights</th>
<th>Lewis &amp; Clark Flood, Wheel &amp; Handline Irrigation Water Requirement (inches)</th>
<th>Management Factor (Percent)</th>
<th>Acres</th>
<th>CV Acre-Feet (AF)</th>
<th>On-farm Efficiency</th>
<th>Field Application AF</th>
<th>Irrecoverable Losses (IL) Flood 5%</th>
<th>CV AF (Including IL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 89633 (29 AC)</td>
<td>20.23</td>
<td>79.7%</td>
<td>37.2*</td>
<td>49.9</td>
<td>70%</td>
<td>71.4</td>
<td>3.5</td>
<td>53.6</td>
</tr>
<tr>
<td>41I 89636 (29 AC)</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41I 118281</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>41I 3009692</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

* This Preliminary Determination takes into account the 8.9 acre of new sprinkler irrigation that calculates irrecoverable losses at 10% of the historic volume applied to the field (see Table 7 below), and **5% for the remaining 37.2 acres that have been historically flood irrigated by the Applicant.** (37.2 acres + 8.9 acres = 46.1 acres total)
25. The Department calculated an additional 1.71 AF for irrecoverable losses on the field for the newly irrigated 8.9-acre POU. The irrecoverable loss percentages for sprinkler irrigation are assumed to be 10% of the historic volume applied to the field. Table 7 below provides a breakdown of the variables considered in the Department’s assessment of post-change consumptive use.

Table 7: Post-Change consumptive use (volume) for the additional 8.9-acre post-change POU

<table>
<thead>
<tr>
<th>Supplemental Water Rights</th>
<th>Lewis &amp; Clark Flood, Wheeline &amp; Handline Irrigation Water Requirements (inches)</th>
<th>Managemen t Factor (Percent)</th>
<th>Acres</th>
<th>CV Acre-Feet (AF)</th>
<th>On-farm Efficiency</th>
<th>Field Application AF</th>
<th>Irrecoverable Losses (IL)</th>
<th>Sprinkler 10%</th>
<th>CV AF (Including IL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 118281 41I 3009692</td>
<td>20.23</td>
<td>79.7%</td>
<td>8.9</td>
<td>11.95</td>
<td>70%</td>
<td>17.07</td>
<td>1.71</td>
<td>13.7</td>
<td></td>
</tr>
</tbody>
</table>

* This Preliminary Determination takes into account the **8.9 acres of new sprinkler irrigation that calculates irrecoverable losses at 10% of the volume applied to the field**, and 5% for the remaining 37.2 acres that have been historically flood irrigated by the Applicant. (37.2 acres + 8.9 acres = 46.1 acres total)

26. The total consumptive volume, including irrecoverable losses for the full 46.1-acre POU is 67.3 AF (53.6 AF + 13.7 AF = 67.3 AF). Table Nos. 8, 9, and 10 below breakdown the proportionate volume contributed by each water right used on the proposed place of use involved in this change. The relative percentage contributed by each right was calculated to determine the relative consumptive volume for each right.
Table 8: Relative Proposed Consumptive Volume for **29.0** acres supplementally irrigated by all water rights.

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Acres</th>
<th>% of Total Volume</th>
<th>Portion of Total CV</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 30069692</td>
<td>29.0</td>
<td>9.7</td>
<td>4.1 AF</td>
</tr>
<tr>
<td><strong>41I 118281</strong></td>
<td><strong>3.3</strong></td>
<td>1.4 AF</td>
<td></td>
</tr>
<tr>
<td>41I 89633</td>
<td>43.5</td>
<td>18.4 AF</td>
<td></td>
</tr>
<tr>
<td>41I 89636</td>
<td>43.5</td>
<td>18.4 AF</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>29.0</strong></td>
<td>100</td>
<td><strong>42.3 AF</strong></td>
</tr>
</tbody>
</table>

*The total acres that will be supplementally irrigated using Claim No. 41I 118281-00 and Claim No. 30069692 (Associated Change No. 41I 30149735) is 46.1 acres. Of those acres, 29.0 acres will be supplementally irrigated using Claim Nos. 41I 89633-00 and 41I 89636-00 as well.*

Table 9: Relative Proposed Consumptive Volume for **8.2** acres supplementally irrigated by 41I 118281 and 41I 30069692

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Acres</th>
<th>% of Total Volume</th>
<th>Portion of Total CV</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 30069692</td>
<td>8.2</td>
<td>50</td>
<td>6.0</td>
</tr>
<tr>
<td><strong>41I 118281</strong></td>
<td><strong>50</strong></td>
<td><strong>6.0</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>8.2</strong></td>
<td><strong>100</strong></td>
<td><strong>12.0</strong></td>
</tr>
</tbody>
</table>

Table 10: Relative Proposed Consumptive Volume for **8.9** new acres supplementally irrigated by 41I 118281 and 41I 30069692

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Acres</th>
<th>% of Total Volume</th>
<th>Portion of Total CV</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 30069692</td>
<td>8.9*</td>
<td>50</td>
<td>6.5</td>
</tr>
<tr>
<td><strong>41I 118281</strong></td>
<td><strong>50</strong></td>
<td><strong>6.5</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>8.9</strong></td>
<td><strong>100</strong></td>
<td><strong>13.0</strong></td>
</tr>
</tbody>
</table>

The values are derived from the proportionate volume contributed by each water right used on the proposed place of use involved in this change. The relative percentage contributed by each right was calculated to determine the relative Consumptive Volume (CV) for each right.

*The total acres that will be supplementally irrigated using Claim No. 41I 118281-00 and Claim No. 30069692 (Associated Change No. 41I 30149735) is 46.1 acres. Of those acres, 29.0 acres will be supplementally irrigated using Claim Nos. 41I 89633-00 and 41I 89636-00 as well.*

27. The proposed appropriation of water will not increase or expand the use of Claim No. 411 118281-00. The proposed changes to Claim Nos. 41I 118281-00 and 41I 30069692 will change the irrigation method from flood irrigation to sprinkler irrigation and change the diversion method from headgate to a pump and pipeline system. The pump locations will be located on Prickly Pear
Creek in the SENWSE, SESWNE, NSENE, and the SENENE of Section 4, T8N, R3W, Jefferson County, and the NWNW of Section 3, T8N, R3W, Jefferson County.

Historic Consumed Volume: 13.9 AF
Historic Diverted Volume: 43.5 AF
Proposed Consumptive Volume: 13.9 AF
Proposed Diverted Volume: 43.5 AF

FINDINGS OF FACT – Return Flows

28. Water will be left instream so historically diverted flows are available where return flows historically returned to Clancy Creek. At the POU change location, return flows will accumulate in Clancy Creek and Prickly Pear Creek at the downstream extent of the historic POU. The historic return flows began accreting at the upstream extent of the historic POU on Clancy Creek and gradually increase to the total relative amounts at the downstream extent of the historic POU. The volume of return flows associated with the irrigation of the historical POU for Claim Nos. 41I 118281-00 and 41I 30069692 are 9.0 AF and 7.5 AF, respectively. Water is left instream so historically diverted flows are available where return flows historically returned to the sources. At the POU change location, the non-consumed (return flows) volume will accumulate in Clancy Creek and Prickly Pear Creek to the downstream extent. (Attila Folnagy, DNRC Water Management Bureau Hydrologist, email dated February 8, 2022).

29. For an adverse effect analysis, the Department considered the following water rights which are in the reach of Prickly Pear Creek.

Table 11: Water Rights Analyzed for Adverse Effect

<table>
<thead>
<tr>
<th>WATER RIGHT #</th>
<th>PRIORITY DATE</th>
<th>OWNER</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>41I 89636 00</td>
<td>4/1/1865</td>
<td>MARKS RANCH INC</td>
<td>PRICKLY PEAR CREEK</td>
</tr>
<tr>
<td>41I 30069586</td>
<td>12/31/1883</td>
<td>MARKS RANCH INC</td>
<td>PRICKLY PEAR CREEK</td>
</tr>
<tr>
<td>41I 30017547</td>
<td>7/1/1985</td>
<td>MONTANA, STATE OF DEPT OF FISH WILDLIFE &amp; PARKS</td>
<td>PRICKLY PEAR CREEK</td>
</tr>
</tbody>
</table>

30. Per the measurement condition contained in this Preliminary Determination, the Applicant will be required to measure and report water usage, therefore no adverse effect should occur from this change.
31. The Applicant will not be able to call water rights they could not previously call. There will be no greater access to the water as a result of the proposed change.

32. The Department finds that the proposed change to Claim 41I 118281-00 will not result in adverse effect to other water users under the terms and conditions set forth in this Preliminary Determination.

**BENEFICIAL USE**

**FINDINGS OF FACT**

33. The Applicant proposes to use water for irrigation which is recognized as a beneficial use under § 85-2-102(2)(5), MCA.

34. The Applicant proposes to use 43.5 AF and a flow rate of 190.3 GPM diverted from Prickly Pear Creek that is used as a natural carrier for Clancy Creek water to supplementally irrigate 46.1-acres post-change POU which is located in the W2NWNW of Section 3, the NENE, SENWNE, W2SENE, E2SWNE, and the W2SE of Section 4, all of T8N, R3W, Jefferson County. The proposed period of diversion and period of use is April 15-October 31. The post-change irrigation POU will be supplementally irrigated using Claim Nos. 41I 30069692, 41I 89633, and 41I 89636. The proportional HCV of 13.9 AF and diverted volume of 43.5 AF for the 8.2 acres of Claim No. 41I 118281-00 were found in Change Authorization No. 41I 30069327.

35. The Department finds the proposed appropriation of 43.5 AF at a flow rate of 190.3 GPM for the purpose of irrigation of 46.1 acres to be a beneficial use of water.

**ADEQUATE DIVERSION**

**FINDINGS OF FACT**

36. The Applicant will move the historical irrigation PODs approximately 1 to 2 miles downstream and northeast of the historical irrigation PODs from Clancy Creek to Prickly Pear Creek.

37. In this change application and associated Change Application No. 41I 30149735 (Claim No. 41I 30069692), the Applicant proposes to add five PODs located in the SENWSE (Pump #1), the SESWNE (Pump #2), the NWSENE (Pump #3), the SENENE of Government Lot L1 (Pump #4), and the NWNWNW of Government Lot L4 (Pump #5), all in Section 4, T8N, R3W, Jefferson County.
County (See Figure 1 above). The Applicant proposes a rotating method of diversion using two permanent pumps (Pumps 3 & 5) and three portable pumps (Pumps 1, 2, and 4). The Applicant may eventually utilize individual portable pumps at PODs 1, 2, and 4, or install permanent pumps at all sites in the future. The historical consumptive and proposed consumptive use for the irrigation portion of Claim No. 41I 118281-00 will not change and remain at 13.9 AF.

38. PODs 1, 2, and 4 will utilize a 30 HP Berkeley Model B3JRB, 13.5-inch impeller, 1800 RPM pump with a maximum flow rate of 440 GPM. Points of diversion 3 & 4 will utilize a 40 HP Cornell Model 2.5 YHB, 8.25-inch impeller pump with a maximum flow rate of 600 GPM.

39. In this change application and associated Change Application No. 41I 30149735 (Claim No. 41I 30069692), the Applicant proposes to divert a total flow rate of 597.4 GPM which is the sum of the flow rate from Claim No. 41I 30069692 (227.5 GPM), Supplemental Claim No. 41I 89636-00 (179.5 GPM), and a proportional split of the total flow rate for Claim No. 41I 118281-00 (445.66 GPM x 8.2 acres/19.2 acres = 190.3 GPM). Once this change application and associated Change Application No. 41I 30149735 are authorized, this flow rate can only be used at POD #1 if a 40 HP pump is utilized. The 597.4 GPM flow rate can only be used at POD #1 because it is the only diversion authorized for supplemental Claim No. 41I 89636-00, the historical headgate utilized for Claim No. 41I 89636-00 has been replaced with Pump #1.

40. Under this change and associated Change No. 41I 30149735, PODs 2, 3, 4, and 5 can pump a maximum of 417 GPM which is the sum of the irrigation flow rates for Claim Nos. 41I 118281-00 and 41I 30069692.

41. The Department finds that the proposed irrigation system and infrastructure are adequate to accommodate the proposed point of diversion change.

POSSESSORY INTEREST
FINDINGS OF FACT
42. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW
HISTORIC USE AND ADVERSE EFFECT
43. 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).³

44. 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

Preliminary Determination to Grant 19 Application to Change Water Right No. 41I 30149922. 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

45. 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

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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
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

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

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.)
Preliminary Determination to Grant Application to Change Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 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

47. 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).

48. 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

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, 31, 198 P.3d 219, ¶¶ 22, 31, 43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).
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).

49. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. ARM 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. ARM 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. ARM 36.12.1901 and 1903.

50. 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.


52. 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).

53. 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. ARM 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Per ARM 36.12.1902, historic use will be assessed for the date of completion of the previous change (Change Authorization No. 41I 30069327).

54. If an applicant seeks more than the historic consumptive use as calculated by ARM .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”).

55. 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. 41I 118281-00 to be 101.88 AF diverted volume, 445.66 GPM flow rate, and a consumptive use of 32.57 AF for the purpose of irrigation and mitigation. (FOF Nos.11-20)

56. 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 Nos. 21-32)

57. BENEFICIAL USE A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .”. McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. ARM 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).

58. 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 43.5 AF of diverted volume and 190.3 GPM flow rate of water requested is the amount needed to sustain the beneficial use. § 85-2-402(2)(c), MCA (FOF Nos. 33-35)

ADEQUATE MEANS OF DIVERSION

59. 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).

60. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 36-41)

POSSESSORY INTEREST

61. 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 ARM 36.12.1802

62. 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 No. 42)
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. 41I 30149922 should be granted.

The Department authorizes the Applicant to change two of the historical PODs for Statement of Claim 41I 118281-00 located on Clancy Creek in the SWNWNW and the NENENW of Section 9, T8N, 3W to 5 PODs on Prickly Pear Creek located in the SENWSE (Pump #1), the SESWNE (Pump #2), the NWSENE (Pump #3), the SENENE of Government Lot L1 (Pump #4), and the NWNWNW of Government Lot L4 (Pump #5), all of Section 4, T8N, R3W, Jefferson County. The new PODs will be approximately 1 to 2 miles downstream and northeast of the old PODs.

The Department authorizes the Applicant to use 43.5 AF diverted volume and a flow rate of 190.3 GPM with the irrigation portion of Claim 41I 118281-00 to supplementally irrigate 46.1 acres located in the W2NWNW of Section 3, the NENE, SENWNE, W2SENE, E2SWNE, and the W2SE of Section 4, all of T8N, R3W, Jefferson County.

This change will be subject to the following condition:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE SUPPLY LINE FOR THE IRRIGATION SYSTEM. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED INCLUDING THE PERIOD. RECORDS OF APPROPRIATIONS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR UNTIL A PROJECT COMPLETION NOTICE IS RECEIVED BY THE DEPARTMENT AND UPON REQUEST AT OTHER TIMES DURING THE YEAR THEREAFTER. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME OF WATER ACCURATELY.
NOTICE

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

DATED this _____ day of ________ 20__. 

/Original signed by Jennifer Daly/
Jennifer Daly, Deputy Regional Manager
Helena 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.

MARKS RANCH INC
30 LUMP GULCH RD
CLANCY, MT 59634-9781

DAVID BALDWIN
HYDROSOLUTIONS INC
303 CLARKE ST.
HELENA, MT 59601

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Regional Office, (406) 444-6999