

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

Water Resources Division • Billings Regional Office

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April 2, 2025

Randall S. Shinn & Deborah G. Steward
13683 Lodge Grass Creek Rd
Lodge Grass, MT 59050

Subject: Draft Preliminary Determination to Grant Water Right Change Application No. 430
30163932

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a change authorization found in §85-2-402, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no response is received by April 23, 2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401

Please let me know if you have any questions.

Sincerely Yours,

A handwritten signature in blue ink that reads "Cassey Strebeck".

Cassey Strebeck
Water Resource Specialist
Billings Regional Office, Montana DNRC
Cassey.Strebeck@mt.gov
406-247-4422

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

* * * * *

APPLICATION TO CHANGE WATER RIGHT) NO. 43O 30163932 BY RANDALL S. SHINN &) DEBORAH G. STEWARD)	DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE
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* * * * *

On February 12, 2025, Randall S. Shinn and Deborah G. Steward (Applicants) submitted Application to Change Water Right No. 43O 30163932 to change Reserved Claim 43O 188069-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published the receipt of the application on its website. The Department delivered the Technical Analysis on January 15, 2025. The application was determined to be correct and complete as of February 21, 2025. The Department met with the Applicant, Ms. Steward, on June 25, 2024, and October 18, 2024, for scoping meetings; and November 18, 2024, for the preapplication meeting, in which the Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Meeting Form on December 2, 2024. The Department again met with Ms. Steward on January 7, 2025; January 31, 2025; and February 12, 2025, for application assistance. An Environmental Assessment for this application was completed on March 26, 2025.

INFORMATION

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

Application as filed

- Application for Change of Appropriation Water Right, Form 606
- Attachments:
 - Possible Pivot Design Layout, dated October 2024
 - Attachment A: Pump Design Discussion 2024
 - Attachment B: Overview of pivot system and irrigation plan
 - Photo of the Riverscreen
- Maps:
 - Map titled: DNRC Examination Report, dated October 22, 2008. Source photo date 1980; survey date 1947.

- Historical Use Map, 2021 Aerial
- Proposed Use Map, 2021 Aerial
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated January 15, 2025.

Information within the Department's Possession/Knowledge

- 1947 Big Horn Country Water Resources Survey
- Department Water Right Files for Reserved Claim 43O 188069-00
- Crow Tribe Current Use List
- DNRC Change Manual
- DNRC Converge – Water Right Information Resource - Mapping Database
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents:
 - Consumptive Use Methodology Memo
 - Historic Diverted Volume Memo

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

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; AU means animal unit; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicants seek to change the point of diversion (POD) of Reserved Claim 43O 188069-00 in this application. Reserved Claim 43O 188069-00 is for a flow rate of 4.40 CFS and the volume of water historically and beneficially diverted, subsequently calculated for this application as 494.85 AF, from Lodge Grass Creek for (wild) flood irrigation of 116.8 acres. The period of use is from May 15 to October 31. The historical point of diversion is a headgate located in the NWNENW Section 32, Township 7 South, Range 34 East, Big Horn County, and water was

conveyed to the place of use into the William Miller Ditch. The project is approximately 13 miles SW of Lodge Grass, MT, in Big Horn County, on the Crow Indian Reservation.

Table 1: Water Right Proposed for Change

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion	Priority Date
43O 188069-00	4.40 CFS	The amount historically put to beneficial use	Irrigation	May 15 To October 31	See Table 2	NWNENW Sec. 32, T7S, R34E, Big Horn County	05/07/1868

Table 2. Claimed Place of Use for Reserved Claim 43O 188069-00

POU#	Acres	Quarter Sections	Section	Township	Range	County
1	0.50	SENESE	20	7S	34E	Big Horn
2	25.00	S2SE	20	7S	34E	Big Horn
3	85.10	NE	29	7S	34E	Big Horn
4	1.20	SESENW	29	7S	34E	Big Horn
5	0.50	NWNWSE	29	7S	34E	Big Horn
6	4.00	E2NESW	29	7S	34E	Big Horn
7	0.50	NESESW	29	7S	34E	Big Horn
Total	116.80	-	-	-	-	-

2. There are no supplemental water rights to Reserved Claim 43O 188069-00. On November 25, 2024, the Applicants filed a withdrawal for Reserved Claim 43O 197352-00, which utilized the William Miller Ditch, citing no interest in the claim. The withdrawal and dismissal of Reserved Claim 43O 197352-00 can be reviewed in the Montana Water Court Master's Report Case 43O-0405-I-2024.

3. There have been no previous change authorizations on Reserved Claim 43O 188069-00.

4. Master's Report filed on July 7, 2017, for Water Court Case 43O-266 reduced the maximum irrigable acreage in the place of use to 116.8 acres, as shown in Table 2, and increased the flow rate to 4.4 CFS. All parties agreed that 43O 188069-00 was not part of the Crow Tribal Water Right; should be clarified as a Walton Right; and may receive supplemental water from the Willow Creek Reservoir (also known as the Willow Creek Dam and Lodge Grass Reservoir; Federally owned by the Bureau of Indian Affairs), which is identified as part of the Crow Tribal Water Right – Little Big Horn River.

5. Land owned by the Applicants may be a place of use for the Crow Tribal Right, and the Applicants may be able to use that right. However, the Applicants currently do not use the Crow Tribal Right, have no intention to use the Crow Tribal Right, and rely entirely on their private rights to irrigate the historical and proposed place of use in this application.

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicants propose to change the historical point of diversion (POD) of Reserved Claim 43O 188069-00 from the headgate for the William Miller Ditch located in the NWNENW Sec. 32, T7S, R34E, Big Horn County, on Lodge Grass Creek to a point downstream to pump directly from Lodge Grass Creek, in the NENENE Sec. 29, T7S, R34E, Big Horn County. If this change is authorized, the Applicants may divert up to 413.91 AF at a flow rate of 820 GPM. No other changes have been proposed to any of the other aspects of water rights. Figure 1 below shows the elements of the proposed change.

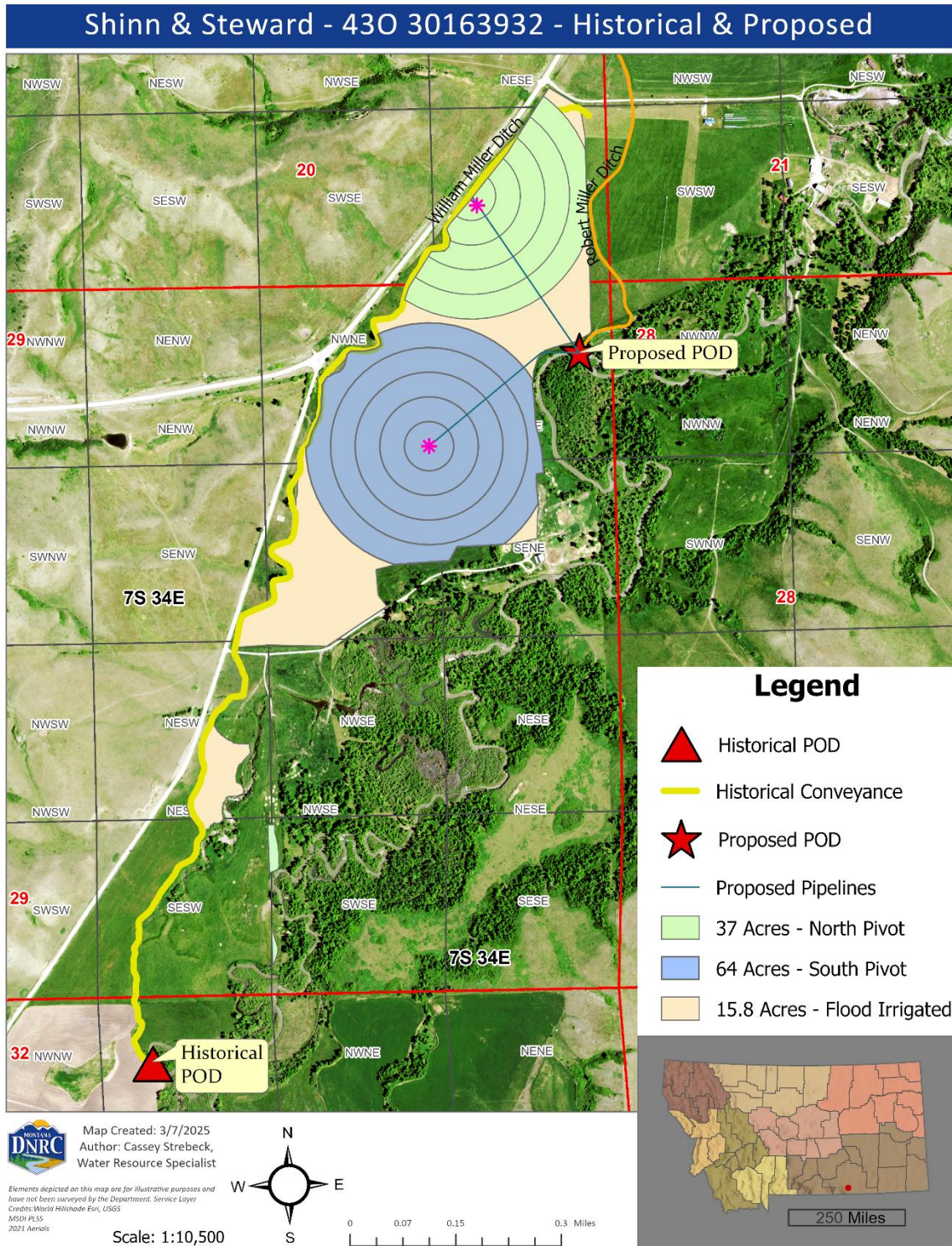


Figure 1. Historical & Proposed Use for Reserved Claim 430 188069-00

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 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.

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*, ¶¶ 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).

9. The existing place of use and proposed place of use for Reserved Claim 43O 188069-00 are located in the Little Bighorn River Basin 43O within the boundaries of the Crow Reservation.

The Crow Tribe-Montana Compact (Compact) was ratified by the Montana Legislature on June 22, 1999, the United States Congress in 2010, and the Crow Tribal Council on March 19, 2011. As such, the Applicant's proposed change in use is subject to the applicable provisions of the Crow Compact in addition to the change provisions of the Montana Water Use Act. § 85-20-901 (IV)(D)(2), MCA.

10. The Crow Tribe has a water right for all surface flow, groundwater, and storage in the Little Bighorn River Basin. MCA § 85-20-901 (III)(B)(7) and (IV)(D)(1) through the Compact. The Compact further provides that any water right Recognized Under State Law with priority date earlier than June 22, 1999 (date Compact ratified by Montana Legislature) in the Little Bighorn River Basin is protected from a claim of senior priority by Tribal Water Rights existing prior to June 22, 1999, and is protected from post-June 22, 1999, new development of the Tribal Water Right. MCA § 85-20-901 (III)(B)(6). While the Little Bighorn River Basin closure prohibits most new water development, the State has the authority to process and approve changes in use to Water Rights Recognized Under State Law that existed prior to June 22, 1999. MCA § 85-20-901 (III)(B)(7)(c).

11. Reserved Claim 43O 188069-00 constitutes a Water Right Recognized Under State Law pursuant to the Compact. The State of Montana may authorize a change in use of a Water Right Recognized Under State Law within the reservation, providing that the change does not adversely affect a use of the Tribal Water Right existing at the time. See generally § 85-20-901 (IV)(D)(2), MCA. The Montana Department of Natural Resource and Conservation is required to determine if an adverse effect to the Tribal Water Right would result from authorizing the change (§ 85-20-901).

12. Master's Report, filed on July 7, 2017, for Water Court Case 43O-266 reduced the maximum irrigable acreage in the place of use to 116.8 acres, as shown in Table 2, and increased the flow rate to 4.4 CFS. All parties agreed that 43O 188069-00 was not part of the Crow Tribal Water Right; should be clarified as a Walton Right; and may receive supplemental water from the Willow Creek Reservoir (also known as the Willow Creek Dam and Lodge Grass Reservoir; Federally owned by the Bureau of Indian Affairs), which is identified as part of the Crow Tribal Water Right – Little Big Horn River.

HISTORICAL USE

FINDINGS OF FACT

13. The water right proposed for change, Reserved Claim 43O 188069-00, is an active water right with a priority date of May 7, 1868.

14. The historical place of use for Reserved Claim 43O 188069-00 consists of 116.8 acres in the S2SE and SENESE of Sec. 20 T7S 34E; and the NE, SESENW, NWNWSE, E2NESW, NESESW of Sec. 29, T7S, R34E, Big Horn County, as shown in Table 3. Pre-1973 historical use was verified by aerial imagery analysis of the Water Resource Survey (WRS), in which the Department found approximately 119.74 acres (115.14 acres in the SE of Sec. 20 and NE of Sec. 29; and 4.6 acres in the NESW and SESW of Sec. 29). While the 119.74 acres found during this Application are greater than the amount quantified by the adjudication process, the Applicant is limited to the 116.80 decreed acres, as shown in Table 3.

Table 3. Historical Place of Use for Reserved Claim 43O 188069-00

	Acres	Quarter Sections	Section	Township	Range	County
1	0.50	SENESE	20	7S	34E	Big Horn
2	25.00	S2SE	20	7S	34E	Big Horn
3	85.10	NE	29	7S	34E	Big Horn
4	1.20	SESENW	29	7S	34E	Big Horn
5	0.50	NWNWSE	29	7S	34E	Big Horn
6	4.00	E2NESW	29	7S	34E	Big Horn
7	0.50	NESESW	29	7S	34E	Big Horn
Total	116.80	-	-	-	-	-

15. The historical consumptive use was calculated by the Department, at the request of the Applicants, using the methodology in ARM 36.12.1902. The 116.8 acres within the place of use for this water right were historically wild flood-irrigated using the William Miller Ditch diverted from Lodge Grass Creek, via a headgate located at NWNENW Sec. 32, T7S, R34E. The Department used 25% irrigation efficiency for wild flood (as provided by the Applicants) to evaluate historical consumptive use. This 25% efficiency for wild flood irrigation is indicated per the Department's Historic Diverted Volume Memo, dated September 13, 2012.

16. Based on 116.8 irrigated acres, an IWR for flood irrigation at the Wyola, MT weather station in Big Horn County of 19.19 inches, and a county management factor of 55.4% (0.554), the historical consumptive use for this right is 103.48 AF ($116.8 \text{ AC} \times (19.19 \text{ inches} / 12 \text{ inches/ft}) \times 0.554 = 103.48 \text{ AF}$). The Department adds 5% of field-applied volume to account for irrecoverable losses (IL) in flood irrigation systems. Using a 25% efficiency, the field-applied volume is 413.91 AF ($103.48 \text{ AF} / 0.25 = 413.91 \text{ AF}$), and the irrecoverable losses are 20.70 AF ($413.91 \text{ AF} \times 0.05 = 20.70 \text{ AF}$). The total historical consumptive use, including irrecoverable losses, is 124.18 AF ($103.48 \text{ AF} + 20.70 \text{ AF} = 124.18 \text{ AF}$). The historically consumed and field applied volume for Reserved Claim 43O 188069-00 are shown in Table 4.

Table 4. Historically consumed volume (HCV) and field application volume for the historical place of use:

Big Horn Flood Irrigation ET (in)	Historical (1964-1973) Management	Historically Irrigated Acres	HCV (Excluding IL)	On- Farm Efficiency	Field Application Volume	Historical Irrecoverable Losses (IL):	HCV (Including IL)
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	Factor, Big Horn County					<i>Flood Irrigation, 5%</i>	
19.19	0.554 (55.4%)	116.8	103.48 AF	0.25 (25%)	413.91 AF	20.70 AF	124.18 AF

17. There are no supplemental water rights to Reserved Claim 43O 188069-00. On November 25, 2024, the Applicants filed a withdrawal for Reserved Claim 43O 197352-00, which utilized the William Miller Ditch, citing no interest in the claim. The withdrawal and dismissal of Reserved Claim 43O 197352-00 can be reviewed in the Montana Water Court Master's Report Case 43O-0405-I-2024.

18. Water was historically diverted water from Lodge Grass Creek at a point of diversion in the NWNENW Sec. 32, T7S, R34E, Big Horn County, via a headgate. Water traveled 3,656 feet from the headgate through the William Miller Ditch to the main (largest) field in the NENESW Sec. 29, T7S, R34E. The ditch is assumed to be trapezoidal, given the dimensions provided by the Applicants with a top width of 5.0 feet, a bottom width of 3.0 feet, and a depth of 3.0 feet. These parameters give a wetted perimeter of 9.32 feet. Based on USGS topographic maps, the ditch drops approximately 20 feet (from 3,940 to 3,920) over 3,656 feet from the headgate located at NWNENW Sec. 32, T7S, R34E to the main field in the NENESW Sec. 29, T7S, R34E, giving a ditch slope of 0.00547 ft/ft. Manning's equation with a coefficient of 0.03, provided by the Applicants, indicates the estimated maximum capacity of the ditch to be 52.01 CFS. The estimated maximum capacity exceeds the flow rate claimed by the Applicants.

19. Water was diverted for 170 days from May 15 to October 31. With the exception of 14 days for 2 cuttings, the fields were irrigated for 156 days.

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 evaporation volumes.

a. The total historical seepage loss attributed to the historical conveyance loss of Reserved Claim 43O 188069-00 is 73.21 AF. Seepage loss is determined by the wetted perimeter (9.32 feet), ditch length (3,655.77 feet), the days the ditch supports flow (156 days), and loss rate, then converted to acre feet (AF). The ditch soil profile consists of Wyola silty clay loam & Korchea silty clay loam, giving a ditch loss rate = 0.60 ft³/ft²/day. Seepage loss for Reserved Claim 43O 188069-00 is given in the following equation: $[(9.32) \times (3,655.77 \text{ ft}) \times (0.60 \text{ ft}^3/\text{ft}^2/\text{day}) \times (156 \text{ days}) / 43560 \text{ ft}^2/\text{acre} = 73.21 \text{ AF}]$.

b. The total vegetation loss attributed to the historical conveyance loss of Reserved Claim 43O 188069-00 is 7.12 AF. Vegetation loss is determined by the days the ditch supports flow (156 days), the ditch length in miles (0.692 miles), the unit conversion constant of 2.0, and the

percent loss per mile. Based on the National Engineering Handbook (NEH) standard of 1993, the percent loss per mile = 0.75% (0.0075). Vegetation loss for Reserved Claim 43O 188069-00 is given in the following equation: $[(0.0075) \times (4.40 \text{ CFS}) \times (156 \text{ days}) \times (0.692 \text{ miles}) \times 2 = 7.12 \text{ AF}]$.

c. The total ditch evaporation attributed to the historical conveyance loss of Reserved Claim 43O 188069-00 is 0.613 AF. Ditch evaporation is determined by the surface area and evaporation rate. The surface area is determined by multiplying the length of the ditch (3,655.77) by the upper width (5 feet). The Adjusted Net Evaporation sum from May 15 through October 31 as taken from the Gridded Monthly NetEvap layer in Converge gives an evaporation rate = 1.46 ft (17.51 in). Vegetation loss for Reserved Claim 43O 188069-00 is given in the following equation: $[(3,655.77 \text{ ft} \times 5 \text{ ft}) \times (1.46 \text{ in ft/acre/yr, period adjusted}) / 43,560 \text{ ft}^2/\text{acre} = 0.613 \text{ AF}]$.

21. Total Historical Conveyance Loss for Reserved Claim 43O 188069-00 is 80.94 AF (73.21 AF + 7.12 AF + 0.61 AF = 80.94 AF). The parameters used in calculating conveyance loss are shown in Table 5.

Table 5. Conveyance Losses for William Millers Ditch

^A Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Length (ft)	Ditch Loss Rate (ft ³ /ft ² /day)	Days Irrigated	Seepage Loss (AF)
	9.32	6,655.77	0.60	156	73.21
^B Vegetation Loss	% Loss/Mile	Historical Flow Rate (CFS)	Days Irrigated	Ditch Length (mi)	Vegetation Loss (x2) (AF)
	0.0075	4.40	156	0.692	7.12
^C Ditch Evaporation	Ditch Width (ft)	Ditch Length (ft)	Period Adjusted Evaporation Factor (ft)	Ditch Evaporation (AF)	Seasonal Conveyance Loss (AF) (A+B+C)
	5	3,655.77	1.46	0.613*	80.94*

*The ditch evaporation was incorrectly calculated in the Technical Analyses as 0.64 AF, resulting in a total season conveyance loss of 80.97 AF. The ditch evaporation has been corrected to 0.613, and the total seasonal conveyance loss represents this correction at 80.943 AF. All subsequent calculations have been corrected.

22. The Department finds the total historical diverted volume for this water right to be 494.85 AF. Per Department standard practice, the historical diverted volume is the sum of the Field Application Volume and the calculated Conveyance Loss volume. The total historical diverted volume for Reserved Claim 43O 188069-00 is shown in the following equation: 413.91 AF + 80.94 AF = 494.85 AF; and in Table 6.

Table 6: Historically diverted volume of Reserved Claim 43O 188069-00

Water Right No.	Field Application Apportionment	Field Application Volume	Conveyance Loss Volume	Diverted Volume
43O 188069-00	100%	413.91 AF	80.94 AF	494.85 AF

23. The Department finds the following historical use, as shown in Table 7 and Table 8.

Table 7: Summary of historical use findings for Reserved Claim 43O 188069-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Total Consumptive Use	Place of Use	Point of Diversion
43O 188069-00	05/07/1868	494.85 AF	4.40 CFS	Flood Irrigation (116.8 Acres)	124.18 AF	See Table 8	NWNENW Sec. 32, T7S, R34E, Big Horn County

Table 8. Historical Place of Use for Reserved Claim 43O 188069-00

POU#	Acres	Quarter Sections	Section	Township	Range	County
1	0.50	SENESE	20	7S	34E	Big Horn
2	25.00	S2SE	20	7S	34E	Big Horn
3	85.10	NE	29	7S	34E	Big Horn
4	1.20	SESENW	29	7S	34E	Big Horn
5	0.50	NWNWSE	29	7S	34E	Big Horn
6	4.00	E2NESW	29	7S	34E	Big Horn
7	0.50	NESESW	29	7S	34E	Big Horn
Total	116.80	-	-	-	-	-

ADVERSE EFFECT

FINDINGS OF FACT

24. The Applicants propose to change the point of diversion (POD) from the NWNENW Sec. 32, T7S, R34E to a location downstream on Lodge Grass Creek, in the NENENE Sec. 29, T7S, R34E. The Applicants will pump water to two pipelines that will supply two pivots in the northern portion of the Applicant's place of use, irrigating 37 acres with the north pivot, up to 300 GPM; and 64 acres with the south pivot, up to 520 GPM, for a total proposed flow rate of 820 GPM. The remaining acres in the place of use not covered by the pivots will be flood irrigated. No additional flow rate will be calculated for these flood-irrigated acres because the flow is not additive but interchangeable with the pivot.

25. The proposed flow rate of 820 GPM is less than the historical flow rate of 4.40 CFS.

26. The Applicants propose to continue irrigating all of the historical place of use. According to MCA 85-2-102(7)(b), the Department will not analyze the change in efficiency for acres within the historical footprint because a change authorization is not required to change the method of irrigation. The historical consumptive volume is 124.18 AF. Per Department policy, the proposed consumptive volume is 124.18 AF.

27. The Department has considered a potentially impacted reach on the source of supply. This reach was determined by accounting for the location of the proposed and historical point of diversion. This reach extends from the historical point of diversion in the NWNENW Sec. 32, T7S, R34E downstream to the proposed point of diversion in the NENENE Sec. 29, T7S, 34E. There are three water rights within the reach: Reserved Claim 43O 189016-00 for Livestock Direct from Source, Statement of Claim 43O 111988-00 Livestock Direct from Source, and Statement of Claim 43O 111993-00 for Irrigation by Natural Flow. These are the only water rights between the two points of diversions, and all three are owned by the Applicants.

28. As a result of the proposed change, the Applicants will have no greater access to water, and the Applicants will not be able to make call on water rights that could not be called previously. The Department will not require the Applicants to measure the proposed diversion as a result of this change, however, the Applicants propose to install an in-line flow meter on the proposed pivot pump. Should a valid call be made, the Applicants have the ability to shut off their pumps to cease diversion.

29. The historically diverted volume is 494.85 AF. If this change is authorized, the Applicants may divert up to 413.91 AF. The Applicants propose to divert 80.94 AF less than the historically diverted volume ($494.85 \text{ AF} - 413.91 \text{ AF} = 80.94 \text{ AF}$); and there is no change to the place of use or the purpose of Reserved Claim 43O 188069-00; therefore, return flows were not analyzed.

30. The proposed change will not increase the consumptive use of Reserved Claim 43O 189016-00. The Department finds there will be no adverse effect to existing water rights as a result of this change. Because there is no increase in consumptive use and because water will be left instream, the Department finds there will be no adverse effect to the Crow Tribal Right.

BENEFICIAL USE

FINDINGS OF FACT

31. The Applicants propose to divert water for irrigation. Irrigation is a recognized beneficial use under § 85-2-102, MCA.

32. The Applicants propose a flow rate of 820 GPM up to 413.91 AF from May 15 to October 31. This flow rate is necessary to run the two proposed pivots. This volume was determined by the Department as the Historically Diverted Volume minus the Conveyance Loss previously attributed by the ditch ($494.85 \text{ AF} - 80.94 \text{ AF} = 413.91 \text{ AF}$).

33. The Department finds that the purpose, flow rate, volume, period of diversion, and period of use proposed for appropriation are a beneficial use of water and that the requested flow rate of 820 GPM and annual volume of 413.91 AF are reasonably justified per ARM 36.12.1801(3).

ADEQUATE DIVERSION

FINDINGS OF FACT

34. The Applicants historically diverted 4.40 CFS flow rate from a headgate on Lodge Grass Creek in the NWNENW Sec. 32, T7S, R34E to the William Miller Ditch. The Applicants propose to abandon this point of diversion and use a pump and pipeline system in the NENENE Sec. 29, T7S, R34E. The proposed POD pump site is located in Lodge Grass Creek near the existing headgate site for the Robert Miller ditch. The pump structure is a 12-inch Riverscreen intake capable of withdrawing sufficient water volume to serve both pivots simultaneously from a creek water depth of 4 inches or more. The pump is a 40 HP Cornel centrifugal pump. The pump is connected to a 12-inch pipeline where gate valves can direct water to the north pivot, south pivot, or both. The north pivot of the proposed system is served with 1,420 feet of 6-inch buried pipeline, which will supply the necessary 300 GPM. The south pivot of the proposed system is served by 1,500 feet of 8-inch pipeline, which will supply the necessary 520 GPM. Both systems are controlled by Linsey Vision control panels and are equipped with Grow Smart IM 3000 flow meters. The irrigation system was designed by Big Sky Irrigation Inc. and is capable conveying water to the entirety of the pivot-irrigated acres from the proposed POD. The Applicants plan to divert 820 GPM to irrigate 116.8 acres in the historical place of use.

35. The remaining acres in the place of use not covered by the pivots will be flood-irrigated utilizing a valve at the end of the pivots. No additional flow rate will be calculated for these flood-irrigated acres because the flow is not additive but interchangeable with the pivot. There are no additional PODs.

36. The Department finds the proposed diversion means are adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

37. The Applicants signed the affidavit on the application form affirming the Applicants 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

38. 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).¹

39. 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*

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

Royston, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.²

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

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).

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. Section 85-2-234, MCA

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

41. 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).⁵

42. 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

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 55 - 57 (Colo., 1999); *Farmers Reservoir and Irr. Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002) ("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); *Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic 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, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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. 43. 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).

44. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

45. Applicants seek 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).

46. 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).

47. 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).

48. The Department has adopted a rule providing for the calculation of historic consumptive use where the Applicants prove by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative, an Applicant may present its own evidence of historic beneficial use. In this case, the Applicants have elected to proceed under ARM 36.12.1902. (FOF No. 15).

49. If an Applicants seek more than the historic consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g., Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*; *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”).

50. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historical use of Reserved Claim 43O 188069-00 to be a diverted volume of 494.85 AF, a historically consumed volume of 124.18 AF, and flow rate of 4.40 CFS. (FOF Nos. 16-23)

51. 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. Section 85-2-402(2)(a), MCA. (FOF Nos. 24-30)

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. Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence irrigation is a beneficial use and that 413.91 AF of diverted volume and 820 GPM 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. 31-33).

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, Applicants have 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. 34-36)

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 Applicants have 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. 37).

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. 43O 30163932 should be GRANTED subject to the following.

The Applicants may change the point of diversion (POD) of Reserved Claim 43O 188069-00 from the historical headgate located at the NWNENW Sec. 32, T7S, R34E, in Big Horn County on Lodge Grass Creek to a pump located downstream on Lodge Grass Creek, in the NENENE Sec. 29, T7S, R34E, Big Horn County

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 2nd day of April 2025



Mark Elison
Manager, Billings Regional 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 2nd day of April 2025, by first class United States mail.

RANDALL S. SHINN & DEBORAH G. STEWARD
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A handwritten signature in blue ink, reading "C. Strebeck", written over a horizontal line.

CASSEY STREBECK
Billings Regional Office, Department of
Natural Resources and Conservation
Cassey.Strebeck@mt.gov
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02 APR 25

DATE