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

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APPLICATION TO CHANGE WATER RIGHT NO. 42K 30172434 BY SWOPE RANCH LLC	)))	**DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE IN MODIFIED FORM**

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On July 10, 2026, Swope Ranch LLC (Applicant) submitted Application to Change Water Right No. 42K 30172434 to change Statement of Claim 42K 175169-00 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on November 24, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form 606-B on March 16, 2026. The Department delivered the Department- completed Technical Analyses on May 7, 2026. The Application was determined to be correct and complete as of July 30, 2026. An Environmental Assessment for this application was completed on September 14, 2026.

INFORMATION

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

Application as filed:

- Application to Change a Water Right, Form 606
- Attachments:
    - Montana Sage Grouse Habitat Conservation Program letter, Project No. 7254, dated January 13, 2026
- Maps:
    - #18 Proposed Use Map #32 Adequate Means of Diversion and Operation
    - Places of Use #2
    - #17 Historical Use Map

- 42K 30172434 – Swope Ranch LLC - Proposed

- Department- completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated May 7, 2026

Information within the Department's Possession/Knowledge

- This section should include every document outside of the application file that was used to inform our decision, with full document/report titles and dates
  - USDA aerial photo no. 378-91, dated October 9, 1978
  - USGS aerial photo no. AR1VBLS00010273, dated July 17, 1966
  - Water Resource Survey photo no. MA 21-40, dated August 6, 1944
  - Water Resource Survey photo no. MA 13-186, dated August 6, 1944
  - Custer County Water Resource Survey, dated circa 1948
  - Montana DNRC Water Right Information System (WRIS)
  - Claim files for the water right proposed for change, Claim 42K 175169-00
- 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 Billings Regional Office at 406-247-4415 to request copies of the following documents.
  - Montana DNRC Change Manual, February 2025
  - Montana DNRC Permit Manual, February 2025
  - Water Right Claim Examination Rules Amended by the Montana Supreme Court – Effective December 5, 2006

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; AC means acres; AF means acre-feet; AF/YR means acre-feet per year; CFS means cubic feet per second; GPM means gallons per minute; IWR means Irrigation Water Requirements; NIR means net irrigation requirement; NRCS means Natural Resource

Conservation Service; POD means point of diversion; POU means place of use; R means Range; Sec. means Section; T means Township; and USDA means United States of Agriculture.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the point of diversion of Statement of Claim 42K 175169-00 in this Application. Statement of Claim 42K 175169-00 is filed for a 3,000 GPM (6.68 CFS) flow rate and 395.2 AF diverted volume from the Yellowstone River via a pump for the purpose of furrow-flood irrigation of 98.8 acres. The period of diversion and the period of use are April 1 to October 1. The historical point of diversion is located in the SWSWSW Sec. 14, T8N, R47E, Custer County, and water is conveyed to the place of use by means of pipeline. Table 1 shows the elements of the water right proposed for change.

Table 1: Water Right Proposed for Change

Water Right Number	Priority Date	Purpose	Flow Rate	Volume	Acres	Period of Diversion	Period of Use	Point Of Diversion	Place Of Use
42K 175169-00	May 1, 1910	Furrow-Flood Irrigation	6.68 CFS	395.2 AF	98.8	April 1 to October 1	April 1 to October 1	SWSWSW Sec. 14, T8N, R47E, Custer County	83.8 acres in W2 Sec. 14 & 15.0 acres in E2E2SE Sec. 15 T8N, R47E, Custer County

2. There are no supplemental water rights.

3. No previous changes to this water right have been authorized.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the point of diversion for Statement of Claim 42K 175169-00 from the SWSWSW Sec. 14, T8N, R47E, Custer County, to the SWNWSE Sec. 14, T8N, R47E, Custer County. The Applicant does not propose to make any other changes. The Applicant proposes to use Statement of Claim 42K 175169-00 as shown in Table 2.

Table 2: Summary of Proposed Use of Statement of Claim 42K 175169-00

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
42K 175169-00	6.02 CFS	199.5 AF	Furrow-Flood Irrigation	April 1 to October 1	83.8 acres in W2 Sec. 14 & 15 acres in E2E2SE Sec. 15 T8N, R47E, Custer County	SWNWSE Sec. 14, T8N, R47E, Custer County	May 1, 1910

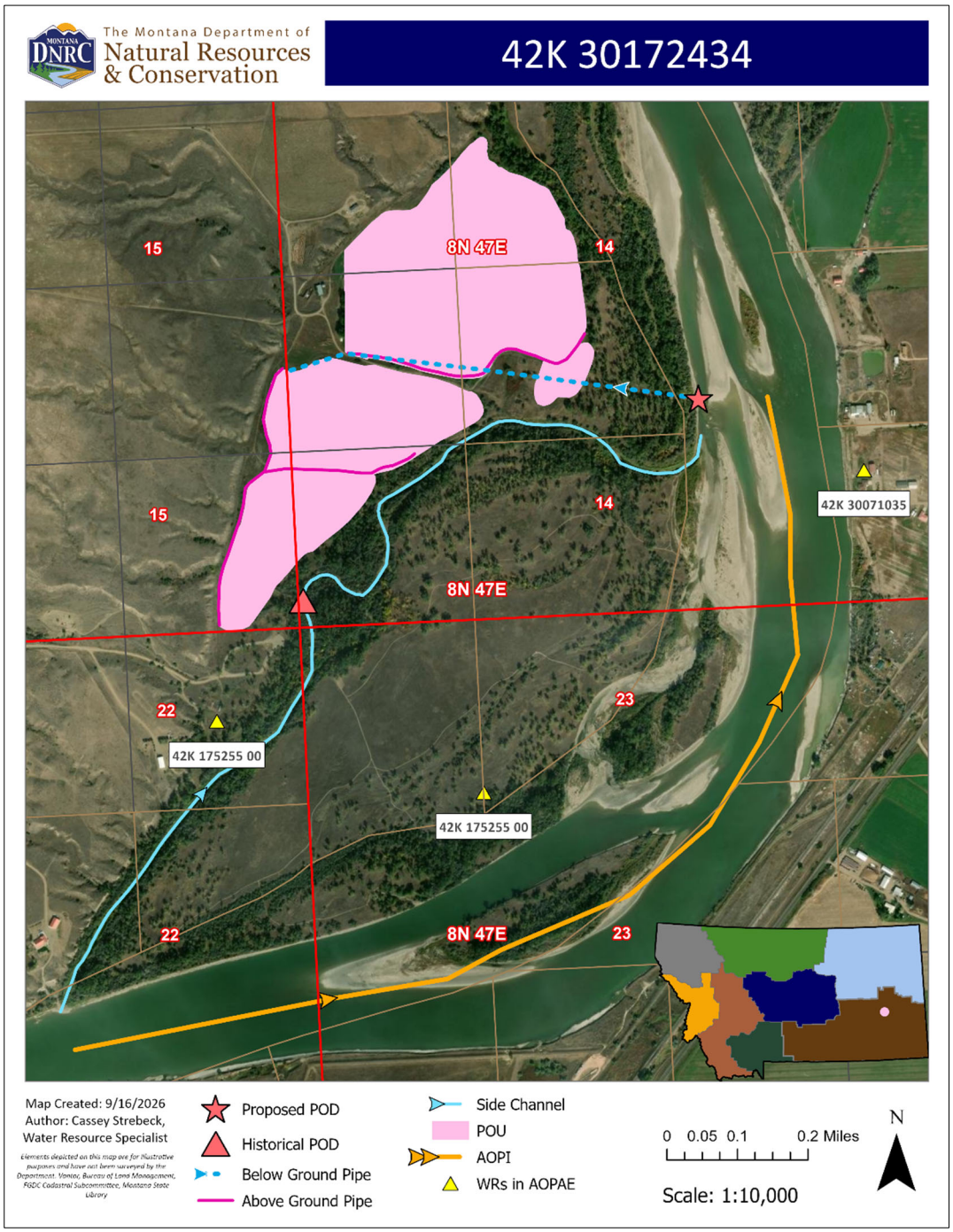


Figure 1. Map of the Applicant's proposed point of diversion on the Yellowstone River, located in the SWNWSE Sec. 14, T8N, R47E, and place of use of 83.8 acres in W2 Sec. 14 and 15.0 acres in E2E2SE Sec. 15, of T8N, R47E, Custer County.

WATER RIGHT CHANGE CRITERIA (§ 85-2-402, MCA)

5. 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), and, if applicable, subject to subsections (1)(c) and (15), 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.

6. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8; *In the*

Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT

7. As of May 08, 2025, basin 42K – Yellowstone River between Tongue and Powder Rivers is undergoing the Second Preliminary Decree. The reexamined version of Statement of Claim 42K 175169-00 shows no changes to the water right, maintaining a flow rate of 6.68 CFS, volume of 395.2 AF, and irrigated acres of 98.8 acres. The historical use of Claim 42K 175169-00 for this application was analyzed based on information available before July 1, 1973 (ARM 36.12.1902(1)(a)).

8. The priority date for Statement of Claim 42K 175169-00 is May 1, 1910. A Notice of Appropriation was filed with the Custer County Clerk on December 7, 1920, stating that Niles Lindeberg of Miles City, Custer County, used such water beginning May 1, 1910. Form No. 76-I R2/80, Statement of Claim for Existing Water Rights: Irrigation, received by the Department on December 7, 1981, claimed the priority date of May 1, 1910. The Department corroborates the priority date in the claim file.

9. Statement of Claim 42K 175169-00 has historically pumped water from the Yellowstone River at 6.68 CFS (3,000 GPM) in the SWSWSW Sec. 14, T8N, R47E, Custer County, from April 1 to October 1, a period of 183 days. Water was conveyed from the pump through a pipeline approximately 647 feet to the first field. From the pipeline, water was moved via a main ditch, a side ditch, and pipelines, with no storage, to furrow-flood irrigate 98.8 acres. Therefore, there are no conveyance losses attributed to Statement of Claim 42K 175169-00, and the ditch was not analyzed for historical conveyance loss. Of the 98.8 irrigated acres, 83.8 acres are in W2 of Sec. 14, T8N, R47E, Custer County, and 15.0 acres are in E2E2SE Sec. 15, T8N, R47E, Custer County. Historical crops consisted of alfalfa, barley, and hay, with 3 cuttings amounting to 15 days of no irrigation in the season. No historical supplemental rights exist at the place of use. This information was provided by the Applicant and corroborated by the Department with historical documents in the file.

10. The 98.8 acres claimed appear irrigated in USDA aerial photo no. 378-191, dated October 9, 1978, with 101.25 irrigated acres identified. USGS aerial photo no. AR1VBLS00010273, dated July 17, 1966, shows 98.0 acres irrigated within the claimed place of use. The Custer County Water Resource Survey, Part 2, published in 1948, shows the Applicant's land irrigated with a pump and private ditches. Water Resource Survey field notes provided by the State of Montana State Engineer's Office, dated May 15, 1947, state that 90 acres were irrigated, with the potential for 8 more acres, using a pump from the Yellowstone River, as shown in photo number MA 13-186. Water Resource Survey photo MA 21-40 dated August 6, 1944, shows 94.0 acres irrigated within the claimed place of use.

11. The Applicants have elected to have the historical diverted and consumed volumes calculated by the Department using the methodology in ARM 36.12.1902(16). The consumed volume for irrigation is based on the net irrigation requirement (NIR) from USDA NRCS Irrigation Water Requirements (IWR) at a representative weather station. The NIR is multiplied by a county-wide management factor (from ARM 36.12.1902(16)) to produce an adjusted NIR representative of actual crop yields in Montana. Crop consumption is determined by multiplying the adjusted NIR by the number of irrigated acres. Crop consumption is then divided by field efficiency, selected by the Applicant based on the irrigation method, to determine the field-applied volume. The Department adds irrecoverable losses (IL) per ARM 36.12.1902(17) based on the type of irrigation system. Irrecoverable losses are 5% of the field-applied volume for flood irrigation or 10% of the field-applied volume for sprinkler irrigation. The irrecoverable losses will be shown in the historical use table for each. Total consumed volume for irrigation equals crop consumption plus irrecoverable losses. The total non-consumed volume is field-applied volume minus the total consumed volume.

12. The historically consumed and field-applied volumes have been calculated with the inputs shown in Table 3, following the methods described in FOF 11 and ARM 36.12.1902(16). The Applicant provided the irrigation method during the preapplication meeting on November 24, 2025, Form 606P-A. The Applicant provided the field slope (3%) and field efficiency (60%) as follow-up information received on January 30, 2026. The field application volume is calculated by dividing the crop consumption by field efficiency.

Table 3: Historical use of Statement of Claim 42K 175169-00

Irrigation Method	Acres	IWR (in)[1]	Mgmt. Factor[2]	Field Efficiency	Crop Consumption (AF)	Field Applied Volume (AF)	IL[3] (AF)	Total Consumed Volume (AF)
Furrow-Flood	98.8	26.68	0.545	0.60	119.7[4]	199.5[4]	10.0[4]	129.7[4]

[1]Miles City IWR Weather Station – Flood Irrigation, Wheeline & Handline Seasonal ET inches
[2]Custer County Historical Use Management Factor (1964-1973)
[3]Irrevocable losses are 5% of the field application volume.
[4]Rounded to the tenths place

13. Per ARM 36.12.1902(10), the historically diverted volume is equal to the sum of the historical field application volume (historically consumed volume divided by on-farm efficiency) and the historical conveyance loss volume. Water was historically pumped from the river into a pipeline that conveyed water directly to the field. Therefore, there are no conveyance losses attributable to Statement of Claim 42K 175169-00, and the historical diverted volume is equal to the historical field-applied volume.

14. The Department finds the following historical use, as shown in Table 4.

Table 4: Summary of historical use findings for Statement of Claim 42K 175169-00

Water Right No.	Priority Date	Purpose (Max Acres)	Place of Use	Point of Diversion	Max Flow Rate	Consumed Volume	Diverted Volume
42K 175169-00	May 1, 1910	Irrigation (98.8)	83.8 acres in W2 Sec. 14 & 15.0 acres in E2E2SE Sec. 15 T8N, R47E, Custer County	SWSWSW Sec. 14, T8N, R47E, Custer County	6.68 CFS	129.7[1] AF	199.5[1] AF

[1]Rounded to the tenths place

ADVERSE EFFECT

FINDINGS OF FACT

15. The Applicant can and will shut down their pump whenever a valid call is made or when their water rights are out of priority.

16. The Applicant proposes to move the historical point of diversion located on a side channel of the Yellowstone River in the SWSWSW Sec. 14, T8N, R47E, Custer County to a point of diversion located on the mainstem of the Yellowstone River in the SWNWSE Sec. 14, T8N, R47E, Custer County, approximately 0.86 river miles downstream. The Applicant does not

propose to make any other changes to the water right. The Applicant proposes to use Statement of Claim 42K 175169-00 as shown in Table 5.

Table 5: Summary of the proposed use of Statement of Claim 42K 175169-00

Water Right No.	Proposed Purpose	Proposed Irrigated Acres	Proposed Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Proposed Consumed Volume	Proposed Diverted Volume
42K 175169-00	Irrigation	98.8	83.8 acres in W2 Sec. 14 & 15 Acres in E2E2SE Sec. 15 T8N, R47E, Custer County	SWNWSE Sec. 14, T8N, R47E, Custer County	6.02 CFS	129.7[1] AF	199.5[1] AF

[1]Rounded to the tenths place

17. As the only change in this application is a change in the point of diversion, the historical consumptive use and the historical diverted volume are equal to their respective proposed values, summarized in Table 6.

Table 6: Volumes associated with historical and proposed use

Purpose	Historically Consumed Volume	Proposed Consumptive Volume	Historically Diverted Volume	Proposed Diverted Volume
Furrow-Flood Irrigation	129.7[1] AF	129.7[1] AF	199.5[1] AF	199.5[1] AF

[1]Rounded to the tenths place

18. Return flows are analyzed when there is a surface water irrigation change in the place of use or purpose. Therefore, return flows were not analyzed for this change application. (ARM 36.12.1303)(3)(a)).

19. The Department has considered an area of potential adverse effect on the Yellowstone River. As the historical point of diversion is located on a side channel, the reach of the area of potential adverse effect was determined to begin at the head of the channel, a point at which the channel broke away from the mainstem in the NWSE Sec. 22, T8N, R47E, Custer County and continue approximately 1.62 river miles downstream on the mainstem to the proposed point of diversion in the SWNWSE Sec. 14, T8N, R47E, Custer County.

20. There are two (2) active water rights within the area of potential adverse effect, shown in Table 7: (1) Provisional Permit 42K 30071035, which was taken at face value; and (2)

Statement of Claim 42K 175255-00, which does not have a defined volume. For the purpose of evaluating adverse effects, the volume was calculated using the Department's standard practice of multiplying the number of acres by the lower range of 60% irrigation efficiency for the climatic region (ARM 36.12.115). Statement of Claim 42K 175255-00 is in climatic area one. The volume was calculated to be 118.25 AF (43 acres x 2.75 AF/AC = 118.25 AF).

Table 7: Water Rights within the Area of Potential Adverse Effect

Water Right No.	Owners Name	Purpose	Period of Diversion	Acres	Flow Rate GPM	Flow Rate CFS	Volume	Priority Date
42K 30071035	Carla Boucher; James Boucher	Lawn And Garden	05/01 to 09/30	0.29	15.0	0.03342	0.73	10/21/2014
42K 175255-00	Montana Dept Of Fish Wildlife & Parks	Irrigation	05/01 to 09/01	43	100.0	0.222801	118.25*	12/31/1922

*Calculated by the Department

21. Statement of Claim 42K 175169-00 (Applicant) is senior to both water rights within the area of potential adverse effect, Provisional Permit 42K 30071035 and Statement of Claim 42K 175255-00. While both water rights are in the area of potential adverse effect, Provisional Permit 42K 30071035 was downstream of the location where the side channel broke away from the mainstem and was not historically subject to call. Statement of Claim 42K 175255-00 has a historical POD on the side channel of the Yellowstone River, upstream of the historical point of diversion, in the NENE Section 22, and a historical transitory point of diversion along the NW Section 23, T8N, R47E, and has historically been subject to call by Claim 42K 175169-00. If this application for change is authorized, the point of diversion for Statement of Claim 42K 175169-00 will be located on the mainstem, downstream of the location where the channel breaks from the mainstem, and downstream of Provisional Permit 42K 30071035. If this application for change is authorized, Claim 42K 175169-00 will be permitted to make call on Provisional Permit 42K 30071035 usage; and permitted to make call on Claim 175255-00 usage.

22. The Applicant does not propose to make changes to the method of irrigation, the acres irrigated, the place of use, the period of diversion, the period of use, or to add storage. Therefore, there is no change in diverted or consumed volumes for Statement of Claim 42K 175169-00.

23. The Department finds that the proposed change may create an adverse effect on existing water rights the Applicant could not previously make a call on.

24. Should this appropriation be authorized, the Department will add the following condition:

IMPORTANT INFORMATION

IN THE EVENT OF INADEQUATE SUPPLY OF WATER FROM THE SOURCE, THE APPROPRIATOR MAY NOT MAKE A CALL ON STATEMENT OF CLAIM 42K 175255-00 OR PROVISIONAL PERMIT 42K 30071035.

BENEFICIAL USE

FINDINGS OF FACT

25. Under this proposed change, the Applicant will continue to irrigate the existing 98.8 acres, located in the W2 Sec. 14 and the E2E2SE Sec. 15, of T8N, R47E, Custer County, at the modified flow rate of 6.02 CFS and the historically diverted volume of 199.5 AF/YR, from April 1 to October 1. Irrigation is a recognized beneficial use under the Montana Water Use Act §85-2-102(5), MCA. The period of diversion and period of use are within Department standards of March 15 to November 15 for climatic area 1.

26. The Applicant's volume is below the Department's standard of 2.75-3.19 AF/AC for 60% efficient irrigation for furrow flood irrigation in climatic area 1, under ARM 36.12.115. The Applicant's volume equates to 2.0 AF/AC (199.5 AF / 98.8 AC = 2.02 AF/AC). The Applicant has historically raised alfalfa and hay with a field-applied volume of 2.0 AF/AC.

27. The Department finds that the modified flow rate of 6.02 CFS and the historically diverted volume of 199.5 AF/YR, during the historical period of diversion and the historical period of use, to furrow-flood irrigate 98.8 acres, is a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

28. The proposed diversion consists of a Riverscreen and Cornell 6YBQ-CC (Close-Coupled) electric pump with a 2,700 GPM (6.02 CFS) capacity, which is less than the historically diverted flow rate of 6.68 CFS. From the pump site, water is piped through a 12-inch 80-pound

underground pipe. This pipe leads to three separate headgates that tie into a 12-inch above-ground gated irrigation pipe that runs along the proposed place of use.

29. The proposed flow rate on the application form is the historical flow rate of 6.68 CFS. The proposed means of diversion has a capacity of 6.02 CFS, which is less than the proposed flow rate. The Department finds that the Applicant has not proven by a preponderance of the evidence that the proposed system can divert the proposed flow rate.

30. The Department finds the proposed means of diversion and conveyance to be adequate to divert the modified flow rate of 6.02 CFS and deliver water to the proposed place of use.

POSSESSORY INTEREST

FINDINGS OF FACT

31. The Applicant owns the property where water is to be put to beneficial use, which demonstrates possessory interest. The Department finds the possessory interest criterion to be met.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

32. 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]

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

34. 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

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

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

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 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]

[3]A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under § 85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. Section 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 as they existed at the time they first made their appropriation); Application for Water Rights in Rio

35. 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]

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

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).

37. 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).

38. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of 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.

39. 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).

40. 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).

41. 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).

42. 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. ARM 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 ARM 36.12.1902. (FOF No. 11).

43. If an Applicant seeks 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").

44. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 42K 175169-00 to be a diverted volume of 199.5 AF, a historically consumed volume of 129.7 AF, and a flow rate of 6.68 CFS. (FOF Nos. 7-14)

45. 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. 15-24)

BENEFICIAL USE

46. 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).

47. Applicant proposes to use water for irrigation, which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 199.5 AF of diverted volume and 6.02 CFS of water requested

are the amounts needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 25-27).

ADEQUATE MEANS OF DIVERSION

48. 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).

49. 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. 28-30)

POSSESSORY INTEREST

50. 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.

51. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 31).

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. 42K 30172434, for Statement of Claim 42K 175169-00, should be GRANTED IN MODIFIED FORM subject to the following.

The Department determines the Applicant may divert water from the Yellowstone River, by means of a pump, from April 1 to October 1, at the modified flow rate of 6.02 CFS and historically diverted volume of 199.5 AF, from a point in the SWNWSE Sec. 14, T8N, R47E, Custer County, for Irrigation use from April 1 to October 1. The place of use is located in the W2 Sec. 14 and the E2E2SE Sec. 15, T8N, R47E, Custer County. The Applicant may irrigate 98.8 acres.

The application will be subject to the following conditions, limitations, or restrictions:

IMPORTANT INFORMATION

IN THE EVENT OF INADEQUATE SUPPLY OF WATER FROM THE SOURCE, THE APPROPRIATOR MAY NOT MAKE A CALL ON STATEMENT OF CLAIM 42K 175255-00 OR PROVISIONAL PERMIT 42K 30071035.

DATED this 23nd day of September 2026

Heidi Christison

Heidi Christison
Billings Regional Manager
Department of natural resources
and conservation
Water Resources Division
1371 Rimtop Drive
Billings, MT, 59105

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 23nd day of September, 2026, by first class United States mail.

Swope Ranch LLC
1110 Kinsey Rd
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