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

APPLICATION TO CHANGE AN EXISTING IRRIGATION WATER RIGHT NO. 43P 30154493 BY HWW, LLC

PRELIMINARY DETERMINATION TO GRANT CHANGE

On January 7, 2022, HWW, LLC (Applicant) submitted Application to Change an Existing Irrigation Water Right No. 43P 30154493 to change Water Right Claim No. 43P 38234-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of March 24, 2022.

The Department met with the Applicant on December 28, 2021, for a pre-application meeting. Christine Schweigert and Jill Lippard were present for the Department; Scott Swenson and Crystal Chesmore of Big Sky Irrigation were present for the Applicant. An Environmental Assessment for this Application was completed on May 16, 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 an Existing Irrigation Water Right, Form 606 IR
- Maps:
  - Seven undated full-color aerial photos showing current and proposed points of diversion, proposed conveyance, historically flooded place of use and proposed places of use for pivot and gated pipe.
  - Ten maps from the claim file showing the claimed and examined points of diversion and places of use as well as acres found in the Yellowstone County Water Resource Survey of 1943.
- Lindsay Flow Meter, PVC-Gated™ pipe, Lindsay Zimmatic center pivot, Clearwater Self-Cleaning Suction Screen and Cornell 4RB pump spec sheets.
• Two Undated photos of two trailer mounted pumps with screened suction lines sitting at a riverbank.
• Letter from Sage Grouse Habitat Conservation Program dated November 18, 2021.

**Information within the Department’s Possession/Knowledge**

- DNRC water right records
- Water Resources Survey (WRS) for Yellowstone County dated 1943
- Aerial photograph ZW-7GG-112 dated 7/23/1966
- Aerial photograph USDA 779-134 dated 9/15/1979
- Department issued technical report dated 3/24/2022
- 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 Billings Regional Office at 406-247-4419 to request copies of the following documents.
  - Development of Standardized Methodologies to Determine Historic Diverted Volume Memo dated September 13, 2012
  - Policy Memo – Change in Method of Irrigation, 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; IWR means irrigation water requirement; POD means point of diversion; and POU means place of use.

**WATER RIGHT TO BE CHANGED**

**FINDINGS OF FACT**

1. The water right proposed for change is Statement of Claim No. 43P 38234-00 with a priority date of December 31, 1924. The point of diversion is claimed as a pump in Government Lot 3 (NENWNE) Sec. 33, T5N, R34E, Yellowstone County. Water right 43P 38234-00 was decreed 2.65 CFS from the Bighorn River to irrigate 70 acres; 20 acres in S2 Sec. 28 and 50 acres in the N2 Sec. 33, T5N, R34E, Yellowstone County. The period of diversion and period of
use are claimed from April 1 through November 30 each year. The historical point of diversion is approximately 1/2 mile south of the confluence of Bighorn and Yellowstone Rivers and approximately 1.5 miles southwest of Bighorn, MT.

Table 1. Water Right Proposed for Change

<table>
<thead>
<tr>
<th>Water Right No.</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>43P 38234-00</td>
<td>Irrigation</td>
<td>2.65 CFS</td>
<td>Amount put to historical and beneficial use</td>
<td>4/1 – 11/30</td>
<td>Gov’t Lot 3 (NENWNE) Sec. 33, T5N, R34E</td>
<td>20 acres in S2 Sec. 28 and 50 in N2 Sec. 33; T5N, R34E</td>
<td>12/31/1924</td>
<td>70</td>
</tr>
</tbody>
</table>

2. There are no supplemental or overlapping water rights on the place of use for the water right proposed for change.
Preliminary Determination to Grant Application to Change Water Right No. 43P 301544993.
CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change the point of diversion for this water right from Government Lot 3 (NENWNE) Sec. 33, T5N, R34E to the SESWSE Sec. 28, T5N, R34E, Yellowstone County, MT. The proposed diversion is approximately 540 feet downstream from the historical diversion. Changing the proposed diversion will allow the applicants a more adequate pump set up for a new center pivot located within the historical flood irrigation footprint. They plan to continue to flood irrigate the remaining historical place of use.

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 water right presented for change in this application, 43P 38234-00, historically diverted 2.65 CFS from the Bighorn River in Government Lot 3 (NENWNE) Sec. 33, T5N, R34E, to irrigate 70 acres; 20 in S2 Sec. 28 and 50 acres in N2 Sec. 33, T5N, R34E. The 70 acres are shown in the Water Resources Survey (WRS) for Yellowstone County as well as in aerial photos dated July 23, 1966, and September 15, 1979. The 2.65 CFS flow rate is based on the DNRC Adjudication standard of 17 GPM/AC for the claimed 70-acre place of use. The amount claimed was 3.34 CFS which was reduced to the DNRC standard during claims re-examination in June of 2014 and was included in the Basin 43P Preliminary Decree issued January 28, 2016.

7. The Applicant chose to use the Department method outlined in ARM 36.12.1902 to calculate historical consumptive use. Using the Treasure County (Hysham) weather station IWR of 25.01 inches per acre and management factor of 53.4% on 70 acres, the historical consumptive use, not including irrecoverable losses, is 77.91 AF (70 * 25.01 /12 * 0.534 = 77.91). As per ARM 36.12.1902(17), the Department adds 5% of the field applied volume to account for irrecoverable losses on flood irrigation systems. Field applied volume is calculated as the historically consumed volume divided by on-farm efficiency. Using a flood irrigation efficiency of 60% based on the Applicant’s description of the historical operation and a portion of the property being irrigated by gated pipe, the field applied volume is 129.84 AF (77.91 / 0.6 = 129.84), and irrecoverable losses are 6.49 AF (77.91/0.60 * 0.05 = 6.49). The total historical
consumptive use including irrecoverable losses is 84.4 AF (77.91 + 6.49 = 84.4). Historical consumptive use is 1.21 AF/AC and historical applied volume is 1.85 AF/AC.

8. The historical diverted volume is 129.84 AF. The Department uses the following formula, found in ARM 36.12.1902 (10), to determine historical diverted volume: Historical Diverted Volume = (Volume historical consumptive use/On-farm efficiency) + Volume conveyance loss. The historical consumptive use, not including irrecoverable losses is 77.91 AF. Using a flood irrigation efficiency of 60%, the field applied volume is 77.91/0.60 = 129.84 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 no conveyance losses because water is pumped directly to the fields, which means that historic diverted volume equals the field applied volume.

9. The Department finds the following historical use:

<table>
<thead>
<tr>
<th>WR Claim #</th>
<th>Flow Rate (CFS)</th>
<th>Historical Diverted Volume (AF)</th>
<th>Historical Consumed Volume (AF)</th>
<th>Max Acres</th>
<th>Place of Use</th>
<th>Point of Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>43P 38234-00</td>
<td>2.65</td>
<td>129.84</td>
<td>77.91</td>
<td>70</td>
<td>20 AC in S2 Sec. 28; 50 AC in N2 Sec. 33, T5N, R34E</td>
<td>Lot 3 (NENWNE) Sec. 33, T5N, R34E Yellowstone County</td>
</tr>
</tbody>
</table>

**FINDINGS OF FACT – Adverse Effect**

10. The Applicants propose to install a half circle center pivot within the historical flood irrigation place of use. As stated in the Change in Method of Irrigation policy memo dated December 2015, the Department will not analyze the change in efficiency for the new irrigation method because the applicants are not changing the place of use and no authorization is required for a change in method of irrigation. Therefore, the proposed consumptive use is the same as the historical, 77.91 AF. The proposed diverted volume is the field applied volume, 129.84 AF (77.91/0.6 = 129.84). The Applicant’s proposed pump will divert water directly onto the field, into the pivot pipeline or into gated pipe so there are no conveyance losses.

11. The total proposed diverted volume is the same as the historically diverted volume (129.84 – 129.84 = 0). There are no conveyance losses associated with the historical or proposed diversion and conveyance systems.
12. Changing this diversion to a downstream location may cause water right holders between the old and new diversions to notice changes in the rate and timing of depletions to the source. The Applicant proposes to leave 2.65 CFS up to 129.84 AF in the source between the historical and proposed diversion which will improve conditions for the intervening water right holders. There are 3 water rights within the area between the historical and proposed diversions, two are for livestock direct from source and one is for instream flow. The following table shows water rights that may be affected by the change in diversion.

<table>
<thead>
<tr>
<th>Water Right No.</th>
<th>Owner Name</th>
<th>Source</th>
<th>Priority Date</th>
<th>Flow Rate (CFS)</th>
<th>Point of Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>43P 30107415</td>
<td>Teresa Bottrell</td>
<td>Bighorn River</td>
<td>01/01/1882</td>
<td>0.08*</td>
<td>E2 Sec. 28, T5N, R34E</td>
</tr>
<tr>
<td>43P 30107382</td>
<td>Bottrell Family Investments Limited Partnership</td>
<td>Bighorn River</td>
<td>01/01/1882</td>
<td>0.00</td>
<td>E2 Sec. 33, T5N, R34E</td>
</tr>
<tr>
<td>43P 30017690</td>
<td>Montana Dept. of Fish Wildlife and Parks</td>
<td>Bighorn River</td>
<td>12/15/1978</td>
<td>5,200</td>
<td>Sec. 28 and 33, T5N, R34E</td>
</tr>
</tbody>
</table>

* water rights for livestock direct from source are taken as 35 GPM (0.08 CFS) for the first right and zero for all others.

13. The Applicant can and will shut down their diversion if a valid call for water is made.

14. There will be no adverse effect because there will be no increase in flow rate or volume and because the proposed point of diversion is moving downstream and water users between the historical and proposed diversions will see increased flows.

**BENEFICIAL USE**

**FINDINGS OF FACT**

15. Applicant proposes to continue to use water for irrigation. Irrigation is a beneficial use under §85-2-102(5), MCA. Applicant proposes to use 2.65 CFS flow rate and 129.84 AF diverted volume for 70 irrigated acres. This flow rate is the amount historically diverted and is 17 GPM/AC. The volume is the amount calculated by the Department using the formulas and equations in Administrative Rule and Department policy (FOF 7-8).

**ADEQUATE DIVERSION**

**FINDINGS OF FACT**

16. The Applicant proposes to use a 25 HP Cornell 4RB-25 pump with a 10.625" impeller which, according to the pump curves, can produce the required flow rate. The 2.65 CFS will be
used to provide water to the existing flood irrigation system and acres under center pivot. The system was designed by Big Sky Irrigation.

**POSSESSORY INTEREST**

**FINDINGS OF FACT**

17. 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. (Department file)

**CONCLUSIONS OF LAW**

**HISTORIC USE AND ADVERSE EFFECT**

18. 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).

19. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. **Spokane Ranch & Water Co. v. Beatty**, 37 Mont. 342, 96 P. 727, 731 (1908); **Quigley**, 110 Mont. at 505-11,103 P.2d at 1072-74; **Matter of Royston**, 249 Mont. at 429, 816 P.2d at 1057; **Hohenlohe**, at ¶¶43-45.

20. 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

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

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

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
21. 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. Hollaron, 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-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

22. 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

amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow... An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use. We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

24. 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. 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.

25. 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.


27. 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).

28. The Department has adopted a rule providing for the calculation of historical 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 historical beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF 7).

29. 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”).

30. Based upon the Applicant’s evidence of historical use, the Applicant has proven by a preponderance of the evidence the historical use of Water Right Claim No. 43P 38234-00 of 2.65 CFS flow rate and 129.84 AF diverted volume with a consumptive use of 84.4 AF including irrecoverable losses for 70 acres. (FOF 6-9)

31. 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 10-14)
BENEFICIAL USE

32. 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-feets); 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).

33. 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 the 2.65 CFS flow rate and 129.84 AF diverted volume of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 15)

ADEQUATE MEANS OF DIVERSION

34. 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).

35. In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion);

36. 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 16)

**POSSESSORY INTEREST**

37. 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

38. The Applicant has proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (FOF 17)

**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. 43P 30154493 should be granted subject to the following.

The Department determines the Applicant may change the point of diversion to the SE SW 1/4 Sec. 28, T5N, R34E, Yellowstone County.
NOTICE

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

DATED this 1st day of June 2022.

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

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 1st day of June 2022, by first class United States mail.

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