

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

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 76C 30165242 BY THE JACKSON PROPERTY GROUP, LLC, SHAYNE A. JACKSON, RANDY BOCK, AND DORI BOCK</b>	) ) ) )	<b>DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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The Jackson Property Group, LLC, Shayne A. Jackson, Randy Bock, and Dori Bock (Applicants) submitted Application to Change an Existing Water Right No. 76C 30165242 to change Statement of Claim No. 76C 25338-00 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) on January 12, 2026. The Department published receipt of the application on its website on January 20, 2026. A preapplication meeting was held between the Department and the Applicants’ consultant, WGM Group, on January 28, 2025, in which the Applicants’ consultant designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Meeting Form on July 25, 2025. The Department delivered the Department-completed technical analyses on October 17, 2025. The Application was determined to be correct and complete as of February 3, 2026. An Environmental Assessment for this application was completed on April 5, 2026.

**INFORMATION**

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

**Application as filed:**

- Application to Change a Water Right, Form 606.
  - Attachments:
    - Form 606 – Question No. 11 Supplement: Notice to owners of water rights sharing the same point of diversion and/or conveyance infrastructure of Application to Change Water Right No. 76C 25338-00.

- Email correspondence between WGM Group and the DNRC.
- Maps and Diagrams:
  - Historical Use Map
  - Proposed Use and Ditch Map
  - Irrigation System Diagram
  - Proposed Diversion Operation Diagram
- Department-completed Technical Analyses based on information provided in the Preapplication Meeting Form, dated October 17, 2025.

Information within the Department's Possession/Knowledge

- Administrative file for Statement of Claim No. 76C 25338-00.
  - DNRC Divided Interest Ownership Update received by the Department January 30, 2025 including plan for cooperative diversion of Ferguson Creek water.
- Montana State Engineer's Office Water Resources Survey Field Notes for Twp 26N, Rge 28W, Lincoln County, Plat No. 110, dated September 9 and 15, 1964.
- Montana State Engineer's Office Water Resources Survey Aerial Images of Twp 26N, Rge 28W, Lincoln County, Photo Nos. DRI-6BB-37, -38, -62, -63, and -64 dated July 11, 1961.
- USDA Aerial Image Nos. 40 30053 279-210 and -213, dated August 9, 1979 (photos available upon request as they are too large to include in the administrative file).
- 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 Kalispell Regional Office at 406-752-2288 to request copies of the following documents.
  - DNRC Memorandum: Development of Standardized Methodologies to determine Historic Diverted Volume, dated September 13, 2012.
  - Montana State Engineer's Office Water Resources Survey for Lincoln County dated June 1965.
  - National Engineering Handbook Part 623. 1993. Chapter 2. Irrigation Water Requirements. Pages 183-186.

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:

<b>Department</b> or <b>DNRC</b> means the Department of Natural Resources and Conservation	
<b>AF</b> means acre-feet	<b>ARM</b> means Administrative Rules of Montana
<b>CFS</b> means cubic feet per second	<b>FOF</b> means finding of fact
<b>GPM</b> means gallons per minute	<b>HCV</b> means historically consumed volume
<b>HDV</b> means historically diverted volume	<b>HFAV</b> means historically field-applied volume
<b>HUA</b> means Historical Use Addendum	<b>IWR</b> means Irrigation Water Requirements
<b>MCA</b> means Montana Code Annotated	<b>NIR</b> means net irrigation requirement
<b>NRCS</b> means Natural Resources Conservation Service	<b>POD</b> means point of diversion
<b>PVC</b> means Polyvinyl Chloride	<b>SEO</b> means State Engineer’s Office
<b>USDA</b> means United States Department of Agriculture	<b>WRS</b> means Water Resources Survey

**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

1. The Applicant proposes changing Statement of Claim No. 76C 25338-00 which is for 2.5 CFS of diverted flow rate to irrigate 200.0 acres in Sections 17, 20, and 21, Township 26N, Range 28W, Lincoln County, MT. The details of the existing water right are summarized in **Tables 1 and 2**.
2. The means of diversion was originally claimed as a pump and headgate with ditch or pipeline, but the Applicants assert that the historical diversion for this water right has been the natural confluence of Ferguson Creek with McGinnis Creek. From the confluence, Ferguson Creek water is conveyed to secondary points of diversion via the McGinnis Creek channel, which acts as a natural carrier for the claimed Ferguson Creek water.
3. Statement of Claim No. 76C 25338-00 is in Water Right Basin 76C (Fisher River) which is currently under a Temporary Preliminary Decree dated February 28, 1984. Statement of Claim No. 76C 25338-00 is included in the Basin 76C Adjudication Summary Report that the DNRC delivered the to the Montana Water Court on May 20, 2025. The Water Court anticipates issuing the Preliminary Decree for Basin 76C in the third quarter of 2026.

Table 1: Summary of Water Right Proposed for Change									
Water Right Number	Priority Date	Source	Purpose	Flow Rate (CFS)	Volume (AF)	Period of Diversion & Use	Means of Diversion	Point of Diversion	Place of Use
76C 25338-00	August 26, 1903	Ferguson Creek	Irrigation (200.0 acres)	2.5	880.0	01/01 – 12/31	Pump/headgate w/ditch or pipeline*	SESESE of Section 20, Twp 26N, Rge 28W, Lincoln County	See Table 2

\*See means of diversion information in FOF 2.

Table 2: Summary of the Places of Use for the Water Right Proposed for Change							
POU ID	1/4	1/4	1/4	Section	Township	Range	County
1	---	S2	SE	17	26N	28W	Lincoln
2	---	---	NE	20	26N	28W	Lincoln
3	NE	NE	SW	20	26N	28W	Lincoln
4	---	N2	SE	20	26N	28W	Lincoln
5	---	SW	NW	21	26N	28W	Lincoln
6	W2	NW	SW	21	26N	28W	Lincoln

4. Statements of Claim Nos. 76C 25338-00, 76C 30165589, 76C 25304-00, and 76C 25325-00, represent multiple uses of the same water right and are for irrigation, irrigation, domestic, and stock purposes, respectively. The use of this right for these multiple purposes does not increase the extent of the water right, rather it decrees the right to alternate and exchange the use (purpose) of the water in accord with historical practices.

5. The Department split Statement of Claim No. 76C 25338-00 at the request of the Applicants on January 30, 2025. Statement of Claim No. 76C 25338-00 was originally for 222.0 acres of irrigation and Statement of Claim No. 76C 25338-00 retained 200.0 of those acres after the split. Those split 22.0 acres are now attributed to child water right Statement of Claim No. 76C 30165589. Statements of Claim Nos. 76C 25339-00, 76C 25340-00, 76C 25341-00, 76C 25342-00 (all with McGinnis Creek as their source) supplement irrigation on the entire 200.0-acre place of use irrigated under the subject water right Statement of Claim No. 76C 25338-00 (**Table 3**). These four supplemental water rights also irrigate the 22.0 acres that were split off from Statement of Claim No. 76C 25338-00. These supplemental water rights are not being changed but they are included in the historical use analysis for Statement of Claim No. 76C 25338-00 (**FOFs 18-19**).

<b>Table 3: Water Rights Supplemental to Statement of Claim No. 76C 25338-00</b>					
<b>Water Right Number and Source</b>	<b>Flow Rate (CFS)</b>	<b>Period of Diversion and Use</b>	<b>Place of Use</b>	<b>Priority Date</b>	<b>Acres</b>
76C 25339-00 (McGinnis Creek)	6.0	01/01 – 12/31	See Table 2*	October 9, 1931	222.0** (200.0 acres overlapping with 76C 25338-00)
76C 25340-00 (McGinnis Creek)	3.0	01/01 – 12/31		October 11, 1941	222.0** (200.0 acres overlapping with 76C 25338-00)
76C 25341-00 (McGinnis Creek)	6.0	01/01 – 12/31		April 18, 1919	222.0** (200.0 acres overlapping with 76C 25338-00)
76C 25342-00 (McGinnis Creek)	6.0	01/01 – 12/31		October 9, 1931	222.0** (200.0 acres overlapping with 76C 25338-00)

\*Overlapping place of use (200.0 acres) only.

\*\*Statement of Claim No. 25338-00 was originally for all 222.0 acres before the Applicants split out their 200.0-acre place of use. The remaining 22.0 acres retained by other owners are in the NESE (12.0 acres) and S2SE (10.0 acres) of Section 17, Township 26N, Range 28W, Lincoln County.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

6. The Applicant proposes changing the POD for Statement of Claim No. 76C 25338-00 by adding an additional (second) POD on Ferguson Creek which will enable the Applicants to more efficiently deliver water to portions of the historical place of use west of the McGinnis Creek channel. The proposed second POD will be in the SWNESW of Section 20, Township 26 N, Range 28 W, Lincoln County (**Figures 1 and 2**) approximately 0.9 miles upstream of the existing POD at the confluence of Ferguson Creek with McGinnis Creek. The existing POD will be retained for the continued use of irrigating the entire place of use at times when it is more practical for the Applicants to do so. No changes to the purpose or place of use are proposed in this change and there is no storage component to this water right. The project is in Water Right Basin 76C (Fisher River) in an area that is not subject to water right basin closures or controlled groundwater area restrictions. The details of the proposed change are summarized in **Table 4**.

7. To ensure that adding a second POD does not adversely affect existing water users by increasing the diverted flow rate or volume from combined use of two PODs, this change will be subject to the following condition:

THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED IN-LINE WATER MEASUREMENT DEVICES AT POINTS IN THE DELIVERY LINES APPROVED BY THE DEPARTMENT. THESE WATER MEASUREMENT DEVICES MUST BE INSTALLED IN LOCATIONS THAT ALLOW THE APPROPRIATOR

TO MEASURE THE FLOW RATE AND VOLUME OF WATER DIVERTED AT BOTH POINTS OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE BY DECEMBER 31 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 APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES ACCURATELY.

Table 4: Summary of the Proposed Use of Statement of Claim No. 76C 25338-00								
Water Right Number	Purpose and Acres	Flow Rate (CFS)	Consumptive Volume (AF)	Diverted Volume (AF)	Period of Diversion & Use	Means of Diversion	Points of Diversion	Places of Use
76C 25338-00	Irrigation --- 200.0 acres	2.5	33.04	271.36	04/25 – 10/05	Natural Carrier	SESESE of Section 20, Twp 26N, Rge 28W, Lincoln County (Historical/existing POD)	See Table 2
						Headgate	<b><u>SWNESW Section 20, Twp 26N, Rge 28W, Lincoln County (Proposed second POD)*</u></b>	

\* *Bold underlined text indicates the water right element proposed for change.*

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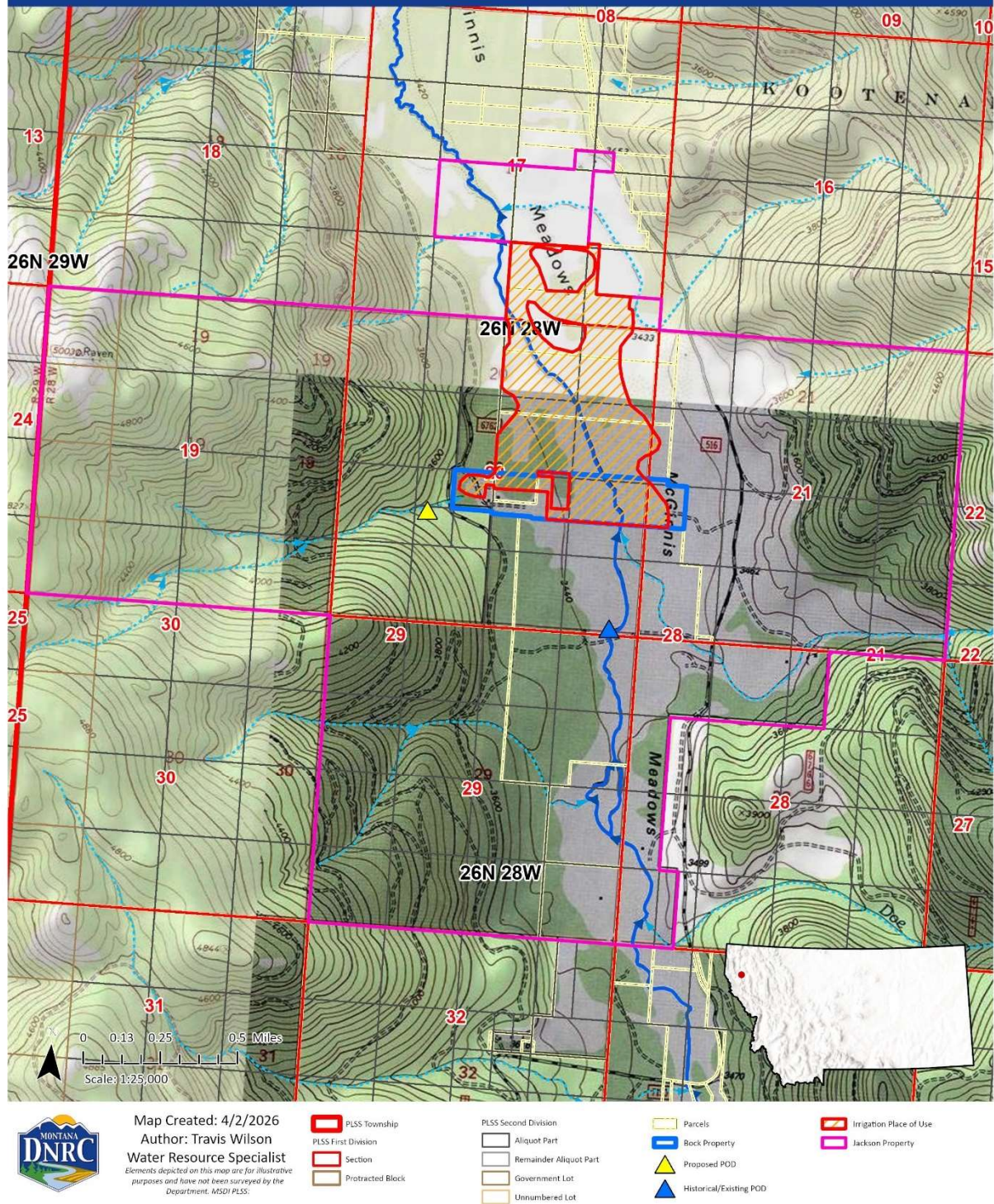
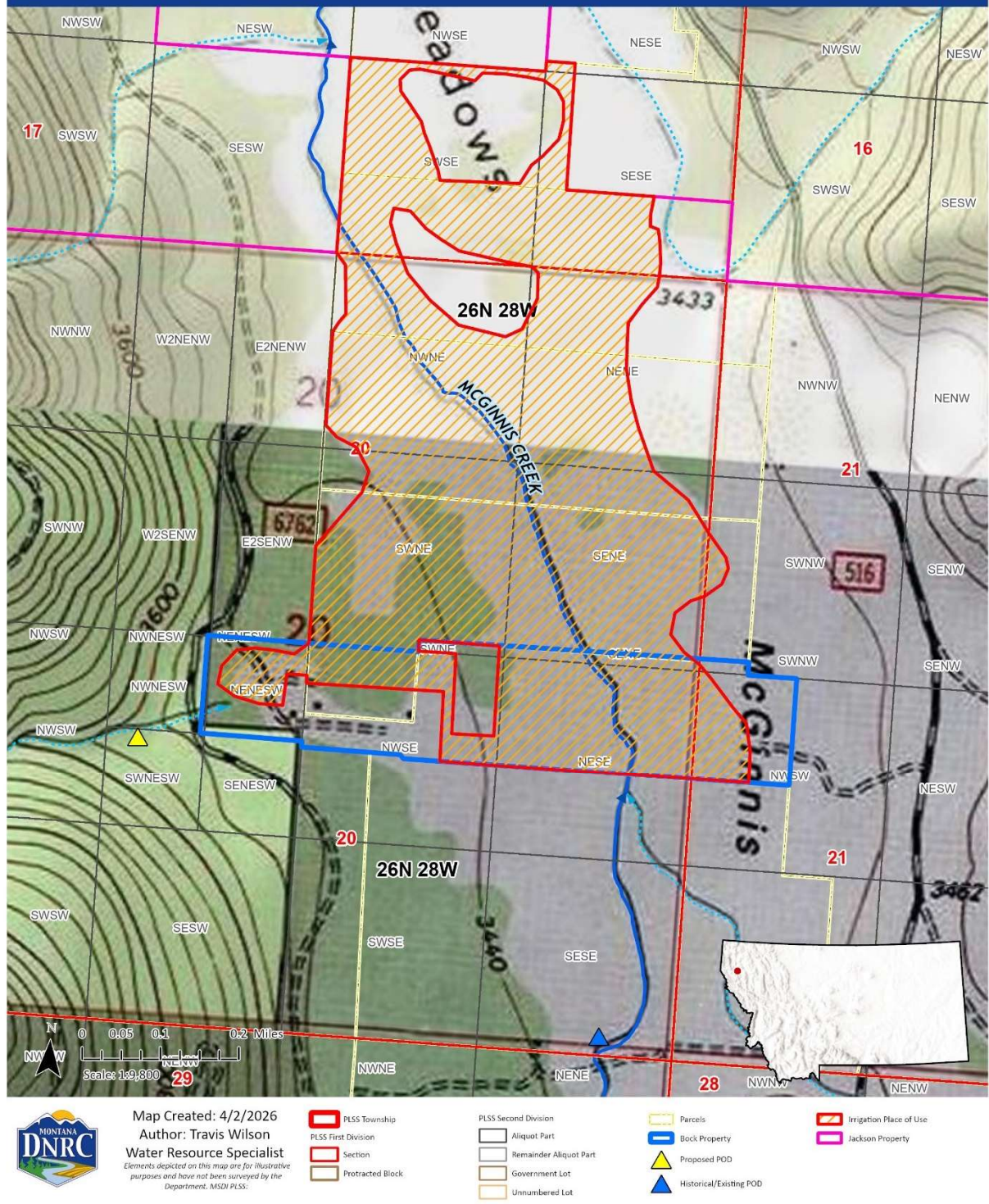


Figure 1: Vicinity map of the Applicants' historical POD, proposed POD, and the historical and proposed place of use within the composited Jackson property.

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**Figure 2:** Detail map of the Applicants' historical POD, proposed POD, and the historical and proposed place of use.

## CHANGE CRITERIA

8. 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.

9. 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).*

## **HISTORICAL USE**

### **FINDINGS OF FACT**

10. The Applicants propose adding a second POD to Statement of Claim No. 76C 25338-00. The Applicants submitted an HUA because they wished to deviate from the DNRC standard practice for evaluating historical diverted volume of their water right.

11. The project area is located in USDA NRCS Climatic Area VI – Mountain Areas. The standard period of diversion and period of use for USDA NRCS Climatic Area VI per ARM 36.12.112 is April 25 – October 5, which are the periods of diversion and use that the Applicants have asserted in their application to be their historical periods of diversion and use for Statement of Claim No. 76C 25338-00.

12. The original claimant filed Statement of Claim No. 76C 25338-00 with a flow rate of 100.0 miner’s inches, which is equivalent to 2.5 CFS (1.0 CFS = 40.0 Montana statutory miner’s inches;  $100.0 \text{ miner's inches} \div 40.0 \text{ miner's inches per 1.0 CFS} = 2.5 \text{ CFS}$ ). The historical irrigation practices under Statement of Claim No. 76C 25338-00 have involved diverting all available Ferguson Creek water (up to 2.5 CFS) into the McGinnis Creek channel to be comingled with McGinnis Creek flows and naturally carried downstream to irrigate the historical place of use. An analysis of USGS StreamStats analytics and basin characteristics of Ferguson Creek along with the observations of the Applicants as diversion operators supports the assertion that Ferguson Creek flows at its confluence with McGinnis Creek have exceeded 2.5 CFS and been diverted into McGinnis Creek for beneficial use downstream.

### **Historical Field Consumed and Applied Volumes**

13. The Applicants employed the standard procedures in ARM 36.12.1902 to calculate the historical consumptive and field applied volumes. The Department verified the Applicants’ calculations using the DNRC Irrigation and Conveyance Loss Calculator.

14. Consumed volume for irrigation is based on the NIR in inches from USDA NRCS IWR at a representative weather station. The NIR is multiplied by a county-wide management factor (from

ARM 36.12.1902) to produce an adjusted NIR representative of actual crop yields in the project area. Crop consumption is determined by multiplying the adjusted NIR in inches by the number of acres of irrigation and dividing by 12 to convert acre-inches to acre-feet. Crop consumption is then divided by the field efficiency identified from the irrigation method and values presented in the on-farm efficiency section of DNRC Memorandum: Development of standardized methodologies to determine Historic Diverted Volume (2012). Irrecoverable losses (IL) are 5% of the field applied volume for flood irrigation and 10% for sprinkler irrigation. The total consumed volume for irrigation is the crop consumption plus irrecoverable losses. The total non-consumed volume is the field applied volume minus the total consumed volume.

15. The historical place of use for irrigation under Statement of Claim No. 76C 25338-00 is 200.0 acres in Sections 17, 20, and 21 of Township 26 N, Range 28 W, Lincoln County (see **Table 2** for the full place of use description). The Department corroborated the 200.0 historical acres by examining the 1964/1965 Lincoln County WRS maps and field notes for Township 26N, Range 28W, the July 1961 aerial imagery of Township 26N, Range 28W, and the August 1979 aerial imagery of Township 26N, Range 28W and comparing them to the Applicant-supplied historical use maps. While the actively irrigated areas of the historical place of use observed by the SEO staff during the September 1964 WRS equate to approximately 35.5 acres, the 1961 and 1979 aerial imagery indicates irrigation of the full 200.0 acres.

16. Historically, irrigation occurred via sprinkler on 12.0 acres, contour ditch flood (design slope = 1.5-3.0%) on 75.0 acres, and wild flood on 113.0 acres. The historically consumed and field applied volumes for the place of use have been calculated with the inputs shown in **Table 5** following the methods described above and in ARM 36.12.1902.

Table 5: Historically consumed and field applied volumes on the Place of Use										
Purpose	IWR NIR (in) <sup>1</sup>	Mgmt. Factor <sup>2</sup>	Method	Field Efficiency	Acres	Crop Consumption (AF)	Non-consumed Applied Volume (AF)	Irrecoverable Losses (AF)	Total Consumed Volume (AF)	Field Application Volume (AF)
Irrigation	11.06	0.47	Sprinkler	0.70	12.0	5.21	1.49	0.74	5.95	7.44
			Flood (contour ditch)	0.55	75.0	32.56	23.68	2.96	35.52	59.20
			Flood (wild)	0.25	113.0	49.05	137.35	9.81	58.86	196.22
<b>Total</b>					200.0	86.82	162.52	13.51	100.33	262.86

<sup>1</sup>Libby IWR Weather Station.

<sup>2</sup>Lincoln County Historical Use Management Factor (1964-1973).

17. The historical POD is the confluence of Ferguson Creek with McGinnis Creek, where Ferguson Creek water comingles with McGinnis Creek water. From that point, McGinnis Creek becomes a natural carrier of Ferguson Creek water through which Ferguson Creek water flows along with McGinnis Creek water downstream approximately 2,250 feet to the place of use and beyond to secondary PODs.

18. The Applicants provided a “Duty of Water” analysis to demonstrate the approximate seasonal ratios as part of the typical apportioned water diversions from Ferguson Creek and McGinnis Creek for beneficial application on the 200.0-acre historical place of use under the five water rights contributing to the place of use. The Applicants calculated a composite irrigation flow rate of 7.59 CFS for the 200.0-acre place of use based on the DNRC adjudication examination standard of 17.0 GPM per irrigated acre for alfalfa crops (17.0 GPM/acre x 200.0 acres ÷ 448.8 GPM/CFS = 7.59 CFS). During periods when Ferguson Creek water has been available for diversion under Statement of Claim No. 76C 25338-00 at its maximum flow rate of 2.5 CFS throughout the entire growing season, Statement of Claim No. 76C 25338-00 has contributed 32.9% of the historically consumed volume to the 200.0-acre place of use (2.5 CFS ÷ 7.59 CFS = 0.329). The Applicants refer to this proportion (32.9%) as the “Duty Factor” for Statement of Claim No. 76C 25338-00.

19. By applying the Duty Factor to the total historically consumed volume for the 200.0-acre place of use, the Applicants calculated a maximum HCV for Statement of Claim No. 76C 25338-00 of 33.04 AF (100.33 AF HCV x 0.329 = 33.04 AF). Similarly, the Applicants calculated a maximum

HFAV for Statement of Claim No. 76C 25338-00 of 86.48 AF (262.86 AF HFAV x 0.329 = 86.48 AF). The remainders of the HCV and HFAV, 67.29 AF and 176.38 AF, respectively, are attributable to Statements of Claim Nos. 76C 25339-00, 76C 25340-00, 76C 25341-00, 76C 25342-00 (100.33 AF HCV – 33.04 AF = 67.29 AF; 262.86 AF HFAV – 86.48 AF = 176.38 AF, respectively). The Department considered the Applicants’ Duty of Water analysis and found it to be a reasonable method for apportioning HCV between the five water rights contributing to the historical place of use.

<b>Table 6: Apportionment of historical use by water right</b>					
<b>Water Right Number</b>	<b>Source</b>	<b>Flow Rate (CFS)</b>	<b>Percentage of Flow</b>	<b>Apportioned HCV (Including IL) (AF)</b>	<b>Apportioned Field Application Volume (AF)</b>
76C 25338-00	Ferguson Creek	2.5	32.9%	33.04	86.48
76C 25339-00	McGinnis Creek	6.0	67.1%	67.29	176.38
76C 25340-00	McGinnis Creek	3.0			
76C 25341-00	McGinnis Creek	6.0			
76C 25342-00	McGinnis Creek	3.0			
<b>Total</b>		7.59*	<b>100.0%</b>	<b>100.33</b>	<b>262.86</b>

*\*Total flow rate based on the DNRC adjudication examination standard of 17.0 GPM per acre. Apportionment of the flow of all five water rights does not exceed 7.59 CFS when used individually or in combination with each other.*

**Historical Conveyance Losses**

20. Per ARM 36.12.1902(10), the historical conveyance loss volume is equal to the sum of the historical seepage loss, vegetation loss, and ditch evaporative loss volumes. Historically, the McGinnis Creek channel has been used as a natural carrier of Ferguson Creek water under Statement of Claim No. 76C 25338-00. The primary historical POD is the confluence of Ferguson Creek with McGinnis Creek, from which Ferguson Creek water is carried by the McGinnis Creek channel downstream to the place of use. Immediately downstream of the primary POD (the confluence) is a secondary POD that pumps up to 0.46 CFS to the 12.0 sprinkler-irrigated acres through closed pipeline. There are no conveyance losses associated with this closed pipeline. The remaining 2.04 CFS of the maximum diversion of 2.5 CFS flows through the McGinnis Creek channel approximately 2,250 feet downstream to the point where the McGinnis Creek channel first intercepts the place of use. Per DNRC Memorandum: Development of standardized methodologies to determine Historic Diverted Volume (2012), ditch length is the distance from

the diversion to the field, which the DNRC considers to be the location at which the conveyance structure first intercepts the place of use.

21. **Table 7** summarizes the conveyance loss experienced by the conveyance (McGinnis Creek as a natural carrier of Ferguson Creek water) from the POD down to the first interception of McGinnis Creek with the place of use.

<b>Table 7: Conveyance losses for all rights contributing to the place of use</b>					
<b>Seepage Loss</b>	<b>Ditch Wetted Perimeter (ft)</b>	<b>Ditch Length (ft)</b>	<b>Ditch Loss Rate (ft<sup>3</sup>/ft<sup>2</sup>/day)</b>	<b>Days Irrigated</b>	<b>Seepage Loss (AF)</b>
	11.66	2,250.00*	2.00**	92***	110.82
<b>Vegetation Loss</b>	<b>% Loss/Mile</b>	<b>Historic Flow Rate (CFS)</b>	<b>Days Irrigated</b>	<b>Ditch Length (mi)</b>	<b>Vegetation Loss (AF)</b>
	0.75	7.59	92***	0.43*	4.50
<b>Ditch Evaporation Loss</b>	<b>Ditch Width (ft)</b>		<b>Ditch Length (ft)</b>	<b>Ditch Evaporation Rate (ft)</b>	<b>Ditch Evaporation (AF)</b>
	10.00		2,250.00*	0.72	0.37
<b>Total conveyance loss volume (AF)</b>					115.69

\*Distance from the POD to the initial interception of the McGinnis Creek channel with the place of use.

\*\*The Applicant provided a typical flow depth in the McGinnis Creek of two feet. With the upper portion of the flow profile interfacing with gravelly silt loam (2 to 13 inches) and the lower portion of the flow profile interfacing with very gravelly sandy loam (13 to 23 inches) and sand (23 to 60 inches), the Department found that a loss rate of 2.0 ft<sup>3</sup>/ft<sup>2</sup>/day was more appropriate than the Applicant provided loss rate of 1.0 ft<sup>3</sup>/ft<sup>2</sup>/day (per Figure 2-50 of NEH 1993<sup>1</sup>).

\*\*\*Number of days from June 1 and August 31.

22. The Applicants provided an analysis of the Ferguson Creek and McGinnis Creek basin characteristics and estimated monthly flows. This analysis was based on USGS StreamStats analytics and basin characteristics of Ferguson and McGinnis Creeks and the experiences and observations of the Applicants as diversion operators. During the three months predicted by IWR to have net irrigation demand (June, July, and August), the estimated monthly proportions of Ferguson Creek flow contributions to the total composite mean flow of McGinnis Creek downstream of the confluence are 8%, 11.0%, and 14.0% for June, July, and August, respectively. For ease of calculating historical conveyance losses, this analysis assumed an average Ferguson Creek flow contribution of 11% to the combined total flows in McGinnis Creek downstream of Ferguson Creek in June, July, and August. The remaining 89% of McGinnis Creek flow downstream of Ferguson Creek was attributed to McGinnis Creek itself. These monthly flow proportions were

<sup>1</sup> National Engineering Handbook Part 623. 1993. Chapter 2. Irrigation Water Requirements. Pages 183-186.

then applied to the five water rights that contribute to the historical place of use in order to distribute conveyance losses between Statements of Claim Nos. 76C 25338-00, 76C 25339-00, 76C 25340-00, 76C 25341-00, 76C 25342-00 (**Table 8**). The Department found the Applicant-provided analysis of monthly flow proportions for Ferguson and McGinnis Creeks to be credible.

<b>Table 8: Apportionment of conveyance loss volume by water right during months of net irrigation demand (June through August)</b>		
<b>Water Right Number</b>	<b>Percent of Total Conveyance Loss</b>	<b>Total Apportioned Conveyance Loss Volume (AF)</b>
76C 25338-00	11%	12.73
76C 25339-00	89%	102.96
76C 25340-00		
76C 25341-00		
76C 25342-00		
<b>Total</b>	100%	115.69

Historical Diverted Volume

23. The Applicants submitted an HUA because they proposed to deviate from the DNRC standard practice for evaluating the HDV of Statement of Claim No. 76C 25338-00. Per ARM 36.12.1902(10), the HDV is equal to the sum of the HFAV (which is the HCV divided by on-farm efficiency) and historical conveyance loss volume.

- i. HDV per ARM 36.12.1902(10):
  - a. Sprinkler irrigation (12.0 acres):
    - 1.  $(5.21 \text{ AF HCV} \times 0.329 \text{ Duty Factor} \div 0.70 \text{ on-farm efficiency}) + 0.0 \text{ AF conveyance losses} = 2.45 \text{ AF}$
  - b. Flood (contour) irrigation (75.0 acres):
    - 1.  $(32.56 \text{ AF HCV} \times 0.329 \text{ Duty Factor} \div 0.55 \text{ on-farm efficiency}) + 5.09 \text{ AF conveyance losses} = 24.57 \text{ AF}$
  - c. Flood (wild) irrigation (113.0 acres):
    - 1.  $(49.05 \text{ AF HCV} \times 0.329 \text{ Duty Factor} \div 0.25 \text{ on-farm efficiency}) + 7.64 \text{ AF conveyance losses} = 72.19 \text{ AF}$
  - d. Total (200.0 acres):  $2.45 \text{ AF} + 24.57 \text{ AF} + 72.19 \text{ AF} = 99.21 \text{ AF}$

24. The Applicants’ modified HDV calculation includes:

- i. historically diverted early season (April 25 – June 1) flows which have been used to saturate soil profiles in preparation for the growing season;

- ii. historically diverted mid-season (June 2 – August 31) flows for regular crop irrigation; and,
- iii. historically diverted late season (September 1 – October 5) flows aimed at replenishing carryover moisture and sustaining nutrition and growth for fall grazing within the historical place of use.

The Applicants assert that historical and current operational practices support the consideration of additional early and late season diverted volumes outside of the period of net irrigation demand given by IWR for the place of use.

25. The Applicants assert that they have historically diverted up to the full claimed flow rate of 2.5 CFS for up to 30 days between April 25 and June 1 and up to 0.5 CFS for up to 25 days between September 1 and October 5 for the aforementioned purposes. These additional early- and late-season diversions add 148.5 AF and 24.75 AF, respectively, to the standardized HDV value as calculated per ARM 36.12.1902(10). The total modified HDV is detailed below:

- i. Early-season (April 25 – June 1) HDV = 2.5 CFS x 1.98 AF/day/CFS x 30 days = 148.5 AF
- ii. Mid-season (June 2 – August 31) HDV = 99.21 AF
- iii. Late-season (September 1 – October 5) HDV = 0.5 CFS x 1.98 AF/day/CFS x 25 days = 24.75 AF
- iv. Total HDV = 148.5 AF + 99.21 AF + 24.75 AF = 272.46 AF

Table 9 summarizes the historical field applied and conveyance loss volumes.

<b>Table 9: Apportionment of historic diverted volume by water right</b>					
<b>Water Right No.</b>	<b>Field Application Apportionment Percent</b>	<b>Apportioned Field Application Volume (AF)</b>	<b>Apportioned Conveyance Loss Volume (AF)</b>	<b>Apportioned HDV (excluding additional early- and late-season diversions) (AF)</b>	<b>Apportioned HDV (AF)</b>
76C 25338-00	32.9%	86.48	12.73	99.21	272.46 (including additional early- and late-season diversions)
76C 25339-00	67.1%	176.38	102.96	279.34	279.34 (no additional early- or late-season diversions)
76C 25340-00					
76C 25341-00					
76C 25342-00					
<b>Total</b>	100%	262.86	115.69	378.55	551.80

Historical Use Summary

26. **Table 10** summarizes the Department’s historical use findings for Statement of Claim No. 76C 25338-00.

<b>Table 10: Summary of historical use of 76C 25338-00</b>							
<b>Water Right No.</b>	<b>Historical Purpose</b>	<b>Maximum Historical Acres</b>	<b>Historical Place of Use</b>	<b>Historical Point of Diversion</b>	<b>Maximum Historical Flow Rate (CFS)</b>	<b>Historically Consumed Volume (AF)</b>	<b>Historically Diverted Volume (AF)</b>
76C 25338-00	Irrigation	200.0	See Table 2	SESESE of Section 20, Twp 26N, Rge 28W, Lincoln County	2.5	33.04	272.46

**ADVERSE EFFECT**

**FINDINGS OF FACT**

27. The Applicants propose adding a second POD to Statement of Claim No. 76C 25338-00. The Applicants’ proposed second POD on Ferguson Creek will be capable of diverting up to the full 2.5 CFS associated with Statement of Claim No. 76C 25338-00 when that amount of flow is available. However, the Applicants predict that an average flow rate of 1.5 CFS will be diverted and conveyed through the Ferguson Ditch, with the remaining 1.0 CFS being diverted into the McGinnis Creek channel at the historical/existing POD. With the average flow of 1.5 CFS being diverted into the Ferguson Ditch, there will be 60% less flow being conveyed through the McGinnis Creek channel to the place of use ( $1.5 \text{ CFS} \div 2.5 \text{ CFS} = 0.6$ ).

28. The Ferguson Ditch will convey water 800 feet from the proposed POD to the point where the ditch first intercepts the place of use. While this 800-foot stretch of the Ferguson Ditch will experience new conveyance losses (detailed in Table 11), the proportional reduction in flow being diverted from Ferguson Creek to be comingled with McGinnis Creek water and then conveyed through the McGinnis Creek channel will result in a 60% reduction in the seepage and vegetative conveyance losses experienced by Statement of Claim No. 76C 25338-00 in the McGinnis Creek channel. This will result in an overall reduction in the total conveyance losses associated with Statement of Claim No. 76C 25338-00. Since no change to the place or purpose of use is proposed, the addition of a second POD will not change the historically consumed or field-applied volumes.

<b>Table 11: Conveyance losses for the proposed Ferguson Ditch</b>					
<b>Seepage Loss</b>	<i>Ditch Wetted Perimeter (ft)</i>	<i>Ditch Length (ft)</i>	<i>Ditch Loss Rate (ft<sup>3</sup>/ft<sup>2</sup>/day)</i>	<i>Days Irrigated</i>	<i>Seepage Loss (AF)</i>
	5.83	800.00*	0.60	92**	5.91
<b>Vegetation Loss</b>	<i>% Loss/Mile</i>	<i>Proposed Average Flow Rate (CFS)</i>	<i>Days Irrigated</i>	<i>Ditch Length (mi)</i>	<i>Vegetation Loss (AF)</i>
	0.75	1.50	92**	0.15*	0.32
<b>Ditch Evaporation Loss</b>	<i>Ditch Width (ft)</i>		<i>Ditch Length (ft)</i>	<i>Ditch Evaporation Rate (ft)</i>	<i>Ditch Evaporation (AF)</i>
	5.00		800.00*	0.72	0.07
<b>Total conveyance loss volume (AF)</b>					<b>6.29</b>

\*Per DNRC Memorandum: Development of standardized methodologies to determine Historic Diverted Volume (2012), ditch length is the distance from the diversion to the field, which the DNRC considers to be the location at which the conveyance structure first intercepts the place of use.

\*\*Number of days from June 1 and August 31.

29. The reduction in the seepage and vegetative conveyance losses associated with the 60% reduction of the historical flow rate diverted into the McGinnis Creek channel under Statement of Claim No. 76C 25338-00 are as follows:

- i. Seepage losses: 12.19 AF historical x 0.6 = 7.31 AF
- ii. Vegetative losses: 0.13 AF historical x 0.6 = 0.08 AF
- iii. Total reduction: 7.31 AF + 0.08 AF = 7.39 AF

A proportional reduction in evaporative losses from the surface of the natural carrier (McGinnis Creek) was not considered because it was assumed that the surface area of McGinnis Creek would remain substantially the same even with a reduction of Ferguson Creek flows entering the channel due to the irregular nature of a natural channel.

30. Since the reduction in conveyance losses in the McGinnis Creek channel is greater than the new conveyance losses that will be experienced in the proposed Ferguson Ditch at times when water is being diverted into the Ferguson Ditch, the proposed change will result in a net reduction of 1.1 AF in conveyance losses and thus the total diverted volume:

- i. 76C 25338-00 HDV: 272.46 AF (**Table 10**)
- ii. Proposed Ferguson Ditch conveyance losses: 6.29 AF (**Table 11**)
- iii. McGinnis Creek channel conveyance loss reduction: 7.39 AF (**FOF 30**)
- iv. Proposed total diverted volume: 272.46 AF + 6.29 AF - 7.39 AF = 271.36 AF

<b>Table 12: Volumes associated with historical use and proposed use for 76C 25338-00</b>				
<b>Purpose</b>	<b>Historically Consumed Volume (AF)</b>	<b>Historically Diverted Volume (AF)</b>	<b>Proposed Consumptive Volume (AF)</b>	<b>Proposed Diverted Volume (AF)</b>
Irrigation	33.04	272.46	33.04	271.36

31. The Department considered a potentially affected reach on the source of supply. This area of potential adverse effect was determined by accounting for the location of the proposed and historical points of diversion. This reach extends approximately 0.9 miles from the location of the proposed POD in the SWNESW of Section 20, Township 26 N, Range 28 W, Lincoln County, downstream to the historical POD in the SESESE of Section 20, Township 26 N, Range 28 W, Lincoln County (which is the point of confluence of Ferguson Creek with McGinnis Creek). There are nine water rights within the reach (**Table 13**). Of the nine existing water rights within this reach, eight are owned by the Applicants. One water right, Statement of Claim No. 76C 30165589, which is the child right created by the split of Statement of Claim No. 76C 25338-00, is owned by parties who entered into a cooperative shared-undivided flow rate agreement with the Applicants for collective management of the undivided flow rate of Statements of Claim Nos. 76C 25338-00 and 76C 30165589. The water right holders of Statements of Claim Nos. 76C 25338-00 and 76C 30165589 plan to cooperatively divert or alternate individual diversions in a manner that does not collectively exceed the maximum total flow rate of 2.5 CFS.

<b>Table 13: Water Rights within the Area of Potential Adverse Effect</b>					
<b>Water Right Number</b>	<b>Purpose</b>	<b>Source Name</b>	<b>Means of Diversion</b>	<b>Period of Diversion</b>	<b>Flow Rate (CFS)</b>
76C 134979 00	STOCK	FERGUSON CREEK	LIVESTOCK DIRECT FROM SOURCE	01/01 to 12/31	0.08*
76C 134974 00	IRRIGATION	FERGUSON CREEK	DIKE	05/15 to 10/19	2.24
76C 30165589	IRRIGATION	FERGUSON CREEK	PUMP/HEADGATE W/DITCH OR PIPELINE	01/01 to 12/31	2.50
76C 25325 00	STOCK	FERGUSON CREEK	MULTIPLE	01/01 to 12/31	0.08*
76C 25308 00	DOMESTIC	FERGUSON CREEK	PUMP	01/01 to 12/31	0.05
76C 25304 00	DOMESTIC	FERGUSON CREEK	PUMP	01/01 to 12/31	0.05
76C 25305 00	DOMESTIC	FERGUSON CREEK	PUMP	01/01 to 12/31	0.05
76C 25306 00	DOMESTIC	FERGUSON CREEK	PUMP	01/01 to 12/31	0.05
76C 25307 00	DOMESTIC	FERGUSON CREEK	PUMP	01/01 to 12/31	0.05

*\*To account for livestock direct from source rights, Department practice is to assign one combined total flow rate of 35 GPM (0.08 CFS) for all stock rights without a designated flow rate.*

32. The Applicants assert in their application that their operation of the proposed and historical diversions and their use of water under Statement of Claim No. 76C 25338-00 will abide by valid calls for water by senior users. In times when there is not enough flow in Ferguson Creek to satisfy senior water diversions and shared-priority diversions simultaneously with the maximum use of Statement of Claim No. 76C 25338-00, the applicants will share in any diversion reductions proportional to their ownership of Statement of Claim No. 76C 25338-00 and any other valid shared-priority rights that are concurrently exercised.

33. In the event of a valid senior or shared-priority call for water, the slide-gate to the proposed new conveyance ditch, referred to as the Ferguson Ditch, will be closed (or adjusted proportionately), allowing the 'called' portion of Ferguson Creek flow to remain in Ferguson Creek for downstream appropriation by the senior or shared-priority caller. The Applicants are the most upstream historical users of Ferguson Creek water; therefore, the proposed new POD farther upstream will not affect their ability to make call on junior water users.

34. To ensure that adding a second POD does not adversely affect existing water users by increasing the diverted flow rate or volume, this change will be subject to the following condition: THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED IN-LINE WATER MEASUREMENT DEVICES AT POINTS IN THE DELIVERY LINES APPROVED BY THE DEPARTMENT. THESE WATER MEASUREMENT DEVICES MUST BE INSTALLED IN LOCATIONS THAT ALLOW THE APPROPRIATOR TO MEASURE THE FLOW RATE AND VOLUME OF WATER DIVERTED AT BOTH POINTS OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE BY DECEMBER 31 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 APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES ACCURATELY.

35. The Department determines that the proposed change will not increase the amount of flow or volume diverted or consumed. The Department finds that the proposed change will not adversely affect existing water users within the area of potential adverse effect.

**BENEFICIAL USE**

**FINDINGS OF FACT**

36. The Applicants propose adding a second POD to Statement of Claim No. 76C 25338-00. The historically diverted and consumed irrigation volumes were quantified in the Historical Use section above (**Table 10**). The proposed beneficial use is to use both the proposed and existing historical PODs, either simultaneously or separately, to divert water for continued irrigation of the historically irrigated 200.0 acres in Sections 17, 20, and 21 of Township 26 N, Range 28 W, Lincoln County. Irrigation will occur via sprinkler on 12.0 acres, contour ditch flood on 75.0 acres, and wild flood on 113.0 acres, as was done historically. Information provided by the Applicants was used to quantify the conveyance losses associated with the historical and proposed uses of Statement of Claim No. 76C 25338-00. The Department found that the proposed use of Statement of Claim No. 76C 25338-00 will result in no change to the diverted flow rate and consumed volume and a decrease in the total diverted volume (**FOFs 28-31 and Tables 11-12**). The proposed beneficial use of Statement of Claim No. 76C 25338-00 is summarized in **Table 14**.

Table 14: Proposed Use of Statement of Claim No. 76C 25338-00								
Water Right Number	Purpose and Acres	Flow Rate (CFS)	Consumptive Volume (AF)	Diverted Volume (AF)	Period of Diversion & Use	Means of Diversion	Points of Diversion	Places of Use
76C 25338-00	Irrigation --- 200.0 acres	2.5	33.04	271.36	04/25 – 10/05	Pump/ headgate w/ditch or pipeline	SESESE of Section 20, Twp 26N, Rge 28W, Lincoln County	See Table 2
						Headgate	<u>SWNESW Section 20, Twp 26N, Rge 28W, Lincoln County</u>	

37. The Department finds that the proposed change in point of diversion supports the continuation of the historically proven irrigation purpose on the historically proven acres at the historically proven flow rate and proposed diverted and consumed volumes.

## **ADEQUATE MEANS OF DIVERSION**

### **FINDINGS OF FACT**

38. The Applicants propose adding a second POD to Statement of Claim No. 76C 25338-00. The addition of the proposed second POD will allow the Applicants to more efficiently deliver water to portions of the historical place of use west of the McGinnis Creek channel. The proposed second POD will consist of a 6-inch-thick cast-in-place concrete structure in the Ferguson Creek channel with a flow-through flashboard check-opening to create head for water to enter a headgate on the proposed Ferguson Ditch. The adjustable headgate will consist of a 15-inch diameter bolt-on cast iron disc-style irrigation canal gate with a threaded stem, steel guiderails, and a hand-operated adjustment wheel. The headgate will be attached to the headwall of a 20-foot length of 15-inch diameter PVC pipe that will discharge water into the proposed Ferguson Ditch. The headgate structure and pipe was sized to allow for forced backwater (full-pipe) flow to accommodate a propeller-style flow meter. The flashboard check opening will be approximately 3 feet wide by 2.5 feet tall and will act as a rectangular weir to measure flows continuing along the historical Ferguson Creek channel. This flashboard check opening was sized to allow for conveyance of a 5-year flood flow event of approximately 26.4 CFS for Ferguson Creek.

39. The Applicants plan to split the maximum shared flow of 2.5 CFS between the proposed new POD/Ferguson Ditch and the historical POD and the McGinnis Creek natural carrier. Up to the full 2.5 CFS flow rate may be diverted into the proposed Ferguson Ditch, though the Applicants estimate an average diversion of 1.5 CFS. The Applicants will operate the proposed new and existing historical diversions in such a manner as not to exceed the 2.5 CFS maximum flow rate.

40. The proposed Ferguson Ditch will be an earthen ditch which will convey water 800 feet from the proposed new POD to the historical place of use. Once within the historical place of use, the proposed Ferguson Ditch will connect into existing irrigation infrastructure. The Ferguson Ditch will be a trapezoidal channel with a bottom width of 3.0 feet and 1:1 left and right bank slopes capable of conveying up to 2.5 CFS. The existing historical POD will still continue to deliver

water throughout the existing system's natural channels, pressurized mains, secondary diversions and lateral ditches, contour ditches, and overland wild flood infrastructure.

41. The Department finds that the proposed diversion and conveyance infrastructure is capable of diverting and conveying the proposed flow rate of 2.5 CFS up a total diverted volume of 271.36 AF/year.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

42. This Applicants signed the affidavit on the application form affirming they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

## **CONCLUSIONS OF LAW**

### **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>2</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 1057; *Hohenlohe*, ¶¶ 43-45.<sup>3</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

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<sup>2</sup> DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

<sup>3</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).

change or potential for adverse effect.<sup>4</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 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>5</sup>

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<sup>4</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

<sup>5</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)(“Once 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

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 - is not part of a water right and is subject to appropriation by subsequent water users).<sup>6</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

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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.)

<sup>6</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).

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).

49. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules put 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. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historical use of Statement of Claim No. 76C 25338-00 to be

a diverted volume of 271.36 AF, a historically consumed volume of 33.04 AF, and a flow rate of 2.5 CFS. (FOF Nos. 10-26)

51. 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. Section 85-2-402(2)(b), MCA. (FOF Nos. 27-35)

### 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. The Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. The Applicants have proven by a preponderance of the evidence that irrigation is a beneficial use and that 271.36 AF of diverted volume and 2.5 CFS flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. Section 85-2-402(2)(c), MCA (FOF Nos. 36-37)

#### 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. 38-41)

#### 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. 42)

**DRAFT PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this DRAFT Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76C 30165242 should be GRANTED subject to the following.

The Department determines the Applicant may add a second point of diversion to Statement of Claim No. 76C 25338-00. The new point of diversion will contribute up to the full 2.5 CFS of historically proven diverted flow to the 200.0-acre irrigation place of use. **Tables i and ii** summarize the details of the granted change.

<b>Table i: Summary of the Granted Change of Statement of Claim No. 76C 25338-00</b>								
<b>Water Right Number</b>	<b>Purpose and Acres</b>	<b>Flow Rate (CFS)</b>	<b>Consumptive Volume (AF)</b>	<b>Diverted Volume (AF)</b>	<b>Period of Diversion &amp; Use</b>	<b>Means of Diversion</b>	<b>Points of Diversion</b>	<b>Places of Use</b>
76C 25338-00	Irrigation --- 200.0 acres	2.5	33.04	271.36	04/25 – 10/05	Natural Carrier	SESESE of Section 20, Twp 26N, Rge 28W, Lincoln County (Historical/existing POD)	See Table ii
						Headgate	<b><u>SWNESW Section 20, Twp 26N, Rge 28W, Lincoln County (Proposed second POD)*</u></b>	

*\*Bold underlined text indicates the water right element proposed for change.*

<b>Table ii: Summary of the Places of Use for Statement of Claim No. 76C 25338-00</b>							
<b>POU ID</b>	<b>1/4</b>	<b>1/4</b>	<b>1/4</b>	<b>Section</b>	<b>Township</b>	<b>Range</b>	<b>County</b>
1	---	S2	SE	17	26N	28W	Lincoln
2	---	---	NE	20	26N	28W	Lincoln
3	NE	NE	SW	20	26N	28W	Lincoln
4	---	N2	SE	20	26N	28W	Lincoln
5	---	SW	NW	21	26N	28W	Lincoln
6	W2	NW	SW	21	26N	28W	Lincoln

To satisfy the adverse effect criterion, this change is subject to the following condition:

THE APPROPRIATOR SHALL INSTALL DEPARTMENT APPROVED IN-LINE WATER MEASUREMENT DEVICES AT POINTS IN THE DELIVERY LINES APPROVED BY THE DEPARTMENT. THESE WATER MEASUREMENT DEVICES MUST BE INSTALLED IN LOCATIONS THAT ALLOW THE APPROPRIATOR

TO MEASURE THE FLOW RATE AND VOLUME OF WATER DIVERTED AT BOTH POINTS OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE BY DECEMBER 31 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 APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES 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 6<sup>th</sup> day of April, 2026.



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James Ferch, Manager  
Kalispell Regional Water Resources Office  
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 6<sup>th</sup> day of April, 2026, by first class United States mail.

SHAYNE JACKSON / JACKSON PROPERTY GROUP LLC  
PO BOX 497  
NORTH BEND WA 98045-0497

RANDY AND DORI BOCK  
2315 PARKISON LN  
LIBBY MT 59923-7993

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*Via email:*

COLE PEEBLES, PE  
WGM GROUP



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TRAVIS WILSON

Kalispell Regional Office, (406) 752-2288