

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

APPLICATION TO CHANGE WATER RIGHT) NO. 41G 30152637 BY RICHARD MCCABE) AND LARGEY P A ESTATE)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On July 30, 2021, Robert Rash, Lea Rash, and Largey P A Estate (Applicants) submitted Application to Change Water Right No. 41G 30152637 to change Water Right Claim No. 41G 197170-00 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 14, 2022. The Applicant responded with information dated March 28, 2022. The Application was determined to be correct and complete as of May 9, 2022.

The Department met with the Applicant (Robert Rash and Lea Rash) on June 29, 2021 and with Applicants (Robert Rash and Mark McDonald, representative of the Largey Estate) and Richard McCabe on March 1, 2022. Robert and Lea Rash sold their parcel of land and water rights to Richard McCabe on March 31, 2022. MT DNRC confirmed Richard McCabe's status as an Applicant on July 19, 2022. Ownership of Water right claim 41G 197170-00 transferred from Robert and Lea Rash and Largey P A Estate to Richard McCabe and Largey P A Estate on August 22, 2022. An Environmental Assessment for this Application was completed on August 31, 2022.

INFORMATION

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

Application as filed:

- Application to Change Water Right, Form 606-IR
- Attachments
- Maps: Four maps either hand drawn or written notation, with places of use and points of diversion

Information Received after Application Filed

- Deficiency Letter Response from Applicant to DNRC dated March 26, 2022

- Email confirming Richard McCabe’s status as an Applicant sent to DNRC on July 19, 2022
- Form 608 and associated Deed, confirming ownership transfer of Water Right Claim 41G 197170-00 from Robert and Lea Rash to Richard McCabe, received August 17, 2022

Information within the Department’s Possession/Knowledge

- Water Resources Survey, Madison County, 1965
- Irrigation Change Application Technical Report dated May 9, 2022
- Application for Change of Appropriation Water Right No. 41G 2564696-00
- 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 Bozeman Regional Office at 406-556-3136 to request copies of the following documents.
 - “Development of Standardized Methodologies to Determine Historic Diverted Volume” (Roberts and Heffner, 2012)
 - “Policy Memo – Change in Method of Irrigation” (Davis, 2015)
 - “Policy Memo – Return Flows” (Davis, 2015)

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Water Right Claim No. 41G 197170-00. Water Right Claim No. 41G 197170-00 is for the volume put to historical and beneficial use, up to 95 gallons per minute (GPM) from Hells Canyon Creek for the purpose of flood irrigation with a priority date of 08/29/1912. The period of use and period of diversion are from 4/30-10/15. The place of use is 5.5 acres. The first place of use (“POU 1”) is 2.25 acres in the NENWNW Section 34, Township 2 South, Range 6 West, Madison County. The second place of use (“POU 2”) is 3.25 acres in the S2NENW Section 34, Township 2 South, Range 6 West, Madison County. The points of diversion are at the SWSWSW Section 27 (“POD 1”, which serves POU 1) and NWNENW Section 34 (“POD

2”, which serves POU 2), Township 2 South, Range 6 West, Madison County. The legal land description of POD 2 does not accurately represent the map location. The original claim map and the map submitted by the Applicant (Deficiency Response, dated 3/26/2022) both show POD 2 to be in the NENWNW Section 34, Township 2 South, Range 6 West, Madison County, rather than NWNENW Section 34, Township 2 South, Range 6 West, Madison County. The means of diversion for both points of diversion is a headgate, and the water is conveyed by ditches, one from each point of diversion to each place of use. The place of use is 5 miles north of Twin Bridges near Montana Highway 41.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

W.R. NO.	FLOW	VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
41G 197170- 00	95 GPM	Historical and beneficial use	Irrigation	4/30- 10/15	NENWNW and S2NENW Sec. 34, Twp. 2S, Rge. 6W, Madison Co.	SWSWSW Sec. 27 and NWNENW Sec. 34, Twp. 2S, Rage. 6W, Madison Co.	8/29/1912

2. Water Right No. 41G 197170-00 is not part of a larger appropriation of water. Ownership of Water Right No. 41G 197170-00 is clear. McCabe owns 2.25 acres in POU 1 and 1 acre in POU 2. Largey P A Estate owns 2.25 acres in POU 2.

3. No water rights are supplemental to Water Right No. 41G 197170-00.

4. No previous change authorizations exist on the water right to be changed.



Figure 1. Historic Use Map

CHANGE PROPOSAL

FINDINGS OF FACT

5. Applicant proposes to change both points of diversion to portable pumps in Hells Canyon Creek at the places of use rather than conveying water from the creek to the places of use by means of ditches. Water will be transported to the places of use by means of hose/above ground pipe to be used in sprinklers rather than for flood irrigation. The proposed points of diversion will be moveable and located along the places of use at N2NW (“McCabe Pump”) and W2E2NW (“Largey Pump”) Section 34, Township 2 South, Range 5 West in Madison County (Figure 2). The place of use, period of diversion, period of use, and purpose will not be changed.

6. The first point of diversion will be moved downstream approximately 228 feet to the place of use at NENWNW Section 34 and will be moveable along the approximately 769-foot stretch of the creek along the place of use. The first moveable pump will also be used to irrigate the portion of the place of use in S2NENW Section 34 that is in the McCabe parcel. This is approximately 1325 feet downstream of the first historic point of diversion and the length of the creek in the place of use in S2NENW Section 34 that is in the McCabe parcel is approximately 530 feet. The second point of diversion will be moved downstream approximately 800 feet to the place of use in S2NENW Section 34 that is located in the Largey P A Estate parcel. The length of the creek in the place of use in S2NENW Section 34 that is in the Largey P A Estate parcel is approximately 388.5 feet. There is no change in purpose or place of use. The pattern of use will change from continuous flood irrigation throughout the period of use to watering on a 14-day schedule for a total of 12 applications during the period of use.

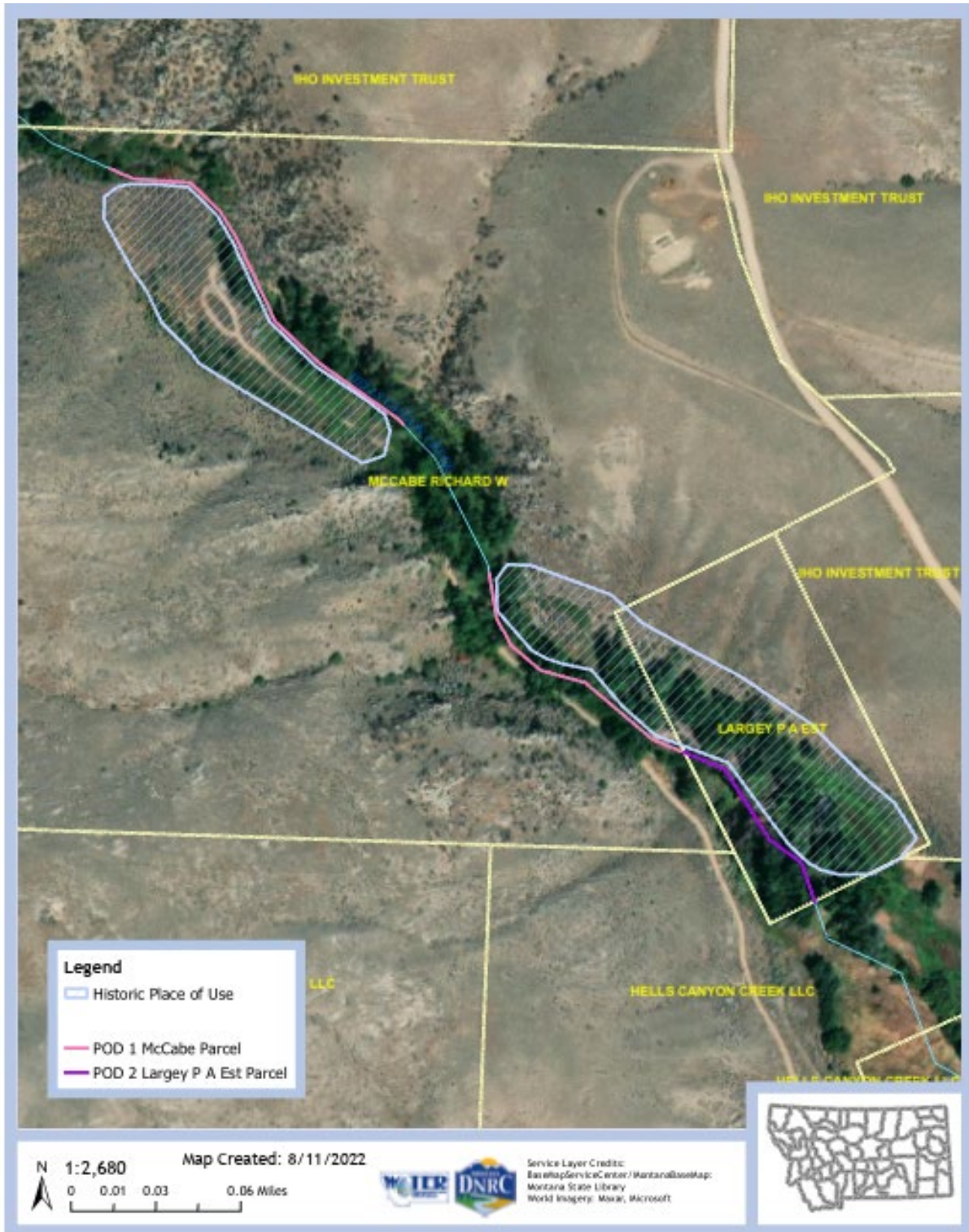


Figure 2. Proposed Use Map

CHANGE CRITERIA

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

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. The historic basis for Statement of Claim 41G 197170 00 is a priority date of August 29, 1912, based on a Notice of Appropriation filing with an original use of 3 CFS of water for irrigating and other purposes out of Hells Canyon Creek in Section 34 (current place of use today). Water Resource Survey Notes specify that at the date of the visit on September 16, 1953, that this water was in use on 5 acres. This water right has now been decreed twice through the Water Court, so the priority date has now been decreed.

10. The Applicant does not have a firsthand knowledge of historic practices, so best available data was used to analyze historic use. Water right 41G 197171 00 is a nearby water right that, at the time of Change Authorization No. 41G 2564696, was owned by the same person as 41G 197170 00 (Douglas Allen). The asserted the historic use information used for Change Authorization No. 41G 2564696 (Deficiency Letter Response dated March 26, 2022) is applicable to 41G 197170 00 and the Department accepted this as sufficient and reasonable because it is the same crop, irrigation method, owner, and an adjacent parcel.

11. Both 41G 197170 00 and 41G 197171 00 were used to grow hay and pasture grass. The method of irrigation is flood irrigation. During the historical use analysis for Change Authorization No. 41G 2564696, flood irrigation was determined to occur continuously for the entire period of diversion. Using this same assumption, 41G 197170 00 would be flood irrigated for 168 days between April 30 and October 15. The original claim file for 41G 197170 00 does not describe any field leveling.

12. The claim specifies a place of use of 5.5 acres. Department analysis determined that all 5.5 acres (3.25 acres on the McCabe parcel and 2.25 acres on the Largey Estate parcel) could be confirmed as irrigated. Department analysis found the following:

- a. Madison County Water Resource Survey, dated 1954 maximum acres found: 5 acres
- b. Photo AR5720005521773, dated 7/26/1972 maximum acres found: 5 acres
- c. Photo AR1VEGA00020010, dated 9/10/1976 maximum acres found: 4.5 acres
- d. Photo 1VELC00020135, dated 7/30/1977 maximum acres found: 5.5 acres

13. No supplemental rights exist with the rights to be changed.

14. The historic consumptive use for this water right was calculated pursuant to ARM 36.12.1902. The water right being changed is a Statement of Claim, so the underlying historic use of the right will be evaluated as it existed prior to July 1, 1973. No documented history of calls on this water right are known, allowing the historic consumptive use to be calculated for the full period of use. The slope of the place of use was measured by DNRC with a Digital Elevation Model in ArcGIS Pro. While the slope varied, it was always 6% or greater. These factors led to an on-farm field efficiency of 45%. The Twin Bridges weather station is the most representative in distance and elevation for determining historic consumptive volume. It has a flood/sprinkler evapotranspiration (ET) of 16.98 inches/year. The Madison County 1964-1973 management factor is 65.2%. The historic irrecoverable losses were set at 5% for flood irrigation. The following historic consumptive volume calculations are calculated according to the rules set forth in ARM 36.12.1902:

Historic Consumptive Volume _{minus irrecoverable losses} = (Twin Bridges Flood/Sprinkler ET (inches)) / 12 inches per foot * Madison County Management Factor * Historic Acres

Field Application = Historic Consumptive Volume _{minus irrecoverable losses} / On-farm Efficiency

Historic Irrecoverable Losses = Field Application * 0.05

Historic Consumptive Volume _{including irrecoverable losses} = Historic Consumptive Volume _{minus irrecoverable losses} + Historic Irrecoverable Losses

Table 2 summarizes these calculations:

Historic Consumptive Volume (HCV) Flood Sprinkler	Madison County, Twin Bridges Flood/Sprinkler ET (Inches)	Madison County 1964-1973 Management Factor (Percent)	Historic Acres	HCV AF (minus IL)	On-farm Efficiency	Field Application AF	Historic Irrecoverable Losses (IL) Flood 5%:	HCV AF (Including IL)
	16.98	65.2%	5.5	5.07	45%	11.3	0.56	5.6

Table 2. Historic Consumptive Volume

15. Historic diverted volume was calculated pursuant to ARM 36.12.1902(10) and the Department's standard methodology (Roberts and Heffner, 2012). The calculations were based off ditch dimensions provided in the Application and Deficiency Letter Response, and irrigation

operations derived from the Deficiency Letter Response and Change Authorization No. 41G 2564696. The following equation is used to calculate Historic Diverted Volume:

$$\text{Historic Diverted Volume} = \frac{\text{Historic Consumptive Volume} - \text{irrecoverable losses}}{\text{On-farm Efficiency} + \text{Conveyance loss}}$$

Table 3 shows the figures used to calculate the Historic Diverted Volume:

Table 3. Historic Diverted Volume

Historic Diverted Volume (HDV)	HCV AF (minus IL)	On-farm Efficiency	Seasonal Conveyance Loss Volume (seepage loss + vegetation loss + ditch evaporation)	Total HDV AF	
	5.1	45%	18.2	29.5	
Seepage Loss:	Ditch Wetted Perimeter (Feet)	Ditch Length (Feet)	Ditch Loss Rate (ft3/ft2/day)	Days Irrigated	Seepage Loss (/43560)
POD 1	1.77	957	1.2	168	7.8
POD 2	1.81	1202	1.2	168	10.1
TOTALS					17.9
Vegetation Loss:	% loss/mile	Est. Flow Rate (CFS) =	Days Irrigated	ditch length (miles)	Vegetation Loss (*2)
POD 1	0.0075	0.087	168	0.2	0.0
POD 2	0.0075	0.125	168	0.2	0.1
TOTALS					0.1
Ditch Evaporation:	Ditch Width (Feet)	Ditch Length (Feet)	Annual Evaporation (Potts)	Period Adjusted Evaporation	Ditch Evaporation (/43560)
POD 1	1.5	957	3.48	2.78	0.1
POD 2	1.5	1202	3.48	2.78	0.1
TOTALS					0.2

16. Conveyance Loss was calculated with the following formula:

$$\text{Seasonal Conveyance Loss} = \text{Seepage Loss} + \text{Vegetation Loss} + \text{Ditch Evaporation}$$

Conveyance loss was calculated for two ditches, one for each of the two historical points of diversion. The Department reconstructed the shape and length of the ditch using the original file for 41G 197170 00, the Water Resources Survey for Madison County, and the map submitted with the Deficiency Letter Response. The Department used Manning's Equation to determine

that the 8-inch CMP culvert the Applicant found at POD 2 did not limit the flow rate even if all 95 GPM was passed through the same POD.

17. Seepage Loss was calculated with the following equation:

$$\text{Seepage loss} = \text{wetted perimeter} * \text{ditch length} * \text{loss rate} * \text{days} / 43,560 \text{ ft}^2 \text{ per acre}$$

Wetted perimeter was calculated with Manning's Equation, based on the following: 18-inch ditch width (supplied by Applicant), 0.0159 ft/ft ditch slope (measured with ArcGIS Pro by Department), Gauckler-Manning Coefficient of 0.1035 (assuming earth material, moderate irregularity, alternating occasionally, appreciable obstructions, high level of vegetation, and appreciable meandering), and discharge (divided proportionally between the two PODs based on the acres irrigated). POD 1 is used to irrigate 2.25 acres and POD 2 is used to irrigate 3.25 acres.

$$\text{POD 1 flow rate} = 0.212 \text{ CFS (equivalent to 95 GPM)} * (2.25/5.5) = 0.087 \text{ CFS}$$

$$\text{POD 2 flow rate} = 0.212 \text{ CFS} * (3.25/5.5) = 0.125 \text{ CFS}$$

The length of POD 1 ditch was measured with ArcGIS Pro to be 957 feet and POD 2 ditch was measured to be 1202 feet. The soils underlying the ditches, based on a DNRC search of Web Soil Survey, are the Shurley-Rock outcrop complex and Yetull loamy sand. These soils are most closely represented by a ditch loss rate of 1.2 ft³/ft²/day.

18. Vegetation Loss was calculated with the following equation:

$$\text{Vegetation loss} = \% \text{ loss per mile} * \text{flow} * \text{days} * \text{ditch length} * 2 \text{ (unit conversion constant)}$$

To calculate vegetation loss, the Department used the following: standard % loss per mile (0.0075), a unit conversion constant (2), flow rate (described above), ditch length (described above), and days irrigated (described above).

19. Ditch Evaporation was calculated with the following equation:

$$\text{Ditch Evaporation} = \text{ditch width} * \text{ditch length} * \text{period adjusted evaporation} / 43,560 \text{ ft}^2 \text{ per acre}$$

The Department calculated ditch evaporation based on the following: ditch width (described above), ditch length (described above), 43,560 ft² per acre (convert to AF), and period adjusted

evaporation (annual evaporation for Virginia City weather station, 3.48 AF (Potts, 1998), adjusted to reflect 168 days of irrigation).

20. Historic diverted volume is equal to 29.5 AF.

21. The Department finds the following historic use (Table 4):

Table 4. Historic Use

WR Claim #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
41G 197170- 00	8/29/ 1912	29.5 AF	95 GPM	5.5	5.6 AF	NENWNW and S2NENW Sec. 34, Twp. 2S, Rge. 6W, Madison Co.	SWSWSW Sec. 27 and NWNENW Sec. 34, Twp. 2S, Rge. 6W, Madison Co.

FINDINGS OF FACT – Adverse Effect

22. The Applicant proposes to change the two points of diversion to two moveable pumps in Hells Canyon Creek at the place of use rather than conveying water from the creek to the place of use by means of a ditch. Water will then be transported by means of hose/above ground pipe to be used in a sprinkler rather than for flood irrigation. The points of diversion will be mobile and located at N2NW (“McCabe Pump”) and W2E2NW (“Largey Pump”) Section 34, Township 2 South, Range 6 West, Madison County. The place of use, period of diversion, period of use, and purpose will not be changed. (Application, IR.1F).

23. The historic consumptive use and proposed consumptive use are equal. No change to the number of irrigated acres or the place of use occurs with this proposal. The proposed consumptive use will still be calculated assuming historic irrigation practices even though the method of irrigation is changing to sprinkler and a 14-day watering schedule is being implemented. Per the 2015 Davis memo (Davis, “Policy memo-change in method of irrigation” dated December 2, 2015) proposed consumptive use will be calculated using historic consumptive use parameters if all the proposed irrigated acres are in the historic place of use. The proposed consumptive use is 5.6 AF, which corresponds to 5.5 acres irrigated, 16.98 inches for evapotranspiration, 65.2% management factor, and 45% on-farm efficiency.

24. Water will be diverted from the source with moveable pumps and conveyed to the place of use by means of hose/above ground pipe. There will be no conveyance loss associated with the pumps and above ground hose/pipe, which is less than the historical conveyance loss associated with the ditches. The proposed diverted volume is equal to the proposed consumptive use, which is equal to the historic consumptive use. The proposed diverted volume does not include conveyance losses, so is equal to the proposed consumptive use, 5.6 AF. The proposed diverted volume, 5.6 AF, is less than the historic diverted volume, 29.5 AF.

25. Return flows will enter back to the same historical source upstream of the next downstream appropriator, water is left instream so historically diverted flows are available during the historic period of diversion, and this change does not constitute an enlargement of flow rate and consumptive use. This project meets the three requirements of the Davis memo (Davis, 2016) that enable evaluating return flows on an annual rather than monthly basis.

26. The Department analyzed return flows by subtracting the historic consumptive volume, including irrecoverable losses, from the historic field application. The annual volume that returned to Hells Canyon Creek under historic practices is 5.7 AF (11.3 AF for field application – 5.6 AF for historic consumptive volume including irrecoverable losses). There is no change in the pattern, timing, or quantity of return flows because the consumptive volume and field applied volume are the same under the new practice. The annual volume that will return to hydraulically connected surface waters under the new practices is 5.7 AF.

27. No documented history of calls on 41G 197170-00 are mentioned in the Application or found by the Department. No increase in length of the historic timing of diversion will occur as the irrigation practices were historically continuous throughout the period of diversion and are proposed to be on a 14-day watering schedule. (Deficiency Response, IR.3.A and IR.5).

28. A period of non-use for this water right has occurred and is greater than 10 years. The Applicant stated the last known usage of 41G 197170-00 was between 1944 and 1997. The Department observed irrigated acres in an aerial photo taken by USGS on 8/13/1995. The Department finds the period of non-use to begin sometime after 8/13/1995. There are no water rights issued on Hells Canyon Creek in the period of non-use. Resuming use of 41G 197170-00 will not adversely affect other water rights on the source because they were all issued while 41G 197170-00 was in use and would have expected the conditions where 41G 197170-00 is used to its full volume and flow rate.

29. There are four irrigation water rights on Hells Canyon Creek: 41G 197170-00, 41G 196995, 41G 197171-00, and 41G 25646-00. Three of the four irrigation water rights are involved in a Future Fisheries Improvement Program grant, where FWP installed a pipeline for the irrigation uses and paid for conversion to sprinklers, then leased salvage water for the benefit of the instream fishery (Change Authorization No. 41G 2564696). Water right 41G 197170-00 was historically diverted upstream of that pipeline. The proposed points of diversion are downstream of that pipeline, which ensures that water stays in the source for longer. The proposed change leaves more water instream, as conveyance loss associated with the pumps and aboveground hose/pipe is negligible. The downstream move of the points of diversion along with the historical conveyance loss being left instream will help to prevent adverse effect to the irrigation water rights that use the pipeline and the instream salvage water leased by FWP. The remaining water rights on Hells Canyon Creek are for livestock direct from source and for a water reservation held by FWP. The livestock direct from source water rights are all located upstream of the historic and proposed points of diversion, so should not be adversely affected by the proposed change. Water right 41G 197170-00 was perfected prior to issuance of FWP's fishery water reservation 43G 30017477 on 07/01/1985, so the proposed change should not adversely affect the water reservation.

30. Water right 41G 197170-00 has a later priority date than two of the other irrigation water rights on Hells Canyon Creek and a priority date equal to the fourth irrigation water right on Hells Canyon Creek. The Applicant cannot call irrigation water rights it could not previously call because its priority date is later than or equal to the other irrigation water rights on Hells Canyon Creek. The Applicant will be able to respond to a call on water right 41G 197170-00 by immediately shutting down the pumps, which will prevent adverse effect to water users on Hells Canyon Creek with earlier priority dates. (Deficiency Response, IR.4.B).

31. There are no measuring devices or reporting requirements to the Department. The historic flow rate and volume will not be exceeded when the proposed pumps and sprinklers are operated with the proposed irrigation schedule. There are two proposed pumps that operate at 30 GPM each (more details in the Adequate Diversion section below), which totals 60 GPM out of the 95 GPM historically diverted. The two sprinkler systems output approximately 0.115 acre-inches per hour each, which could exceed the historic consumptive volume if run continuously. Instead, the sprinklers will be run on a 14-day schedule between May 1 and October 8; with a total of 12 waterings per season. During May and October, two inches of water per acre will be applied for

each watering, and three inches of water per acre will be applied for each watering in June through September. The total water applied is 32 inches of water per acre per season for each sprinkler system, which totals 64 inches of water per acre applied per season (32" per sprinkler system x two sprinkler systems). The volume of water applied per season according to the operation plan, 64 acre-inches, is equivalent to 5.34 AF, which is not greater than the historically consumed volume of 5.6 AF. Given the proposed place of use is identical to the historic place of use and the volume of water applied according to the operation plan is nearly equal to the historically consumed volume, the consumed volume moving forward will remain 5.6 AF. (Deficiency Response, IR.5).

BENEFICIAL USE

FINDINGS OF FACT

32. Applicant proposes to use water for irrigation of agricultural crops. The reason for changing the water right is to change the points of diversion because neither the historic ditches nor the historic headgates presently exist. (Application, IR.1.F). The acreage irrigated will be 5.5 acres across two places of use. The first place of use will have 2.25 acres and is entirely located in the McCabe Parcel. The second place of use will have 3.25 acres and is in both parcels. Approximately 1 acre of the POU 2 is in the McCabe Parcel and 2.25 acres is in the Largey P A Estate Parcel. Irrigation is identified as a beneficial use of water in §85-2-102(5)(a), MCA.

33. Applicant proposes to use 5.6 AF volume and 60 GPM flow rate. This amount is 1.02 AF per acre (5.6 AF / 5.5 acres) and 10.91 GPM per acre, which is less than the 3.0 AF/acre defined in the Climatic Area Guidelines for Sprinkler and Pumped Systems for Climatic Area V. The Climatic Area is actually VI, but no guidelines exist for Climatic Area VI in the Claims Examination Manual, so the most conservative guideline for sprinklers was used. (Deficiency Response, IR.5)

34. The Department finds that irrigation of agricultural crops is a beneficial use, and that a flow rate of 60 GPM, a diverted volume of 5.6 AF, and a consumed volume of 5.6 AF are reasonable for the proposed 5.5-acre sprinkler system.

ADEQUATE DIVERSION

FINDINGS OF FACT

35. The proposed points of diversion are two moveable pumps. Each pump is a Honda WH15XTA engine driven pump that diverts 30 GPM of water at a pressure of 48 pounds per square inch. The two pumps will divert water at a combined rate of 60 GPM. The water will be conveyed from each pump by a 2" line to a portable K-Line Irrigation Kit ("irrigation system"). The K-Line Irrigation Kit has 8 pods that are connected by a 1.5" line. Each pod has an impact sprinkler with a red color nozzle that has a 0.118" orifice. Each K-Line Irrigation Kit waters at a rate of 0.115" per hour. One identical moveable pump and K-Line Irrigation Kit will be located on each of the two Applicant's properties. The two pumps and irrigation systems can be operated to stay within the volume limits by watering on a 14-day schedule with a total of 12 waterings each, and limiting the total water applied to 64" per season (32" per irrigation system).

POSSESSORY INTEREST

FINDINGS OF FACT

36. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

37. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new

priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

38. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

39. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions

40. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

41. 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

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.)

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

source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

42. 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).

43. 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. Admin.R.M. 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.

Admin.R.M. 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. Admin.R.M. 36.12.1901 and 1903.

44. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

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

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

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

46. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final

Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

47. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF No.14).

48. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water").

49. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41G 197170-00 of 29.5 acre-feet diverted volume and 95 gallons per minute flow rate with a consumptive use of 5.6 acre-feet. (FOF Nos. 9—21)

50. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or

certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 22—31)

BENEFICIAL USE

51. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

52. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 5.6 acre-feet of volume and 60 gallons per minute flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF Nos. 32—34)

ADEQUATE MEANS OF DIVERSION

53. 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).

54. 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)

POSSESSORY INTEREST

55. 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 Admin.R.M. 36.12.1802

56. 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 Nos. 36)

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. 41G 30152637 should be granted subject to the following.

The Applicants are authorized to change their points of diversion to two moveable pumps, each operating at 30 GPM, on Hells Canyon Creek within the places of use. The points of diversion will

be moveable and located N2NW (“McCabe Pump”) and W2E2NW (“Largey Pump”) Section 34, Township 2 South, Range 6 West, Madison County. The acreage irrigated will be 5.5 acres across two places of use. The first place of use will have 2.25 acres and will be entirely located in the McCabe Parcel. The second place of use will have 3.25 acres and will be in both parcels; 1 acre in the McCabe Parcel and 2.25 acres in the Largey P A Est Parcel. The Department found 95 GPM, 29.5 AF diverted volume, and 5.6 AF consumed volume of historical use from April 30th to October 15th. The proposed beneficial use has a diverted volume of 5.6 AF, and flow rate of 60 GPM from April 30th to October 15th.

NOTICE

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

DATED this 1st day of September 2022

/Original signed by Kerri Strasheim/
Kerri Strasheim, Manager
Bozeman Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

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

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