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

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APPLICATION TO CHANGE WATER RIGHT NO. 40A 30159622 BY BRAND ROCK RANCH LLC	**)** **)** **)**	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On January 30, 2023, Charles W. and Irene M. Carson (original applicants) submitted Application to Change Water Right No. 40A 30159622 to change Statement of Claim No. 40A 214125-00 to the Lewistown 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 transferred from the Lewistown Regional Office to the Billings Regional Office on May 12, 2023. The Application was determined to be correct and complete as of July 13, 2023.

The Department met with the original applicant, Charles Carson, on August 11, 2022. Brand Rock Ranch LLC (Charles King) was present with Charles Carson. Anthony Joyce and Matt Schmidt were present for the Department.

On July 13, 2023, Brand Rock Ranch c/o Charles D. King submitted DNRC Water Right Ownership Update OUID# 251349 transferring Statement of Claim No. 40A 214125-00 and Application to Change Water Right No. 40 30159622 to Brand Rock Ranch c/o Charles D. King (the "Applicant").

An Environmental Assessment for this Application was completed July 26, 2023.

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: Undated aerial photograph showing historical place of use and proposed point of diversion

Information Received after Application Filed

- Undated aerial photograph depicting historical use, including historical point of diversion and means of conveyance.
- Phone conservation on June 2, 2023, between Mark Elison, Billings Regional Manager, and Charles King regarding proposed irrigation method.
- Email exchange dated July 3, 2023, between Mark Elison and Charles King confirming shared point of diversion notification, historical use, land improvements, and conveyance method.
- Maps and written notes from meeting on July 11, 2023, between Mark Elison, Veronica Corbett, Billings Regional Water Resource Specialist, and Charles King, confirming historical point of diversion and means of conveyance, proposed flow rate, adverse effects, supplemental water rights, and proposed diversion means and operation.
- Photographs of proposed diversion means taken by Charles King, dated July 16, 2023.

Information within the Department's Possession/Knowledge

- DNRC water right records.
- Water Resources Survey (WRS) for Musselshell County dated July 1949.
- Field notes from Musselshell County WRS showing historical irrigated acreage dated June 1949.
- Fourteenth Judicial District Court ruling, Case 5115 regarding Naderman Ditch dated June 2, 1952.
- Water Commissioner Decree Usage Report on Naderman Ditch 2002 by Gale Stensvad.
- Preliminary Determination to Grant Change Application No. 40A 30064373 by Vescovi Polled Herefords adopted May 12, 2014.
- Aerial photograph USGS 2633 dated October 5,1953.
- Aerial photograph USGS 5-72-601-4799 dated August 2, 1972.
- Department-issued Technical Report dated July 13, 2023, (revised July 28, 2023, to utilize Gridded Net Evaporation Dataset calculations).
- DNRC Water Right Ownership Update OUID# 251349, received July 13, 2023.

- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents.
    - DNRC Consumptive Use Methodology Memo dated March 17, 2010.
    - DNRC Efficiency Policy Memo dated December 2, 2015.
    - DNRC Return Flow Memo dated April 1, 2016.
    - DNRC Technical Memorandum: Distributing Conveyance Loss on Multiple User Ditches date February 14, 2020.
    - Gridded Net Evaporation Dataset as described in DNRC Pond and Wetland Evaporation/Evapotranspiration Memo dated June 7, 2023

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 of 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; POU means place of use; FOF means finding of fact; and ARM means Administrative Rules of Montana.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. On July 13, 2023, Brand Rock Ranch c/o Charles D. King submitted DNRC Water Right Ownership Update OUID# 251349 documenting the transfer of Statement of Claim No. 40A 214125-00 and Application to Change Water Right No. 40 30159622 to Brand Rock Ranch c/o Charles D. King.

2. The Applicant seeks to change Statement of Claim No. 40A 214125-00 for 392.7 GPM diverted from the Musselshell River. Statement of Claim No. 40A 214125-00 is used on 34.6 AC in the SE Section 5, Township 7N, Range 25E, Musselshell County for the purpose of irrigation with an enforceable priority date of June 30, 1973. Thirty-five miner's inches were decreed in the Fourteenth Judicial District Court ruling, Case 5115 regarding Naderman Ditch dated June 2, 1952.

3. The decreed priority date for this water right was May 1, 1897. However, a late claim was filed October 6, 1989; as mandated by Section 85-2-221(3), MCA, this claim is subordinate, and therefore junior to all Indian and federal reserved water rights and all valid timely filed claims based on state law.

4. The claimed point of diversion is the headgate to the Naderman Ditch in the SWSWSE Section 23, T7N, R24E, Musselshell County (Figure 1). The claimed period of diversion is May 1 – October 15. The claimed point of diversion is approximately 9.5 miles southwest of Roundup and the place of use is approximately 5.5 miles southwest of Roundup. Table 1 lists the elements of the water right:

TABLE 1: WATER RIGHT PROPOSED FOR CHANGE

WR Number	Purpose	Flow	Period of Use	Place of use	Point of diversion	Priority date	Acres
40A 214125 - 00	Irrigation	392.7 GPM (Decreed)	May 1 – October 15	NESE Sec. 5, T7N, R25E, Musselshell County E2NWSE Sec. 5, T7N, R25E, Musselshell County N2SESE Sec. 5, T7N, R25E, Musselshell County	SWSWSE Sec. 23, T7N, R24E (Headgate), Musselshell County	June 30, 1973	34.6

5. Conveyance for this water right is the Naderman Ditch. According to the 1949 Musselshell County WRS, construction of the Naderman Ditch was completed on or about October 29, 1900.

6. This water right is not supplemental to any other water rights. The place of use has 82.5 shares of contract water from Deadman's Basin, an off-stream, state-owned water storage project.

7. The water right being changed in this Application is located in the Musselshell River Basin (Basin 40A) which is subject to an administrative water right basin closure. The basin is closed to all or most new surface water appropriations between June 1 and September 30.

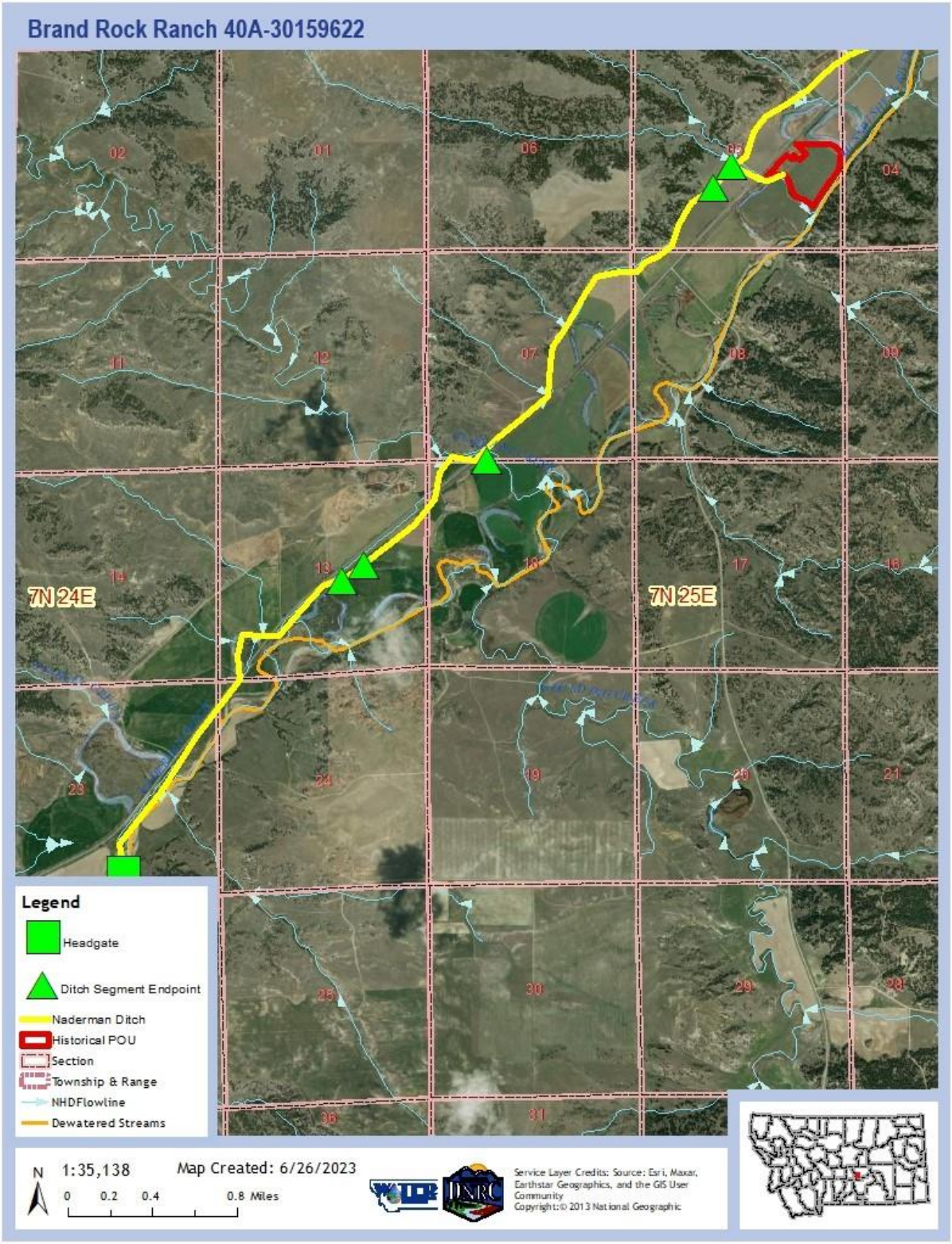

FIGURE 1. HISTORICAL POINT OF DIVERSION AND PLACE OF USE.

CHANGE PROPOSAL

FINDINGS OF FACT

8. The Applicant proposes to change the point of diversion from the headgate to the Naderman Ditch in the SWSWSE Sec. 23, T7N, R24E to a downstream pump site on the Musselshell River in the NWSESE Sec. 5, T7N, R25E (Figure 2). The headgate to the Naderman Ditch washed out in 2011 and other irrigation water rights that used the ditch have changed their point of diversion since 2011. The proposed point of diversion is located approximately 5.5 miles southwest of Roundup.

9. Per the Musselshell River Distribution Project, a District Court-ordered water right enforcement project, the Applicant is required to measure all water diverted from the Musselshell River.

FIGURE 2. PROPOSED POINT OF DIVERSION

CHANGE CRITERIA

10. 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.

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

Company (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

12. Statement of Claim No. 40A 214125-00 utilizes water appropriated from the Musselshell River via the Naderman Ditch. Water was historically diverted into the Naderman Ditch by a headgate located at SWSWSE Sec. 23, T7N, R24E. The WRS for Musselshell County dated July 1949 describes the Naderman Ditch headgate as "a concrete headgate structure with gates 3 feet by 4 feet in size to the main canal" and the Ditch as "being 10 feet wide by 3 feet deep." Using the dimensions of the Naderman Ditch from the WRS, assuming a trapezoidal ditch profile and using a slope of .003 from topographic maps, Mannings equation gives a capacity of the Naderman Ditch of 158.5 CFS ($1.5/.02 \times 25.5\ ft^2 \times (25.5\ ft^2/13.7\ ft)^{(2/3)} \times .003^{0.5} = 158.5$ CFS). A water usage report dated August 27, 2002, from water commissioner Gale Stensvad, indicates an estimated maximum ditch capacity of 42-46 CFS.

13. The Fourteenth Judicial District Court in 1952 decreed a total of 1,690 miner's inches, or 42.25 CFS, to a combination of all water users on the Naderman Ditch, and 35 miner's inches, or 0.875 CFS (392.7 GPM) to the Applicant's predecessor.

14. The Department found in Preliminary Determination to Grant Change Application No. 40A 30064373 by Vescovi Polled Herefords, adopted May 12, 2014, that the Naderman Ditch could supply the full flow rate of water rights holders on the ditch over the entire period of diversion in some years. In some years, the Musselshell River does not provide full-service irrigation for water rights on the Naderman Ditch and contract water from Deadman's Basin is purchased. Based on this Department finding, the 1952 decree, and the calculated and reported capacity of the Naderman Ditch, the Department finds that the historical flow rate for Statement of Claim No. 40A 214125-00 was 392.7 GPM. This is a reasonable flow rate, equivalent to 11.35 GPM/AC. The DNRC adjudication standard for flood irrigation is 17.0 GPM/AC. The claimed period of diversion is May 1 to October 15. The place of use is in USDA Natural Resource and Conservation Service Climatic Area I – High Consumptive Use. Per ARM 36.12.112, the Department standard period of diversion for Climatic Area I is March 15 to November 15. The Department finds that

with no substantial evidence to the contrary, the period of diversion, as claimed, was the historical period of diversion.

15. The WRS for Musselshell County indicates 8.63 AC of the place of use of Statement of Claim No. 40A 214125-00 were historically irrigated. However, field notes dated June 10, 1949, suggest an additional 28.5 AC of potential irrigation, and specifically note the discrepancy between acreage claimed verbally by the original landowner and mapped acreage. The claimed and decreed acreage is 34.6 AC. Aerial photograph USGS 2633 dated October 5, 1953, shows 36.3 AC irrigated and aerial photograph USGS 5-72-601-4799 dated August 2, 1972, shows 35.7 AC irrigated. Based on the claimed irrigated acres and the aerial photography, the Department finds that 34.6 AC were historically irrigated by Statement of Claim No. 40A 214125-00.

16. The Applicant provided a signed statement affirming his decision to use the Department's method of calculating historical diverted and consumptive volume under ARM 36.12.1902.

17. The Department calculated historical consumptive use as outlined in ARM 36.12.1902. Based on 34.6 AC of flood irrigation with an Irrigation Water Requirement for flood irrigation in Musselshell County at Roundup of 23.98 inches and a county Management Factor of 50.0%, the historical consumptive use is 34.57 AF (34.6 AC x 23.98 in/12 in/ft x 0.50 = 34.57 AF). Field applied volume is calculated using the formula (Volume of historical consumptive use/On-farm efficiency). The Department adds 5% of field applied volume to account for irrecoverable losses in flood irrigation systems. Using an irrigation efficiency of 45%, the field applied volume is 76.82 AF (34.57 AF/.45 = 76.82 AF), and the irrecoverable losses are 76.82 AF x 0.05 = 3.84 AF. Total historical consumptive use including irrecoverable losses for the flood irrigation under this water right is 38.41 AF (34.57 AF + 3.84 AF = 38.41 AF).

18. The Department finds total historical consumptive use including irrecoverable losses for this water right is 38.41 AF.

19. The Department calculated historical diverted volume as outlined in ARM 36.12.1902. The Department uses the following formula to determine historical diverted volume: Historical Diverted Volume = Field Applied Volume + Volume of conveyance loss. The field applied volume is 76.82 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 loss, vegetative loss, and evapotranspiration

from the ditch. In this case, there were multiple water rights using the same diversion and conveyance facilities. The Department broke the ditch down into 5 segments based on the locations where the ditch reached the first field of each Appropriator. The segments are 10,262 feet, 538 feet, 4,448 feet, 9,583 feet, and 664 feet long, respectively. The flow rate of Statement of Claim No. 40A 214125-00 was then divided by flow remaining in the ditch for each segment to determine the percent of flow apportioned to Statement of Claim No. 40A 214125-00 in each segment. The ditch segments carry 40.25 CFS, 38 CFS, 21.78 CFS, 6.38 CFS and .88 CFS, respectively, and the water right being changed has 2.17%, 2.3%, 4.0%, 13.73% and 100% of the flow in the five ditch segments. These percentages were then applied to the conveyance losses for each segment to determine the portion attributable to Statement of Claim No. 40A 214125-00.

20. Parameters used in calculating conveyance loss are: ditch wetted perimeter = 13.7 feet, ditch width = 10 feet, ditch length = 25,495 feet, seepage loss rate (loam, very fine sandy loam) = 0.8 ft^3/ft^2/day, historical flow rate in the ditch = 40.245 CFS, days irrigated = 168 days, net evaporation from the DNRC Gridded Net Evaporation Dataset for the period of diversion = 17.39 inches or 1.45 feet. The Department determined the ditch width and wetted perimeter from the Musselshell WRS and calculated the length using aerial imagery. Because the ditch serves multiple users and because the flow rate is low for the number of acres irrigated (11.35 GPM/AC), the historical number of days the ditch was operational was taken as the period of diversion (168 days) in calculation of conveyance losses.

21. Seepage loss calculated as (wetted perimeter)(ditch length)(loss rate)(days)/(square feet per acre) is 1,077.67 AF ((13.7 ft x Varies by segment ft x 0.8 ft^3/ft^2/day x 168 days)/43,560 sq. ft/ac). The portion of the seepage loss attributable to the water right is 101.18 AF which is the sum of the losses for each segment based on the water right's percent of flow in each segment. Vegetative loss calculated as (% loss per mile)(flow rate)(days)(ditch length)(unit conversion factor) is 282.53 AF (0.0075 x Flow Rate Varies by Segment CFS x 168 days x Ditch Length Varies by Segment ft/5,280 x 2). The portion of vegetative losses attributable to the water right is 10.65 AF which is the sum of the losses for each segment based on the water right's percent of flow in each segment. Evaporation calculated as (ditch width)(ditch length)(net evaporation for period of diversion)/(square feet per acre) is 8.49 AF ((10 ft x 25,495 ft x 1.45 ft/43,560 sq. ft/ac). The portion of evaporation losses attributable to the water right is 0.80 AF which is the sum of the

losses for each segment based on the water right's percent of flow in each segment. Total conveyance losses attributable to the water right calculated as (Seepage loss + Vegetative loss + Evaporative loss) are 101.18 AF + 10.65 AF + 0.79 AF = 112.6 AF and the historical diverted volume calculated (Field applied volume + Conveyance losses) is 76.82 AF + 112.62 AF = 189.4 AF.

22. The Department finds the conveyance losses per ditch segment reflected in Table 2:

TABLE 2: CONVEYANCE LOSSES PER NADERMAN DITCH SEGMENT

	Ditch Length (ft)	**Flow (CFS)**	**% Flow Attributed to Brand Rock Ranch**	**Total Seepage Loss (AF)**	**Total Vegetative Loss (AF)**	**Evaporation (AF)**
Segment 1	10,262	40.25	2.17	433.77	197.11	3.41
Segment 2	538	38.0	2.30	22.74	9.76	0.18
Segment 3	4,448	21.78	4.0	188.02	46.23	1.48
Segment 4	9,583	6.38	13.73	405.07	29.16	3.19
Segment 5	664	0.88	100	28.07	0.28	0.22
Total	25,495	-	-	1,077.67	282.53	8.49

23. The Department finds the conveyance losses attributable to Statement of Claim No. 40A 214125-00 per Naderman Ditch segment reflected in Table 3:

TABLE 3: CONVEYANCE LOSSES FOR STATEMENT OF CLAIM NO. 40A 214125-00 PER NADERMAN DITCH SEGMENT

	Statement of Claim No. 40A 214125-00 Seepage Loss (AF)	**Statement of Claim No. 40A 214125-00 Vegetative Loss (AF)**	**Statement of Claim No. 40A 214125-00 Evaporation Loss (AF)**	**Statement of Claim No. 40A 214125-00 Conveyance Loss (AF)**
Segment 1	9.43	4.29	0.07	13.79
Segment 2	0.52	0.22	0.00	0.74
Segment 3	7.56	1.86	0.06	9.48

Segment 4	55.60	4.00	0.44	60.04
Segment 5	28.07	0.28	0.22	28.57
Total	101.18	10.65	0.79	112.62

24. The Department finds total conveyance losses attributable to Statement of Claim No. 40A 214125-00 are 112.6 AF and the historical diverted volume is 189.4 AF.

25. The Department finds the following historical use:

TABLE 4: HISTORICAL USE

WR Number	Priority Date	Purpose (Total Acres)	Flow Rate	Consumptive Use	Diverted Volume
40A 214125-00	June 30, 1973	Irrigation (34.6 AC)	392.7 GPM	38.41 AF	189.4 AF

FINDINGS OF FACT – Adverse Effect

26. The Applicant proposes changing only the point of diversion of Statement of Claim No. 40A 214125-00. Historically the Applicant diverted 189.4 AF at a flow rate of 392.7 GPM from the Naderman Ditch headgate for flood irrigation. The new means of diversion will be a pump in the Musselshell River. The proposed flow rate from the pump is 120.0 GPM. The change from the headgate to the Naderman Ditch to a pump in the Musselshell River could potentially result in greater availability of water. However, water from the Musselshell River is distributed by a water commissioner and because Statement of Claim 40A 214125-00 was filed late and has a June 30, 1973, priority date as a result, there will be no greater water availability than historically under the original May 1, 1897, priority date.

27. Pursuant to the December 2, 2015, DNRC Efficiency Policy Memo regarding changes in method of irrigation, for changes to a point of diversion that do not involve any increase in acres irrigated or change in the historical place of use the Department will not compare the historical use to the proposed use for consumption or return flow. Because a change in method of irrigation does not require a change, the historical consumptive use and historical field applied volume are not considered to change. The proposed system uses a pipeline to the sprinklers and there are no conveyance losses. The proposed diverted volume is 76.82 AF, the historically field applied volume. The proposed consumptive use is the same as the historical consumptive use of 38.41 AF.

28. The water rights in Table 5 have points of diversion from the Musselshell River between the historical point of diversion for Statement of Claim No. 40A 214125-00 and the proposed point of diversion. These water rights are considered for the Department's analysis of adverse effect.

TABLE 5: WATER RIGHTS CONSIDERED FOR DEPARTMENTAL ANALYSIS OF ADVERSE EFFECT

Water Right Number	Owners	Flow Rate (CFS)	Maximum Acres	Volume (AF)	Priority Date	Animal Units
40A 203529 00	VESCOVI POLLED HEREFORDS	1.25	202.2	163.6	9/15/1894	0
40A 203054 00	RATHS RANCH LP	1.25	15	67.5	9/4/1895	0
40A 198049 00	WILBUR C HARPER	11.4	231.6	827.4	5/1/1897	0
40A 198049 00	WILBUR C HARPER	11.4	231.6	827.4	5/1/1897	0
40A 203056 00	RATHS RANCH LP	2.25	72.5	196	5/1/1897	0
40A 203057 00	RATHS RANCH LP	2.25	8	45.6	5/1/1897	0
40A 203058 00	RATHS RANCH LP	2.25	12	0	5/1/1897	0
40A 203531 00	VESCOVI POLLED HEREFORDS	4.9	202.2	515.8	5/1/1897	0
40A 203532 00	VESCOVI POLLED HEREFORDS	4.9	202.2	515.8	5/1/1897	0
40A 14975 00	VESCOVI POLLED HEREFORDS	1.25	131.1	106.9	4/1/1897	0
40A 206912 00	VESCOVI POLLED HEREFORDS	1.33	0	0	10/29/1900	400
40A 203535 00	VESCOVI POLLED HEREFORDS	1.25	202.2	163.6	11/11/1901	0
40A 14976 00	VESCOVI POLLED HEREFORDS	2.32	131.1	184.7	8/15/1906	0
40A 203537 00	VESCOVI POLLED HEREFORDS	4.75	202.2	515.8	6/18/1945	0
40A 203055 00	RATHS RANCH LP	6.68	20	114	1/31/1947	0
40A 214290 00	RATHS RANCH LP	5.43	15	67.5	12/31/1947	0
40A 206915 00	VESCOVI POLLED HEREFORDS	1.25	202.2	163.6	9/15/1962	0
40A 214291 00	RATHS RANCH LP	2.45	15	67.5	7/5/1972	0
40A 214292 00	RATHS RANCH LP	2.45	20	114	7/5/1972	0

40A 214293 00	RATHS RANCH LP	6.88	8	45.6	7/5/1972	0
40A 212176 00	WILBUR C HARPER	4.0	95	359.3	6/30/1973	0
40C 30008849	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	80.0	0	57,913.41	7/1/1985	0

29. No other water rights using the original point of diversion will be adversely affected due to the ditch no longer being in use. No other ditch users will be adversely affected as other ditch users have previously changed their points of diversion. There is a single water right, Water Reservation No. 40C 30008849, owned by Montana Department of Fish, Wildlife & Parks that is junior to the water right being changed in this application. This water right is for instream flow for fishery purposes and includes the reach above the historical point of diversion as well as the reach between the historical and proposed points of diversion. The Applicant would be able to call Water Reservation 40C 30008849 and has been able historically to call the Water Reservation. The Applicant will have no greater ability to make call on this water right based on the change in point of diversion than they did historically.

30. The proposed flow rate of 120 GPM compared to the historical flow rate of 392.7 GPM does not result in an expansion of the historical use.

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

32. Beginning in 2002, the Musselshell River is subject to water distribution by District Court-appointed water commissioners in a project known as the Musselshell River Distribution Project (MRDP). The proposed change is subject to water distribution by the District Court. The Applicant will be required to measure diversion to ensure compliance with the distribution project.

33. Based on a historical field applied volume of 76.82 AF and a historical consumptive use of 38.41 AF, 38.41 AF of water historically returned to the Musselshell River. Pursuant to the December 2, 2015, DNRC Efficiency Policy Memo regarding changes in method of irrigation, for changes to a point of diversion that do not involve any increase in acres irrigated or change in the historical place of use the Department will not compare the historical use to the new use for consumption or return flow. Moreover, under ARM 36.12.1901(5) and ARM 36.12.1902, the Department determined there will be no increase in flow rate or consumptive use. Return flows will enter back into the Musselshell River in the same location as they did historically because the

place of use is not changing. Pursuant to the April 1, 2016, DNRC Return Flow Memo the Department will not develop a monthly return flow analysis for change authorizations without an objection.

34. Based on a decrease in diverted flow rate and diverted volume, the Department finds that the proposed change in point of diversion will not create an adverse effect.

BENEFICIAL USE

FINDINGS OF FACT

35. The Applicant proposes to use water for agricultural irrigation. Irrigation is a recognized beneficial use under § 85-2-102, MCA.

36. The Applicant proposes to use 120 GPM flow rate and 76.82 AF diverted volume. This use is less than Department standards for applied volume for sprinkler irrigation on 34.6 AC but is beneficial to the Applicant and based on historical use.

37. The Department finds that irrigation is a beneficial use of water and that 120 GPM flow rate, and 76.82 AF diverted volume are sufficient to serve the purpose.

ADEQUATE DIVERSION

FINDINGS OF FACT

38. The proposed method of diversion is a 15 horsepower US Motors electric pump located in the NWSESE Sec. 5 T7N R25E on the Applicant's property. The pump is connected to 1,470 feet of 4-inch pipe that serves a wheel line irrigation system. The irrigation system is in place and operational.

39. The Department finds that the proposed diversion and conveyance are adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

40. The original Applicant, Charles Carson, 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. On July 13, 2023, Brand Rock Ranch c/o Charles D. King submitted DNRC Water Right Ownership Update OUID#

251349 documenting the transfer of Statement of Claim No. 40A 214125-00 and Application to Change Water Right No. 40 30159622 to Brand Rock Ranch c/o Charles D. King. Brand Rock Ranch consents to the changes proposed to Statement of Claim No. 40A 124215-00 by Application to Change Water Right No. 40A 30159622.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

41. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA

change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).[1]

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

43. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historical 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 historical 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 historical 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 historical 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

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[1] DNRC decisions are available at: https://dnrc.mt.gov/Directors-Office/HearingOrders

[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 historical beneficial use. §85-2-234, MCA

ascertain historical 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 historical 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 historical 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 historical 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]

44. An applicant must also analyze the extent to which a proposed change may alter historical 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

[4] Other western states likewise rely upon the doctrine of historical 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 historical rate of diversion under the existing use, nor increase the historical amount consumptively used under the existing use, nor decrease the historical 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 historical rate of diversion under the existing use, the historical amount consumptively used under the existing use, and the historical amount of return flow must be considered.)

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-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); 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]

45. 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).

46. 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 historical use, historical consumption, and historical return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-

[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).

60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historical 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 historical consumptive use, as quantified in part by return flow analysis, represents a key element of proving historical beneficial use.
> We do not dispute this interrelationship between historical 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).

47. 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 historical 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 historical 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 historical diversions and return flows. ARM 36.12.1901 and 1903.

48. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with

limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

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

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

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

50. 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).

51. 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 No.16).

52. If an applicant seeks more than the historical consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historical consumptive use by a preponderance of the evidence. The actual historical 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").

53. Based upon the Applicant's evidence of historical use, the Applicant has proven by a preponderance of the evidence the historical use of Statement of Claim No. 40A 214125-00 of 189.4 AF diverted volume and 392.7 GPM flow rate with a consumptive use of 38.41 acre-feet. (FOF Nos. 12-25)

54. Based upon the Applicant's comparative analysis of historical 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. 26-34)

BENEFICIAL USE

55. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. 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.

56. The Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 76.82 AF of diverted volume and 120 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF No. 35-37)

ADEQUATE MEANS OF DIVERSION

57. 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).

58. Pursuant to §85-2-402 (2)(b), MCA, the 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. 38-39)

POSSESSORY INTEREST

59. 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

60. The Applicant has proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (FOF No. 40)

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. 40A 30159622 should be granted subject to the following.

The Department determines the Applicant may change the point of diversion for Statement of Claim No. 40A 214125-00 to a pump in the N2SESE Sec. 5 T7N R25E, Musselshell County. The authorized flow rate is 120 GPM up to 76.82 AF diverted volume.

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 20th day of September 2023.

/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 20th day of September 2023, by first class United States mail.

BRAND ROCK RANCH LLC
C/O CHARLES D. KING
734 INDIAN TRAIL
BILLINGS, MT 59105-2751

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Veronica Corbett, Water Resource Specialist
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