

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

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 40S 30165372 BY RICHLAND COUNTY CONSERVATION DISTRICT (THE LARRY AND LAURI HANDY TRUST, PRODUCER)</b>	<b>) DRAFT PRELIMINARY DETERMINATION ) TO GRANT CHANGE</b>
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On June 4, 2025, Richland County Conservation District (Applicant) submitted Application to Change Water Right No. 40S 30165372 to change Conservation District Record 40S 30165163 to the Havre Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on February 25, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on March 21, 2025. The Department delivered the Department - completed technical analyses on May 1, 2025. The Application was determined to be correct and complete as of July 23, 2025. An Environmental Assessment for this application was completed on July 31, 2025.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

**Application as filed:**

- Form 606-CD, Conservation District Application to Change Water Reservation
- Attachments:
  - Copy of the Conservation District Application from the Producer, Dated April 3, 2024.
    - Argi Industries Calculation Sheet
    - Cornell Pump Curve Graph
    - Soil Map – Half Pivot
    - Soil Map – Larry Handy ¾ Pivot
    - Larry Handy Pipeline Profile
    - Larry Handy Irrigation Map
    - Cornell Data Sheet 5RB-F
    - Cornell Pump Company G(R) 104484 – 40S

- Pump System Diagram Drawing
- Agri Industries Valley V-Chart
  - Valley Standard Pivot 7000 Machine Summary
  - Valley Standard Pivot 7000 Machine Sprinkler Chart
  - Valley Standard Pivot 7000 Percent Timer Data
- Signed Copy of the Reserved Water Use Authorization from the Conservation District, Dated January 10, 2025.
- 40S 30165163 Conservation District Record General Abstract, Dated February 18, 2025.
- Copy of the Conservation Public Notice from the Conservation District, Dated December 11, 2024.
- Affidavit of Publication from the Conservation District, Dated December 11, 2024.
- Copy of the public notice Certificate of Service from the Conservation District, Dated December 9, 2024.

Maps:

- Richland County Conservation District Pre Application Map, Larry & Lauri Handy Trust Application, (Undated)
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated May 1, 2025.

Information Received after Application Filed

- None

Information within the Department's Possession/Knowledge

- DNRC Water Rights Database Records
- Lower Missouri River Basin Final Order of the Board of Natural Resources & Conservation, December 30, 1994.
- USGS Gaging Station #06185500 data for the Missouri River near Culbertson (Period of Record: April 1958 – September 2024)

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).

For the purposes of this document, 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; and AF/YR means acre-feet per year. CD means Conservation District, and Producer means the applicant who applied to the CD to use a portion of the CD water reservation water right.

## **WATER RIGHTS TO BE CHANGED**

### **FINDINGS OF FACT**

1. The Applicant seeks to add a point of diversion and place of use to the Richland County Conservation District Water Reservation (40S 84500-00) that were not included in the original water reservation public notice.

**Table 1: Water Rights Proposed for Change**

WR TYPE	WR NUMBER	WR PRIORITY DATE	WR SOURCE
Water Reservation	40S 84500-00	7/1/1985 08:00 AM	Missouri River
Conservation District Record	40S 30165163 (RI-036M)	4/3/2024 10:28 AM (Internal CD Priority Date)	Missouri River

2. There are no supplemental water rights for the 158 AC to be irrigated.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

3. The Applicant proposes to divert water from the Missouri River, by means of a pump, from April 1 through October 31 at 2.7 CFS up to 368 AF, from a point in the NESESW, Section 27, T27N, R51E, Richland County, for Sprinkler Irrigation use from April 1 through October 31. The proposed place of use includes two pivots located in the following legal descriptions:

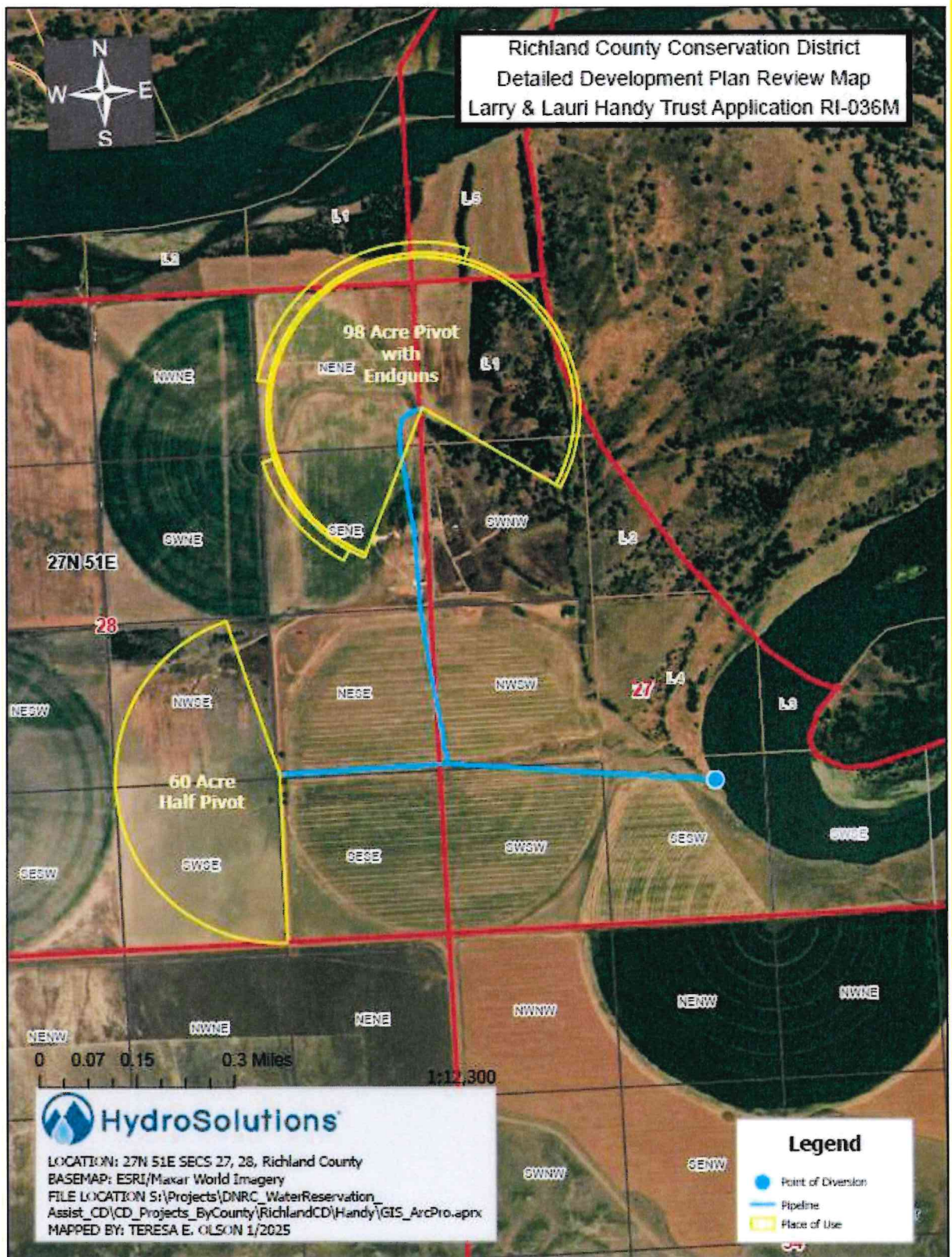
<b>Table 2: Proposed Place of Use</b>							
Pivot Description	Acres	Lot	Quarter Section	Section	Twp.	Range	County
98 AC	4.5	1		21	27N	51E	Richland
	4	5		22	27N	51E	Richland
	34	1		27	27N	51E	Richland
	35.5		NENE	28	27N	51E	Richland
	4		N2SWNW	27	27N	51E	Richland
	16		SENE	28	27N	51E	Richland
60 AC	28		NWSE	28	27N	51E	Richland
	32		SWSE	28	27N	51E	Richland

4. According to the 2025 Water Reservation Record, the Richland County CD had 58.85 CFS and 14,435.55 AF remaining in their water reservation prior to the submission of this application.
5. The CD granted the producer (The Larry and Lauri Handy Trust) the right to use a portion of the CD water reservation on January 10, 2025. The CD granted approval, subject to the installation of a water measuring device. As such, the DNRC will add the following conditions:

WATER MEASUREMENT-MEETS CONSERVATION DISTRICT REQUIREMENT

THIS RIGHT IS SUBJECT TO THE TYPE OF WATER USE MEASURING DEVICE OR WATER USE ESTIMATION TECHNIQUE REQUIRED BY THE CONSERVATION DISTRICT. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.





**Figure 1:** Applicant Provided Map of Proposed Point of Diversion and Place of Use for CD Change Application No. 40S 30165372

## CHANGE CRITERIA

6. 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 probable 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.

7. 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*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **WATER RESERVATION CRITERIA**

### **FINDINGS OF FACT**

8. An authorization for change is required in § 85-2-316(12), MCA, because the producer's proposed point of diversion and place of use are outside the project areas identified in the original Water Reservation application's public notice.
9. The purpose for the Water Reservation was established by the Board of Natural Resources and Conservation, and the conclusions are contained in the Lower Missouri River Basin Final Order dated December 30, 1994.
10. The need for the Water Reservation was established by the Board of Natural Resources and Conservation, and the conclusions are contained in the Lower Missouri River Basin Final Order dated December 30, 1994.
11. The amount of water necessary for the purposes of the Water Reservation was established by the Board of Natural Resources and Conservation, and the conclusions are contained in the Lower Missouri River Basin Final Order dated December 30, 1994.
12. That the water reservation was in the public interest was established by the Board of Natural Resources, and the conclusions are contained in the Lower Missouri River Basin Final Order dated December 30, 1994.
13. This change authorization proposal is consistent with the purpose, need, amount, and public interest established by the Board of Natural Resources.

## **HISTORICAL USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historical Use**

14. The Board of Natural Resources and Conservation granted the Richland County Conservation District a water reservation (40S 84500-00) for 186.9 CFS up to 25,349 AF for use on 11,141 acres for future irrigation development out of the Missouri River. The water reservation was granted in the Lower Missouri River Basin Final Order dated December 30, 1994, with a priority date of July 1, 1985.
15. This application is to change a portion of the water reservation not yet put to use, and therefore, no historical use for the amount of water being changed exists.

## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

16. Richland County CD is proposing to add Sprinkler Irrigation to its water reservation. The proposed period of diversion and period of use is April 1 to October 31.



17. Water is physically and legally available in the amount the Applicant seeks to appropriate under the Richland County CD water reservation.
18. The CD published notice of this proposed project on December 11, 2024, in the Roundup and set a January 10, 2025, deadline for objections.
19. The CD sent individual public notices to water users downstream of the proposed point of diversion and to the entities on the DNRC standardized list of entities to notice.
20. No objections were received by the CD to this project.
21. The Richland County CD requires the water user to keep written records of the flow rate and volume of all water diverted and to submit the report to the Conservation District annually by November 15. The method of water flow measurement will be recorded by a flowmeter.
22. The Applicant is seeking to divert 368 AF to irrigate 158 AC. Consumptive volume was calculated by assigning a field application of 2.3 AF/AC, as authorized by the Richland County CD for 158 AC.
23. A full-service irrigation Consumptive Volume was calculated by the Department using the Wolf Point, MT weather station. This station was chosen because it is closest to the proposed irrigated acres.
24. The Department used a management factor of 74.6% per ARM 36.12.1902. Sprinkler Irrigation for the 60 AC pivot will consume  $27.03 \text{ in}/12\text{in}/\text{ft} \times 74.6 \times 60 \text{ AC} = 100.82 \text{ AF}$  per year. Adding 10% of the field applied volume (144.03 AF) as irrecoverable losses from pivot operation, the total consumptive use is  $100.82 \text{ AF} + 14.4 \text{ AF} = 115.23 \text{ AF}$ .
25. Using a management factor of 74.6% per ARM 36.12.1902. Sprinkler Irrigation for the 98 AC pivot will consume  $27.03 \text{ in}/12\text{in}/\text{ft} \times 74.6 \times 98 \text{ AC} = 164.68 \text{ AF}$  per year. Adding 10% of the diverted volume (235.25 AF) as irrecoverable losses from pivot operation, the total consumptive use is  $164.68 \text{ AF} + 23.53 \text{ AF} = 188.2 \text{ AF}$ .
26. The total Consumed Volume for both proposed pivots, totaling 152 AC, is 303.43 AF.
27. The Applicants' proposed diverted volume is 368 AF, and the Department's diverted volume necessary for a full-service irrigation is 379.28 AF.
28. There is no historical return flow to assess because the water has not yet been put to beneficial use.
29. This application represents a non-perfected portion of the Richland County CD water reservation. Therefore, water rights both senior and junior to Water Reservation No. 40S 84500-00 must be considered in order to determine whether this proposed application would have an adverse effect. USGS Gaging Station #06185500, Missouri River near

Culbertson, was used to calculate flow rate and volume physically available during the proposed period of diversion. The Culbertson gaging station is approximately 49.4 river miles downstream of the POD and has a period of record from April 1958 to September 2024. Water physically available was calculated by taking the median of the mean monthly flows (CFS) and adding in all water rights between the requested POD and the gaging station. Table 3 lists the existing water rights between the POD and the gaging station:

<b>Table 3: Existing Water Rights between Proposed POD and Gaging Station</b>				
<b>Water Right #</b>	<b>Flow (CFS)</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>	<b>Water Right Type</b>
40S 184965 00*	0.1	7	01/01 to 12/31	Statement of Claim
40S 30142616*	0.1	2	01/01 to 12/31	Statement of Claim
40S 30073870	0.1	1	01/01 to 12/31	Reserved Claim
40S 30142619*	0.1	0	01/01 to 12/31	Statement of Claim
40S 1549 00	1.8	257	01/01 to 12/31	Statement of Claim
40S 30073871	0	304	01/01 to 12/31	Reserved Claim
40S 142790 00	0.5	135	01/01 to 12/31	Statement of Claim
40S 30142621*	0.1	0.03	01/01 to 12/31	Statement of Claim
40S 30051664	2.25	270.6	01/01 to 12/31	Provisional Permit
40S 30142621*	0.08	0.03	01/01 to 12/31	Statement of Claim
40S 30142628*	0.08	0.54	01/01 to 12/31	Statement of Claim
40S 214733 00	0.17	2.5	01/01 to 12/31	Statement of Claim
40S 30142617*	0.08	0.88	01/01 to 12/31	Statement of Claim
40S 30142620*	0.08	1.6	01/01 to 12/31	Statement of Claim
40S 30148233	4.9	3	01/01 to 12/31	Provisional Permit
40S 1508 00**	3.8	348	03/01 to 12/04	Statement of Claim
40S 30046592**	7.4	685	03/01 to 12/04	Statement of Claim
40S 5257 00	3.34	600	03/15 to 11/15	Provisional Permit
40S 101303 00**	1.2	80	04/01 to 09/30	Statement of Claim
40S 2400 00**	4.23	230	04/01 to 09/30	Statement of Claim
40S 30025552	2.8	228	04/01 to 10/01	Conservation District Record
40S 80553 00	4.46	741	04/01 to 10/01	Provisional Permit
40S 46549 00**	3.34	465	04/01 to 10/04	Statement of Claim
40S 30150186	0.8	69	04/01 to 10/15	Conservation District Record
40S 30012791	6	414	04/01 to 10/15	Conservation District Record
40S 30027588	3.9	273	04/01 to 10/15	Conservation District Record
40S 30044041	1.8	177	04/01 to 10/15	Conservation District Record
40S 114741 00	6.55	312.5	04/01 to 10/15	Conservation District Record
40S 116904 <sup>34</sup>	6.7	68	04/01 to 10/15	Conservation District Record
40S 30002059	4.9	569	04/01 to 10/15	Conservation District Record
40S 30027595	4.1	283.6	04/01 to 10/15	Conservation District Record

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right Type
40S 30072073	1.73	224	04/01 to 10/15	Conservation District Record
40S 30104412	1.1	161	04/01 to 10/15	Conservation District Record
40S 30104519	5.08	242.5	04/01 to 10/15	Conservation District Record
40S 30104520	1.57	75	04/01 to 10/15	Conservation District Record
40S 30001844	2.6	364	04/01 to 10/15	Conservation District Record
40S 30030883	6.2	0	04/01 to 10/31	Provisional Permit
40S 178507 00**	1.1	70	04/01 to 10/31	Statement of Claim
40S 10761 00	2.2	640	04/01 to 10/31	Provisional Permit
40S 130506 00**	2.89	200	04/01 to 10/31	Statement of Claim
40S 130507 00**	5.67	392.5	04/01 to 10/31	Statement of Claim
40S 182909 00**	3.6	237.5	04/01 to 10/31	Statement of Claim
40S 30151578**	11.49	795	04/01 to 10/31	Statement of Claim
40S 30159245	2.23	220	04/01 to 10/31	Conservation District Record
40S 38071 00	1.07	162	04/01 to 10/31	Provisional Permit
40S 163084 00**	1.9	104	04/01 to 10/31	Statement of Claim
40S 30030881	2.7	0	04/01 to 10/31	Provisional Permit
40S 78203 00	4.5	1202	04/01 to 10/31	Provisional Permit
40S 168965 00**	9.36	682.5	04/01 to 10/31	Statement of Claim
40S 70237 00	7.8	454	04/01 to 10/31	Provisional Permit
40S 89101 00**	3.34	358.78	04/01 to 10/31	Provisional Permit
40S 178504 00**	1.8	400	04/01 to 11/01	Statement of Claim
40S 125402 00**3	x	275	04/01 to 11/19	Statement of Claim
40S 214734 00*	0.17	6.868	04/01 to 11/30	Statement of Claim
40S 30043641	0.5	60	04/11 to 11/01	Conservation District Record
40S 57404 00	2.79	486	04/11 to 11/01	Provisional Permit
40S 172266 00	9	1095	04/15 to 10/04	Statement of Claim
40S 101074 00	5.8	927	04/15 to 10/15	Conservation District Record
40S 106990 00	4.2	636	04/15 to 10/15	Conservation District Record
40S 103671 00	2.5	360	04/15 to 10/15	Conservation District Record
40S 101055 00 <sup>5</sup>	3.6	560	04/15 to 10/15	Conservation District Record
40S 101076 00	7.35	1272	04/15 to 10/15	Provisional Permit
40S 101092 00	3.6	636	04/15 to 10/15	Conservation District Record
40S 1666 00	4.46	99	04/15 to 10/15	Provisional Permit
40S 30005493	6	768	04/15 to 10/15	Conservation District Record
40S 30024907	2.2	272	04/15 to 10/15	Conservation District Record
40S 30152290	8.91	120	04/15 to 10/15	Provisional Permit
40S 66284 00	4.46	700	04/15 to 10/15	Provisional Permit
40S 106984 00	2.93	284	04/15 to 10/15	Conservation District Record
40S 30006748	1.6	125.95	04/15 to 10/15	Conservation District Record
40S 30063091	1.45	92	04/15 to 10/15	Conservation District Record

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right Type
40S 91841 00	4.34	139.5	04/15 to 10/15	Provisional Permit
40S 42905 00**	1	68	04/15 to 10/19	Statement of Claim
40S 42906 00**	3.6	238	04/15 to 10/19	Statement of Claim
40S 96357 00	5.8	795	04/15 to 10/31	Provisional Permit
40S 11957 00**	1	100	05/01 to 09/19	Statement of Claim
40S 5134 00**	1.4	150	05/01 to 09/30	Statement of Claim
40S 13878 00	13.37	189	05/01 to 09/30	Provisional Permit
40S 5421 00	7.2	1290	05/01 to 09/30	Provisional Permit
40S 130565 00**5	x	145	05/01 to 09/30	Statement of Claim
40S 101292 00**	6.2	1738	05/01 to 10/19	Statement of Claim
40S 137 00	5.57	500	05/01 to 10/31	Provisional Permit
40S 89100 00	3.9	292.5	05/01 to 10/31	Provisional Permit
40S 17166 00 <sup>3</sup>	x	x	05/01 to 11/01	Provisional Permit
40S 171797 00**	13.37	851.6	05/10 to 09/24	Statement of Claim
40S 46465 00**	11.14	473.25	05/10 to 10/19	Statement of Claim
40S 3215 00 <sup>34</sup>	0.11	x	05/15 to 09/19	Statement of Claim
40S 17844 00	1.3	216	06/01 to 08/15	Provisional Permit
40S 30022924	1.3	232	06/01 to 09/01	Provisional Permit
40S 4947 00	1.9	350	06/01 to 09/01	Provisional Permit
40S 30022935	1.3	240	06/01 to 09/01	Provisional Permit
40S 171834 00**	6.68	337.5	06/01 to 09/19	Statement of Claim
40S 171835 00**	5.8	382.5	06/01 to 09/19	Statement of Claim
40S 104484 00	2.70	264	04/15 to 10/15	Conservation District Record

\* These statements of claims were issued for livestock drinking directly from source. Flow rate and volume were not given; rather, these rights were assigned a consumptive rate of 30 gallons per day per animal unit. For legal availability purpose, volume is calculated by multiplying the number of animal units by 30 gallons by the number of days in the claimed period of use. Flow rate is then converted from the volume.

\*\* These statements of claims were issued for irrigation in which a volume was not given. For legal availability purpose, volume is calculated by multiplying the number of acres by 2.5 AF/ac, an irrigation standard within those set by ARM 36.12.115(2)(e).

3 This water use authorization is issued in conjunction with water rights 40S W125402 and 40S P17166. The combined appropriation shall not exceed 6.7 CFS (3000 GPM). Use under this authorization if used alone is 6.7 CFS.

4 This water use authorization is issued supplemental to water right 40S W3215. They have overlapping places of use. If both rights are used to irrigate the overlapping acres, the total volume appropriated shall not exceed 68 acre-feet. This authorization used alone limits the volume appropriated to 68 acre-feet for the overlapping acres.

5 This authorization is used in conjunction with existing claim W130565. All waters are diverted by means of a shared diversion and shall not exceed 3.6 CFS (1600 GPM).

**Table 4: Physical Availability of Flow Rate and Volume on the Missouri River**

A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)	Existing Rights from Gage 06185500 to POD (CFS)	Existing Rights from the POD to Gage 06185500 (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
April	8,000	475,200	244.64	3,925.74	8,244.64	479,125.74
May	8,656	531,305	307.90	4,871.09	8,963.90	536,176.37

June	9,547	567,092	326.18	5,161.16	9,873.18	572,252.96
July	9,371	575,192	326.18	5,161.16	9,697.18	580,353.14
August	8,973	550,763	326.18	5,161.16	9,299.18	555,923.90
September	7,836	465,458	320.38	4,989.89	8,156.38	470,448.29
October	6,976	428,187	258.76	4,210.33	7,234.76	432,397.21

\*Median of the mean monthly volume was calculated by multiplying the median of the mean monthly flow rates in CFS by the number of days in the month by 1.98 AF/CFS/day.

30. The Department determined that the area of potential impact for this application is from the POD approximately 49.4 river miles downstream to the Culbertson gaging station.

Table 5 lists the existing downstream users within the area of potential impact:

<b>Table 5: Existing Downstream Users in the Area of Impact</b>				
<b>Water Right #</b>	<b>Flow (CFS)</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>	<b>Water Right Type</b>
MCA 85-20-201	See Table 4	See Table 4	01/01 to 12/31	Reserved Claim
40S 30017671	5,178	3,748,500	01/01 to 12/31	Water Reservation
40S 184965 00*	0.1	7	01/01 to 12/31	Statement of Claim
40S 30142616*	0.1	2	01/01 to 12/31	Statement of Claim
40S 30073870	0.1	1	01/01 to 12/31	Reserved Claim
40S 30142619*	0.1	0	01/01 to 12/31	Statement of Claim
40S 1549 00	1.8	257	01/01 to 12/31	Statement of Claim
40S 30073871	0	304	01/01 to 12/31	Reserved Claim
40S 142790 00	0.5	135	01/01 to 12/31	Statement of Claim
40S 30142621*	0.1	0.03	01/01 to 12/31	Statement of Claim
40S 30051664	2.25	270.6	01/01 to 12/31	Provisional Permit
40S 30142621*	0.08	0.03	01/01 to 12/31	Statement of Claim
40S 30142628*	0.08	0.54	01/01 to 12/31	Statement of Claim
40S 214733 00	0.17	2.5	01/01 to 12/31	Statement of Claim
40S 30142617*	0.08	0.88	01/01 to 12/31	Statement of Claim
40S 30142620*	0.08	1.6	01/01 to 12/31	Statement of Claim
40S 30148233	4.9	3	01/01 to 12/31	Provisional Permit
40S 1508 00**	3.8	348	03/01 to 12/04	Statement of Claim
40S 30046592**	7.4	685	03/01 to 12/04	Statement of Claim
40S 5257 00	3.34	600	03/15 to 11/15	Provisional Permit
40S 101303 00**	1.2	80	04/01 to 09/30	Statement of Claim
40S 2400 00**	4.23	230	04/01 to 09/30	Statement of Claim
40S 30025552	2.8	228	04/01 to 10/01	Conservation District Record
40S 80553 00	4.46	741	04/01 to 10/01	Provisional Permit
40S 46549 00**	3.34	465	04/01 to 10/04	Statement of Claim
40S 30150186	0.8	69	04/01 to 10/15	Conservation District Record
40S 30012791	6	414	04/01 to 10/15	Conservation District Record
40S 30027588	3.9	273	04/01 to 10/15	Conservation District Record



Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right Type
40S 30044041	1.8	177	04/01 to 10/15	Conservation District Record
40S 114741 00	6.55	312.5	04/01 to 10/15	Conservation District Record
40S 116904 <sup>34</sup>	6.7	68	04/01 to 10/15	Conservation District Record
40S 30002059	4.9	569	04/01 to 10/15	Conservation District Record
40S 30027595	4.1	283.6	04/01 to 10/15	Conservation District Record
40S 30072073	1.73	224	04/01 to 10/15	Conservation District Record
40S 30104412	1.1	161	04/01 to 10/15	Conservation District Record
40S 30104519	5.08	242.5	04/01 to 10/15	Conservation District Record
40S 30104520	1.57	75	04/01 to 10/15	Conservation District Record
40S 30001844	2.6	364	04/01 to 10/15	Conservation District Record
40S 30030883	6.2	0	04/01 to 10/31	Provisional Permit
40S 178507 00**	1.1	70	04/01 to 10/31	Statement of Claim
40S 10761 00	2.2	640	04/01 to 10/31	Provisional Permit
40S 130506 00**	2.89	200	04/01 to 10/31	Statement of Claim
40S 130507 00**	5.67	392.5	04/01 to 10/31	Statement of Claim
40S 182909 00**	3.6	237.5	04/01 to 10/31	Statement of Claim
40S 30151578**	11.49	795	04/01 to 10/31	Statement of Claim
40S 30159245	2.23	220	04/01 to 10/31	Conservation District Record
40S 38071 00	1.07	162	04/01 to 10/31	Provisional Permit
40S 163084 00**	1.9	104	04/01 to 10/31	Statement of Claim
40S 30030881	2.7	0	04/01 to 10/31	Provisional Permit
40S 78203 00	4.5	1202	04/01 to 10/31	Provisional Permit
40S 168965 00**	9.36	682.5	04/01 to 10/31	Statement of Claim
40S 70237 00	7.8	454	04/01 to 10/31	Provisional Permit
40S 89101 00**	3.34	358.78	04/01 to 10/31	Provisional Permit
40S 178504 00**	1.8	400	04/01 to 11/01	Statement of Claim
40S 125402 00** <sup>3</sup>	x	275	04/01 to 11/19	Statement of Claim
40S 214734 00*	0.17	6.868	04/01 to 11/30	Statement of Claim
40S 30043641	0.5	60	04/11 to 11/01	Conservation District Record
40S 57404 00	2.79	486	04/11 to 11/01	Provisional Permit
40S 172266 00	9	1095	04/15 to 10/04	Statement of Claim
40S 101074 00	5.8	927	04/15 to 10/15	Conservation District Record
40S 106990 00	4.2	636	04/15 to 10/15	Conservation District Record
40S 103671 00	2.5	360	04/15 to 10/15	Conservation District Record
40S 101055 00 <sup>5</sup>	3.6	560	04/15 to 10/15	Conservation District Record
40S 101076 00	7.35	1272	04/15 to 10/15	Provisional Permit
40S 101092 00	3.6	636	04/15 to 10/15	Conservation District Record
40S 1666 00	4.46	99	04/15 to 10/15	Provisional Permit
40S 30005493	6	768	04/15 to 10/15	Conservation District Record

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right Type
40S 30024907	2.2	272	04/15 to 10/15	Conservation District Record
40S 30152290	8.91	120	04/15 to 10/15	Provisional Permit
40S 66284 00	4.46	700	04/15 to 10/15	Provisional Permit
40S 106984 00	2.93	284	04/15 to 10/15	Conservation District Record
40S 30006748	1.6	125.95	04/15 to 10/15	Conservation District Record
40S 30063091	1.45	92	04/15 to 10/15	Conservation District Record
40S 91841 00	4.34	139.5	04/15 to 10/15	Provisional Permit
40S 42905 00**	1	68	04/15 to 10/19	Statement of Claim
40S 42906 00**	3.6	238	04/15 to 10/19	Statement of Claim
40S 96357 00	5.8	795	04/15 to 10/31	Provisional Permit
40S 11957 00**	1	100	05/01 to 09/19	Statement of Claim
40S 5134 00**	1.4	150	05/01 to 09/30	Statement of Claim
40S 13878 00	13.37	189	05/01 to 09/30	Provisional Permit
40S 5421 00	7.2	1290	05/01 to 09/30	Provisional Permit
40S 130565 00**5	x	145	05/01 to 09/30	Statement of Claim
40S 101292 00**	6.2	1738	05/01 to 10/19	Statement of Claim
40S 137 00	5.57	500	05/01 to 10/31	Provisional Permit
40S 89100 00	3.9	292.5	05/01 to 10/31	Provisional Permit
40S 17166 00 <sup>3</sup>	x	x	05/01 to 11/01	Provisional Permit
40S 171797 00**	13.37	851.6	05/10 to 09/24	Statement of Claim
40S 46465 00**	11.14	473.25	05/10 to 10/19	Statement of Claim
40S 3215 00 <sup>34</sup>	0.11	x	05/15 to 09/19	Statement of Claim
40S 17844 00	1.3	216	06/01 to 08/15	Provisional Permit
40S 30022924	1.3	232	06/01 to 09/01	Provisional Permit
40S 4947 00	1.9	350	06/01 to 09/01	Provisional Permit
40S 30022935	1.3	240	06/01 to 09/01	Provisional Permit
40S 171834 00**	6.68	337.5	06/01 to 09/19	Statement of Claim
40S 171835 00**	5.8	382.5	06/01 to 09/19	Statement of Claim
40S 104484 00	2.70	264	04/15 to 10/15	Conservation District Record

\* These statements of claims were issued for livestock drinking directly from source. Flow rate and volume were not given; rather, these rights were assigned a consumptive rate of 30 gallons per day per animal unit. For legal availability purpose, volume is calculated by multiplying the number of animal units by 30 gallons by the number of days in the claimed period of use. Flow rate is then converted from the volume.

\*\* These statements of claims were issued for irrigation in which a volume was not given. For legal availability purpose, volume is calculated by multiplying the number of acres by 2.5 AF/ac, an irrigation standard within those set by ARM 36.12.115(2)(e).

3 This water use authorization is issued in conjunction with water rights 40S W125402 and 40S P17166. The combined appropriation shall not exceed 6.7 CFS (3000 GPM). Use under this authorization if used alone is 6.7 CFS.

4 This water use authorization is issued supplemental to water right 40S W3215. They have overlapping places of use. If both rights are used to irrigate the overlapping acres, the total volume appropriated shall not exceed 68 acre-feet. This authorization used alone limits the volume appropriated to 68 acre-feet for the overlapping acres.

5 This authorization is used in conjunction with existing claim W130565. All waters are diverted by means of a shared diversion and shall not exceed 3.6 CFS (1600 GPM).

<b>Table 6: Fort Peck-Montana Compact, MCA §85-20-201, Article III F.1 Volumes</b>		
<b>Month</b>	<b>Fort Peck Tribal Right (AF)</b>	<b>Fort Peck Tribal Right (CFS)**</b>
April	50,000	840
May	105,000	1708
June	145,000	2437
July	215,000	3497
August	180,000	2927
September	105,000	1765
October	50,000	813

\*\* Flow rate in CFS is calculated by dividing monthly volume in AF by the number of days in the month by 1.98 AF/day.

31. Water legally available was calculated by subtracting the existing legal demands, the MT Department of Fish, Wildlife and Parks (FWP) instream flow reservation (Water Reservation 40S 30017671), and the Fort Peck Tribal right (assuming full development of Fort Peck-Montana Compact, MCA §85-20-201, Article III F.1) from the flow and volume physically available within the identified area of potential impact. Tables 7 and 8 summarize the legal availability of flow and volume on the source within the area of potential impact. The monthly volume of downstream water rights was calculated by dividing the claimed volumes by the number of months in the claimed period of use.

<b>Table 7: Legal Availability of Flow Rate</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Flow Rate Physically Available (CFS)</b>	<b>Existing Legal Demands (CFS)</b>	<b>FWP Instream Flow Reservation (CFS)</b>	<b>Fort Peck Tribal Right (CFS)**</b>	<b>Flow Rate Legally Available Water (CFS)</b>
April	8,244.6	244.6	5,178.00	840	1982.00
May	8,963.9	307.9	5,178.00	1708	1770.00
June	9,873.2	326.2	5,178.00	2437	1932.00
July	9,697.2	326.2	5,178.00	3497	696.00
August	9,299.2	326.2	5,178.00	2927	868.00
September	8,156.4	320.4	5,178.00	1765	893.00
October	7,234.8	258.8	5,178.00	813	985.00

\*\* Flow rate in CFS is calculated by dividing monthly volume in AF by the number of days in the month by 1.98 AF/day.

Table 8: Legal Availability of Volume					
A	B	C	D	E	F
Month	Volume Physically Available (AF)	Existing Legal Demands (AF)	FWP Instream Flow Reservation (AF)	Fort Peck Tribal Right (AF)	Volume Available Water (AF)
April	479,125.74	3,925.74	307,573.20	50,000	117,626.8
May	536,176.37	4,871.09	317,825.64	105,000	108,479.6
June	572,252.96	5,161.16	307,573.20	145,000	114,518.6
July	580,353.14	5,161.16	317,825.64	215,000	42,366.3
August	555,923.90	5,161.16	317,825.64	180,000	52,937.1
September	470,448.29	4,989.89	307,573.20	105,000	52,885.2
October	432,397.21	4,210.33	317,825.64	50,000	60,361.2

32. The least amount of flow legally available in any month during the period of diversion is 696 CFS in July, and the Applicant is applying for 2.7 CFS. The least amount of volume legally available in any month during the period of diversion is 42,366.3 AF in July, and the Applicant is requesting 368 AF for the entire period of use. The Department finds the proposed change will not have an adverse effect on other users.

### **BENEFICIAL USE**

#### **FINDINGS OF FACT**

33. This change will allow the Richland County Conservation District to authorize the use of a portion of their water reservation. The Conservation District must authorize projects to fulfill the purpose of the reservation.
34. The Applicant proposes to use water for Sprinkler Irrigation on 158 AC. Irrigation is recognized as beneficial use under the Montana Water Use Act. § 85-2-102 (5), MCA. Applicant proposes to use 2.7 CFS up to 368 AF. The volume and flow rate were agreed upon by the Conservation District and the producer. The Department finds the proposed use of water to be beneficial.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

35. The water will be diverted under Richland County's water reservation from the Missouri River at a point of diversion, shared with Conservation District Record 40S 104484 00.
36. The Point of Diversion is located in the NESESW, Section 27, T27N, R51E, Richland County. The diversion method is a Cornell 5RB-F - 2400 rpm, frame pump. The pump is powered by a John Deere 4045T-100 diesel motor. The motor and pump will be mounted

on a trailer with an A-frame that will support the suction pipe and the self-cleaning screen. The pump is a shared diversion method with an existing pivot irrigation system (served by Conservation District Record 40S 104484 00). A 2.7 CFS flow rate is being proposed.

37. Water will be conveyed into 100' of 10" aluminum pipe extending to the center of the existing 132 AC pivot (served by Conservation District Record 40S 104484 00). The pipe will hook into a 10" 80psi PIP pipe that will feed the 98 AC pivot. 10" hose line will feed the 60 AC pivot. The existing (Conservation District Record 40S 104484 00) and proposed pivots may be operated at the same time or individually, depending on field needs and to prevent over-saturation.
38. The diversion and conveyance are typical of those used for Sprinkler Irrigation on this source in this region.
39. Measurements will be taken by a flowmeter (AgSense Measuring Device) to measure the total amount of water diverted from the Missouri River.
40. The Department finds the means of diversion and conveyance to the places of use to be adequate.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

41. The submission of the Conservation District Application for Reserved Water Use Authorization (Form 101) was signed by the producer, The Larry and Lauri Handy Trust, and implies written consent. The affidavit on the Conservation District Reserved Water Use Authorization (Form 102) was signed by Shawn Conradsen, Conservation District Chairman, and Julie Goss, District Administrator.

## **CONCLUSIONS OF LAW**

### **WATER RESERVATION CRITERIA**

42. The Applicant has proven by a preponderance of the evidence that the purpose, need, amount, and public interest are consistent with the 1978 Order of Board of Natural Resources Establishing Water Reservations. §§ 85-2-316(12), 85-2-402(2)(d), MCA. (FOF Nos. 8 - 13)

### **HISTORICAL USE AND ADVERSE EFFECT**

43. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water

law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (beneficial use constitutes the basis, measure, and limit of a water right); *Featherman v. Hennessy*, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911) (increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940) (appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924) (“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); *Town of Manhattan*, ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied).<sup>1</sup>

44. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 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

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<sup>1</sup> DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>



1057; *Hohenlohe*, ¶¶ 43-45.<sup>2</sup>

45. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> 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*, ¶ 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

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<sup>2</sup> 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).

<sup>3</sup>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. Section 85-2-234, MCA

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).<sup>4</sup>

46. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g., Hohenlohe*, ¶ 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; 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

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)



- is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

47. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. *Royston*, 249 Mont. at 431, 816 P.2d at 1059-60; *Hohenlohe*, at ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each 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).

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<sup>5</sup> 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, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

49. 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.
50. There is no historic use because the water being changed in this application is for future irrigation development pursuant to § 85-2-316, MCA. (FOF Nos. 14 - 15)
51. The Applicant has proven by a preponderance of the evidence that the proposed change in appropriation 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. 16 - 32)

#### BENEFICIAL USE

52. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 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 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting

Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900) ("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

53. Applicant proposes to use water for Irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence Irrigation is a beneficial use and that 294 AF of diverted volume and 1.8 CFS flow rate of water requested is the amount needed to sustain the beneficial use on 122 AC. Section 85-2-402(2)(c), MCA (FOF Nos. 33 - 34).

#### ADEQUATE MEANS OF DIVERSION

54. 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).
55. Pursuant to § 85-2-402 (2)(b), MCA, Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 35 - 40)

#### POSSESSORY INTEREST

56. 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.

57. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 41).

### **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. 40S 30165372 should be GRANTED subject to the following.

The Applicant proposes to divert water from the Missouri River, by means of a pump, from April 1 through October 31 at 2.7 CFS up to 368 AF, from a point in the NESESW, Section 27, T27N, R51E, Richland County, for Sprinkler Irrigation use from April 1 through October 31.

The Applicant is authorized to add the proposed point of diversion and place of use. A flow rate of 2.7 CFS up to 368 AF shall be diverted from the Missouri River from the following location: NESESW, Section 27, T27N, R51E, Richland County, to 158 AC of place of use (see Table 2). The period of diversion and the period of use are from April 1 to October 31. This change authorization will be subject to the following conditions, limitations, or restrictions:

### **WATER MEASUREMENT-MEETS CONSERVATION DISTRICT REQUIREMENT**

THIS RIGHT IS SUBJECT TO THE TYPE OF WATER USE MEASURING DEVICE OR WATER USE ESTIMATION TECHNIQUE REQUIRED BY THE CONSERVATION DISTRICT. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

### **NOTICE**

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307,

and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 18<sup>th</sup> day of August 2025.

**Matt Miles**

Digitally signed by Matt

Miles

Date: 2025.08.18 11:20:53

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Matt Miles, Manager  
Havre Regional Office  
Montana Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 18<sup>th</sup> day of August, 2025, by first class United States mail.

Richland County Conservation District  
2745 West Holly St.  
Sidney, MT 59270

Teresa Olson  
2612 7th Ave. N.  
Billings, MT 59101  
[tolson@hydrosi.com](mailto:tolson@hydrosi.com)

A handwritten signature in black ink, appearing to read "Kailee Ngall", is written over a horizontal line.

HAVRE Regional Office, (406) 265-5516