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

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APPLICATION TO CHANGE WATER RIGHT NO. 43O 30161500 BY SUNLIGHT RANCH COMPANY	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On September 8, 2023, Sunlight Ranch Company (Applicant) submitted Application to Change Water Right No. 43O 30161500 to change Water Right Claim No. 43O 208965-00 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. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated February 13, 2024. The Applicant responded with information dated June 6, 2024. The Application was determined to be correct and complete as of September 4, 2024.

The Department met with the Applicant's attorneys, Laurence Martin and Martin Smith of Felt Martin PC, consultant Craig Hossfield, and ranch manager Bret Barney on August 17, 2023, for a pre-application meeting. Mark Elison, Christine Schweigert, Veronica Corbett, and Jill Lippard were present for the Department. An Environmental Assessment for this Application was completed on December 18, 2024.

INFORMATION

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

Application as filed:

- Application to Change Water Right, Form 606
- Narrative responses to Criteria Assessment questions
- Calculations of historical and proposed consumptive use and diverted volume
- Maps:
    - USDA FSA Maps showing irrigated cropland associated with the place of use, dated September 19, 2022
    - USGS Aerial Photo dated October 4, 1968, showing historical use including point of diversion, means of conveyance, and historical place of use

- Undated aerial imagery showing proposed use including points of diversion, means of conveyance, and proposed place of use

Information Received after Application Filed

- Letter dated October 19, 2023, from Laurence R. Martin, attorney, to Jill Lippard, Water Resource Specialist, regarding notice sent to other users on the ditch and the amount of time needed to complete the proposed changes
- Email dated October 31, 2023, from Martin S. Smith, attorney, to Jill Lippard with attached table to clarify the historical place of use and attached map depicting the acres of the historical place of use to be retained, acres to be added, and acres to be removed through the proposed change
- Deficiency response dated June 5, 2024, including additional information about the proposed means of diversion on the south bank of the Little Bighorn River, about the total number of acres which are proposed through this change, and about acres which appear irrigated on land not owned by the Applicant

Information within the Department's Possession/Knowledge

- DNRC Change Application 43O 30161500 Irrigation Change Application Technical Report, dated September 4, 2024
- Water right file for Statement of Claim 43O 208965-00
- Change Authorization No. 43O 20896500
- Water right file for Statement of Claim 43O 30146954
- Change Authorization No. 43O 30152542
- Master's Report for Water Court Case 43O-16, dated December 12, 1998
- DNRC Water Rights database
- Big Horn County Water Resources Survey, dated May 1947
- USGS aerial photograph ARA001250111920, dated September 15, 1953, from USGS Earth Explorer
- USGS aerial photograph ARA001250183059, dated October 27, 1953, from USGS Earth Explorer
- USDA 1979 aerial imagery; DNRC GIS layer
- Crow Tribal Water Right

- 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 or may be contained within the Montana DNRC Change Application Manual. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents:
    - Change Application Manual
    - Change in Method of Irrigation Memo dated December 2, 2015
    - Development of Standardized Methodologies to Determine Historic Diverted Volume Memo dated September 13, 2012

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). NOTE: Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; IWR means irrigation water requirement; POD means point of diversion; and POU means place of use.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes changes to the point of diversion and place of use for Statement of Claim 43O 208965-00 to match the current use and irrigation practices of the water right. Statement of Claim 43O 208965-00 was originally used for 54.17 CFS to flood and sprinkler irrigate 2,166.9 AC with a priority date of May 7, 1868. The period of diversion and period of use were January 1 to December 31. The source was the Little Bighorn River and water was transported using the Antler Land Company Ditch (Antler Ditch). The POD was the Antler Ditch headgate in the SWSWSW Section 17, Township 9 South, Range 34 East, Big Horn County. The POU was generally 2,166.9 AC in Section 36, T8S, R34E, and Sections 1, 2, 3, 8, 9, 10, 11, 16 and 17, T9S, R34E. This water right is located approximately 50 miles south of Hardin, MT on the Crow Indian Reservation.

2. An amendment was filed March 20, 1998, to clarify the legal description of the place of use. However, the amendment duplicated acres in Sec. 3, T9S, R34E, Big Horn County. A total of

301.3 irrigated acres were described in the amendment on page one as 146.3 AC in the SE Sec. 3, T9S, R34E, and on page two as 131 AC in the SE Sec. 3, T9S, R34E. A Change Application for Statement of Claim 43O 208965-00 was filed on April 4, 1998, and a Change Authorization was issued on July 27, 1998. This Change Authorization removed 51.3 AC from the existing POU and added 49 new acres to the POU (7 AC in Sec. 3, T9S, R34E; 42 AC in Sec. 9, T9S, R34E), to total 2,164.6 AC of irrigation. 301.3 irrigated acres in Sec. 3, T9S, R34E. The accidentally duplicated acres from the 1998 amendment were retained through this change. The Change Authorization was certified on February 21, 2024. This error was corrected through verification to 170.3 AC of irrigation in the SE Sec. 3, T9S, R34E. This Change Authorization authorized a final total of 2,033.6 AC of irrigation.

3. A preliminary decree was issued in Basin 43O, Little Bighorn River, including Statement of Claim 43O 208965-00, on March 25, 2010. A Master's Report filed on December 12, 2019, for Water Court Case 43O-161 amended the place of use to reflect pre-1973 use, changed the claim to 2,031.6 AC and 50.79 CFS, and changed the priority date to June 11, 1914, as agreed to by the parties in a stipulation filed August 28, 2019. Implied claim 43O 30146954 was authorized and generated by the Master's Report based on information in Statement of Claim 43O 208965-00. Statement of Claim 43O 30146954 is for stock use from the Antler Ditch. After the creation of Statement of Claim 43O 30146954, the period of use and period of diversion of Statement of Claim 43O 208965-00 was reduced to April 1 to October 31, per DNRC standards for the climatic area. The Applicant submitted information for the Department to consider in historical use and based on Department standard practice, historical use was reanalyzed. Using information from the Master's Report and stipulations from Water Court Case 43O-161, the Departments finds the Post Decree version of this water right represents the most accurate description of the water right as it existed prior to July 1, 1973. The water right shown in Table 1 and Table 2 reflect this Post Decree version of the water right and the water right as it is proposed to be changed through this application.

Table 1: Water Rights Proposed for Change

Water Right No.	Priority Date	Flow Rate	Volume	Purpose	Acres	Period Of Use	Place Of Use	Point Of Diversion
43O 208965-00	June 11, 1914	50.79 CFS	The amount historically put to beneficial use	Irrigation	2,031.6	April 1 to October 31	See Table 2	SWSWSW Section 17 T09S R34E Big Horn County

Table 2: Place of Use of Statement of Claim 43O 208965-00

POU#	Acres	Quarter Sections	Section	Township	Range	County
1	2.12	SWSE	25	8S	34E	Big Horn
2	33.1	E2SE	35	8S	34E	Big Horn
3	483.17		36	8S	34E	Big Horn
4	63.25	N2NE	1	9S	34E	Big Horn
5	131.73	NW	1	9S	34E	Big Horn
6	16.04	N2SE	1	9S	34E	Big Horn
7	63.96	N2SW	1	9S	34E	Big Horn
8	27.81	NENE	2	9S	34E	Big Horn
9	34.2	NWSE	2	9S	34E	Big Horn
10	4.68	SESE	2	9S	34E	Big Horn
11	113.97	SW	2	9S	34E	Big Horn
12	115.9	SE	3	9S	34E	Big Horn
13	6.74	SENE	3	9S	34E	Big Horn
14	12.35	SESW	3	9S	34E	Big Horn
15	2.05	SESE	8	9S	34E	Big Horn
16	121.19	SE	9	9S	34E	Big Horn
17	7.8	SENE	9	9S	34E	Big Horn
18	85.4	SW	9	9S	34E	Big Horn
19	161.25	NE	10	9S	34E	Big Horn
20	85.18	NW	10	9S	34E	Big Horn
21	68.31	SE	10	9S	34E	Big Horn
22	126.77	SW	10	9S	34E	Big Horn
23	22.82	NE	11	9S	34E	Big Horn
24	111.58	NW	11	9S	34E	Big Horn
25	0.12	NWSW	11	9S	34E	Big Horn
26	63.98	NE*	16	9S	34E	Big Horn
27	8.08	NWNE	16	9S	34E	Big Horn
28	51.5	NE	17	9S	34E	Big Horn
29	6.51	E2NW	17	9S	34E	Big Horn
TOTAL	**2,031.6**					

*POU 26 should be 63.98 AC in the NW Sec. 16 not in the NE Sec. 16 based on examination of historical aerial imagery and based on acres identified on previous Change Authorization 43O 20896500. It appears this may have been a clerical error in the stipulation and Master's Report issued by the Water Court. The Applicant proposes changes to the place of use in Section 16 through this Change Application, so the correct place of use can be addressed through the change if authorized. The Applicant may file an Amendment with the Water Court to correct the Post Decree version of the water right before Final Decree.

4. This water right is not supplemental to any other water rights. Statement of Claim 43O 30146954 is for stock use from the Antler Ditch. Statements of Claim 43O 208965-00 and 43O 30146954 are associated because they share the same POD and means of conveyance through the Antler Ditch.

5. Land owned by the Applicant may be a place of use for the Crow Tribal Right and the Applicant may be able to use that right. However, the Applicant currently does not use the Crow Tribal Right and relies entirely on their private rights to irrigate the historical and proposed place of use in this application.

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicant proposes to add a POD in the NWSENW Sec. 16, T9S, R34E. The historical POD from the Antler Ditch headgate in the SWSWSW Sec. 17, T9S, R34E will continue to be used. The proposed PODs are shown in Table 3. The Applicant proposes to remove 195.6 AC of irrigation within the historical POU, generally in Sections 1, 2, 3, 10, 11, and 16, T9S, R34E, and Sections 35 and 36, T8S, R34E, Big Horn County. Under the proposed change, 1,836.0 AC within the historical POU footprint will remain. The Applicant proposes to add 105.5 AC of irrigation outside of the historical POU. The new POU includes 27.9 AC of pivot irrigation on the Antler Ditch in Sections 2, 3, 10, 16, and 17, T9S, R34E, and in Sections 35 and 36, T8S, R34E, and 77.6 AC of irrigation to the south of the Little Bighorn River in Section 16, T9S, R34E. The 77.6 AC south of the Little Bighorn River includes 62.2 AC of pivot irrigation and 15.4 AC of flood irrigation. The total acres irrigated historically under this water right prior to this change are 2,031.6 AC. The total acres proposed for irrigation are 1,941.5 AC. The proposed POU is shown in Table 4.

Table 3. Proposed Points of Diversion

POD#	Quarter Sections	Section	Township	Range	County
1	SWSWSW	17	9S	34E	Big Horn
2	NWSENW	16	9S	34E	Big Horn

Table 4. Proposed Place of Use

POU#	Acres	Gov't Lot	Quarter Section	Section	Township	Range	County
1	27.7		E2SE	35	8S	34E	Big Horn
2	107.6		NE	36	8S	34E	Big Horn
3	63.8		NW	36	8S	34E	Big Horn
4	127		SE	36	8S	34E	Big Horn
5	130.7		SW	36	8S	34E	Big Horn
6	72.7		NE	1	9S	34E	Big Horn
7	153.5		NW	1	9S	34E	Big Horn
8	1.7		NWNWSE	1	9S	34E	Big Horn
9	36		SW	1	9S	34E	Big Horn
10	34.7		NENE	2	9S	34E	Big Horn
11	34.2		NWSE	2	9S	34E	Big Horn
12	95.4		SW	2	9S	34E	Big Horn
13	1.1	5	S2SENE	3	9S	34E	Big Horn
14	132.5		SE	3	9S	34E	Big Horn
15	6.9		E2SW	3	9S	34E	Big Horn
16	0.5		E2SESE	8	9S	34E	Big Horn
17	17.1		S2NE	9	9S	34E	Big Horn
18	1.5		SESENW	9	9S	34E	Big Horn
19	141.8		SE	9	9S	34E	Big Horn
20	99.3		SW	9	9S	34E	Big Horn
21	154.6		NE	10	9S	34E	Big Horn
22	55.7		NW	10	9S	34E	Big Horn
23	37		SE	10	9S	34E	Big Horn
24	134.4		SW	10	9S	34E	Big Horn
25	0.9		NWNWNE	11	9S	34E	Big Horn
26	89.3		NW	11	9S	34E	Big Horn
27	69.6		NE	16	9S	34E	Big Horn
28	57.7		NW	16	9S	34E	Big Horn
29	0.4		NENWSE	16	9S	34E	Big Horn
30	50.4		NE	17	9S	34E	Big Horn
31	5.8		NESENW	17	9S	34E	Big Horn
TOTAL	**1,941.5**						

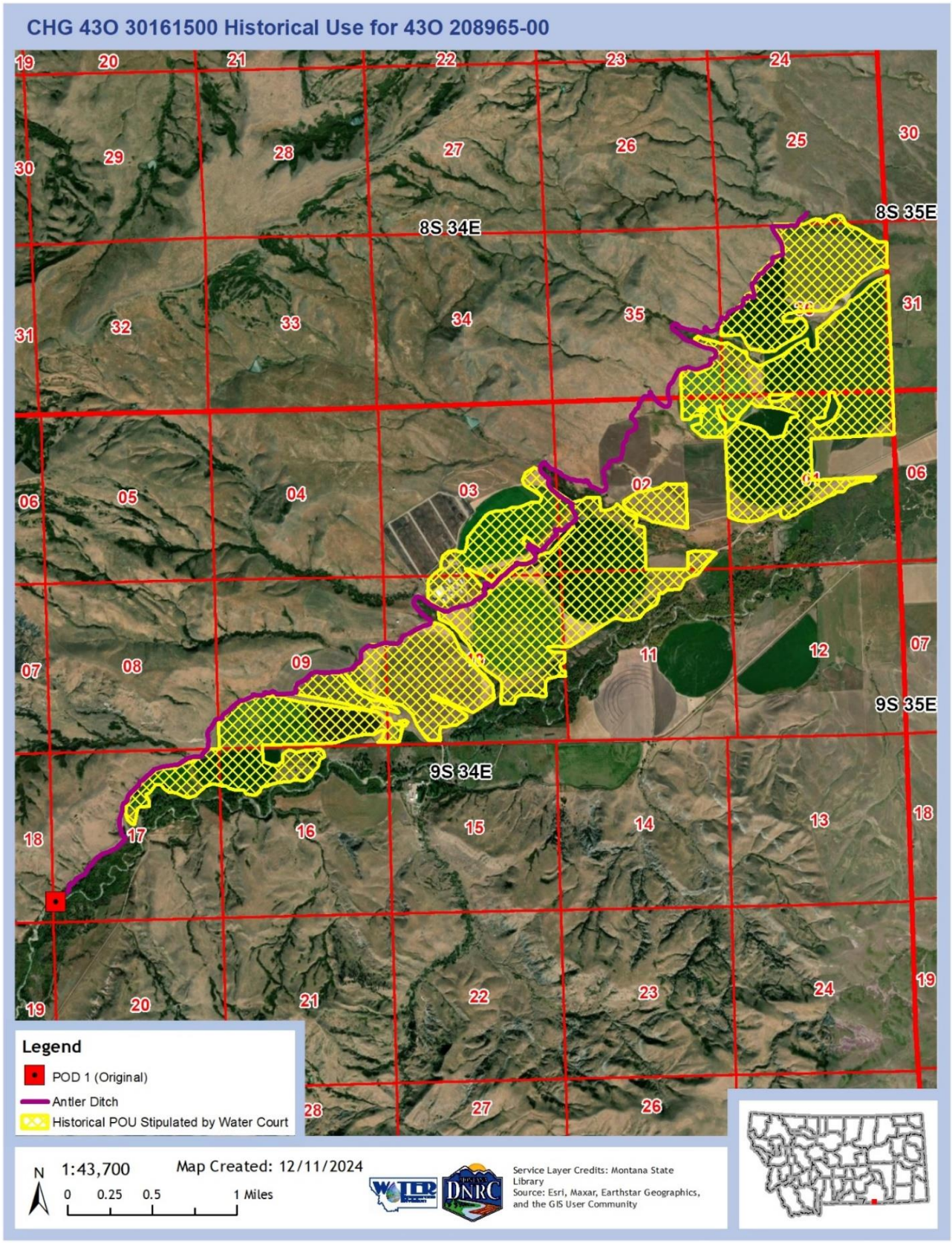

Figure 1. Historical POU and POD for Statement of Claim 43O 208965-00

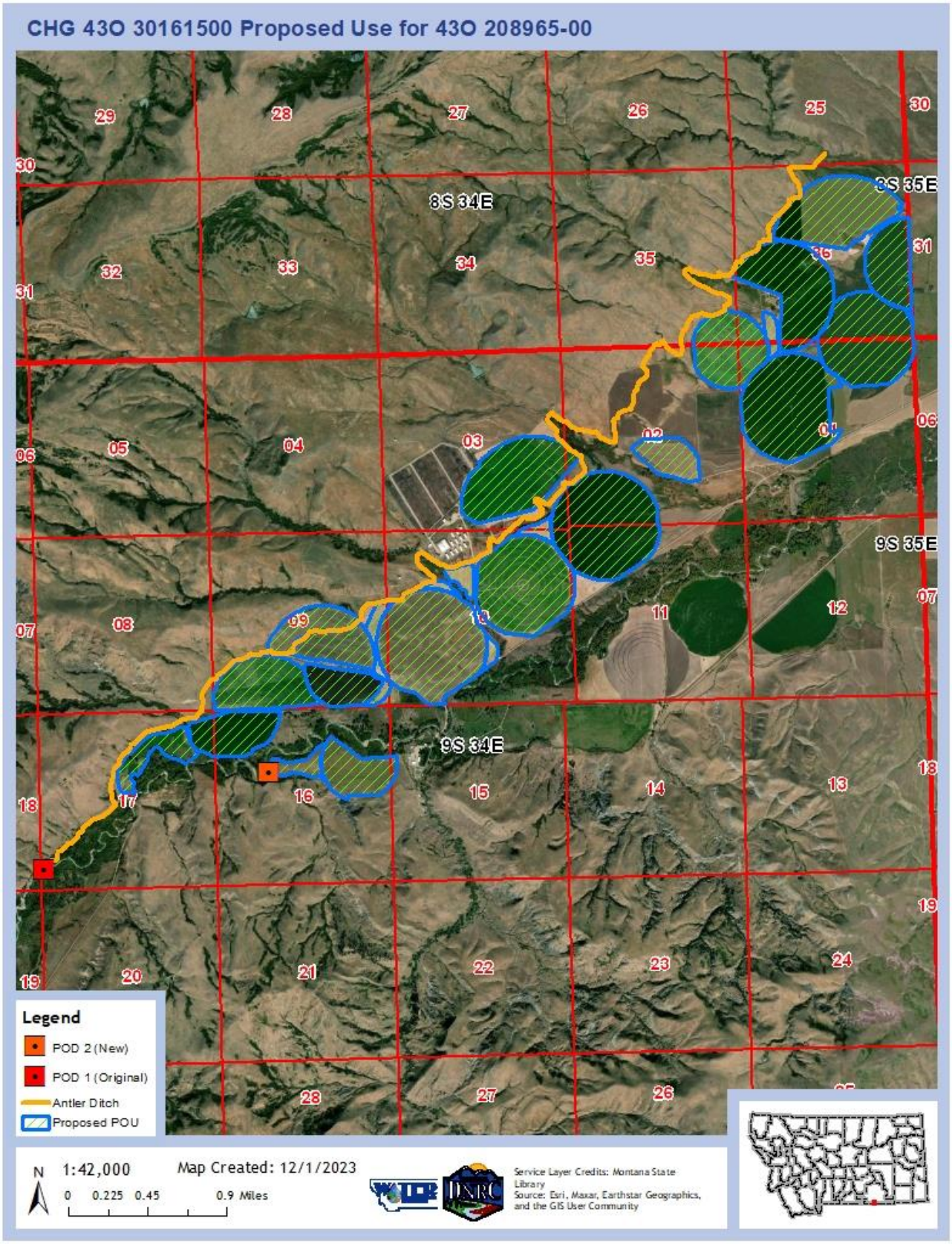

Figure 2. Proposed POU and PODs for Change Application 43O 30161500

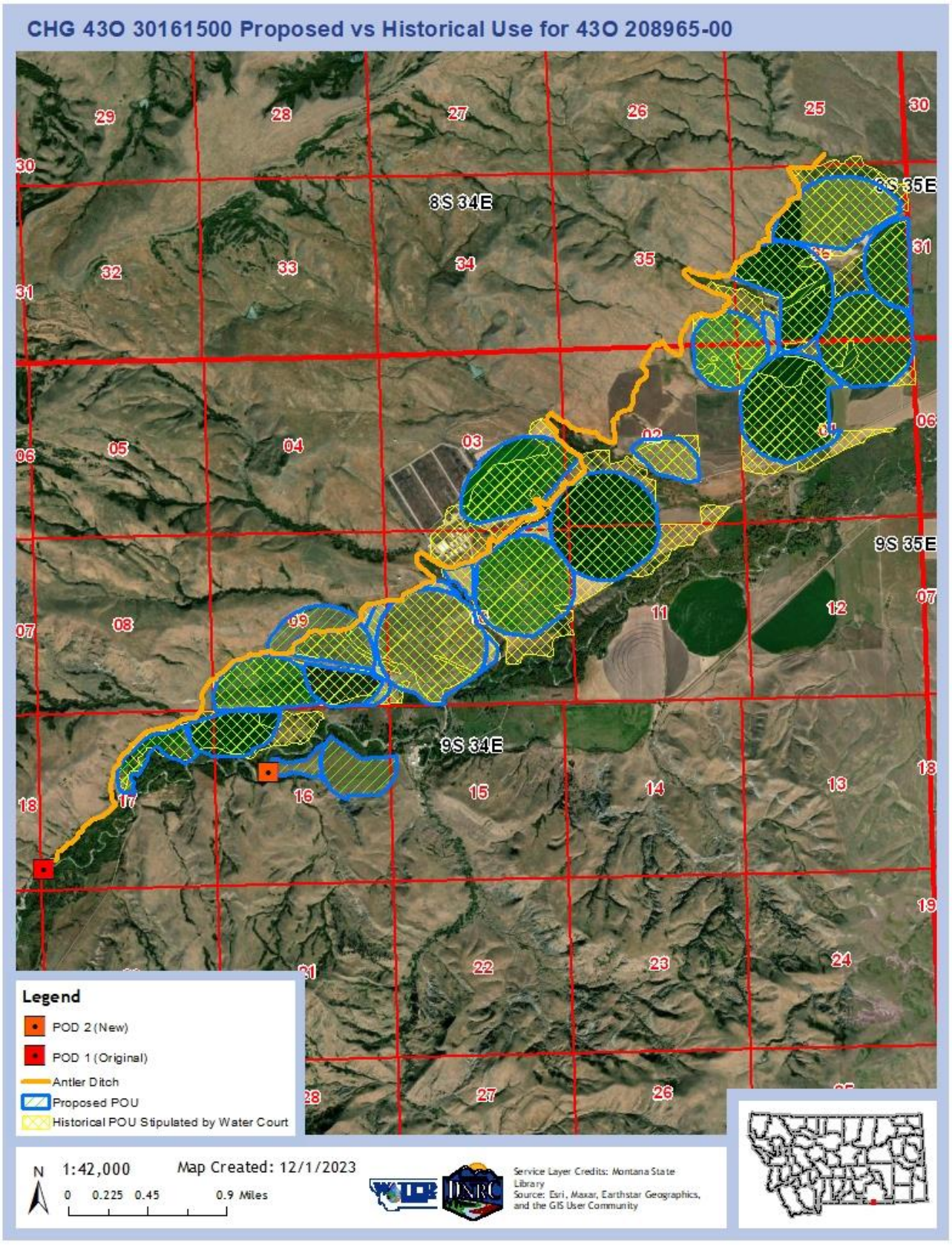

Figure 3. Proposed and Historical POU and PODs for Change Application 43O 30161500

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 Statement of Claim 43O 208965-00 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. Statement of Claim 43O 208965-00 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).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

12. Statement of Claim 43O 208965-00 historically diverted water from the Little Bighorn River. A preliminary decree for this basin, 43O Little Bighorn River, was issued in March 2010, which included this water right, and an interlocutory decree was issued in 2023. Statement of Claim 43O 208965 had a priority date of May 7, 1868, and a period of use of January 1 to

December 31. During claims examination by the DNRC, an issue remark was added that the claimed period of use exceeds the usual period of use for the claimed purpose. The original claim lists 1,563.4 AC and a maximum flow rate of 1,718 miner's inches. An amendment was filed March 20, 1998, which modified the acres to 2,166.9 AC and the flow rate to 54.17 CFS. These values are considered the original claim.

13. A Change Authorization for Statement of Claim 43O 208965-00 was issued in 1998, which removed 51.3 AC from the existing POU and added 49 new acres to the POU, to total 2,164.6 AC of irrigation. The Change Authorization was certified on February 21, 2024, during which a clerical error in the number of acres for one of the places of use was identified. After certification, the Change Authorization authorized a total of 2,033.6 AC of irrigation. The original flow rate, priority date, period of diversion, and period of use were retained in the Change Authorization.

14. A Master's Report filed on December 12, 2019, for Water Court Case 43O-161 amended the place of use to reflect pre-1973 use, changed the acreage to 2,031.6 AC, and changed the priority date to June 11, 1914, as agreed to by the parties in a stipulation filed August 28, 2019. The Master's Report also changed the period of diversion and period of use on Statement of Claim 43O 208965-00 to April 1 to October 31 per DNRC standards for irrigation in ARM 36.12.112 and created implied claim 43O 30146954 for stock use from Antler Ditch with a period of diversion and period of use from January 1 to December 31. The Department reanalyzed historical use based on Applicant-submitted information from the Master's Report and stipulations from Water Court Case 43O-161. The Departments finds the Post Decree version of this water right represents the most accurate description of the water right as it existed prior to July 1, 1973. The water right as shown in Table 1 and Table 2 reflects this Post Decree version of the water right and the water right proposed to be changed through this application.

15. The examination report from DNRC dated October 7, 2008, found 2,090.22 AC irrigated on the Big Horn County Water Resources Survey. However, the 2008 examination included acres on property that was not owned by the Applicant. The number of irrigated acres supported by the Big Horn WRS are 2,003.99 AC and do not include any property that is not owned by the Applicant. Mapping of the acres using Esri ArcGIS software with USGS aerial imagery from 1953 found 2,038.49 AC. Mapping of the acres using Esri ArcGIS software with USDA 1979 aerial imagery found 2,076.47 AC. Based on the reanalysis of historical use, the Department finds the

maximum acres for this water right are 2,031.6 AC as reflected in the stipulation, supported by review of historical aerial imagery, and representing the most accurate historical place of use. The 2,031.6 AC of the historical POU are shown in Table 2 and are generally in Secs. 25, 35, and 36, T8S, R34E, and Sections 1, 2, 3, 8, 9, 10, 11, 16, and 17, T9S, R34E.

16. The Applicant opted to use the Department methodology in ARM 36.12.1902 to calculate the historical consumed volume and historical diverted volume, including conveyance losses. Based on 2,031.6 AC of flood irrigation, an Irrigation Water Requirement (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%, the historical consumptive volume (HCV) for this right is 1,799.9 AF (2,031.6 AC x 19.19 in/12 in/ft x 0.554). The Department will use 55% efficiency based on contour ditch irrigation with 1.5-3.0% design slope for the purpose of evaluating historical consumptive use, as provided by the Applicant. Using a 55% efficiency, the field applied volume is 3,272.5 AF (1,799.9 AF/0.55). The field applied volume is equivalent to 1.61 AF/AC (3,272.5 AF / 2,031.6 AC). The Department adds 5% of field applied volume to account for irrecoverable losses in flood irrigation systems. The irrecoverable losses are 163.6 AF (3,272.5 AF x 0.05). The Department finds the total historical consumptive volume including irrecoverable losses is 1,963.5 AF (1,799.9 AF + 163.6 AF). The historical consumptive volume is equivalent to 0.97 AF/AC (1,963.5 AF / 2,031.6 AC).

Table 5. Historically consumed volume (HCV) and field applied volume for the historical place of use

Big Horn County IWR Flood Irrigation, Wheeline & Handline Seasonal ET	**Management Factor Percentage 1964-1973 (Pre-July 1, 1973 HCU)**	**Historically Irrigated Acres**	**HCV *(Excluding IL)***	**On- Farm Efficiency**	**Field Applied Volume (HCV/% Efficiency)**	**Historical Irrecoverable Losses (IL):** *Flood, 5%*	**HCV *(Including IL)***
19.19 in	55.4%	2,031.6 AC	1,799.9 AF	55%	3,272.5 AF	163.6 AF	1,963.5 AF

17. The historical POD for Statement of Claim 43O 208965-00 is the Antler Ditch headgate in the SWSWSW Sec. 17, T9S, R34E, Big Horn County. Water is conveyed through the Antler Ditch to fields for irrigation. Statement of Claim 43O 208965-00 is the only active state-based irrigation water right on the Antler Ditch. Information indicates that some tribal water rights also use the

Antler Ditch as a means of conveyance. However, there is no information for the Department to quantify those rights. The Applicant provided written notice of this proposed change to the USA in Trust for Crow Tribe and Wailes Yellowtail as potential users of the Anter Ditch. The Big Horn County WRS states that the Antler Ditch is about six (6) miles long and is used to convey irrigation water to 2,234.71 AC. As measured by Esri ArcGIS software, the Antler Ditch appears to be 8.8 miles long and travels northeast to its terminus in an Unnamed Tributary of the Little Bighorn River in the SW Sec. 25, T8S, R34E on land owned by the Applicant. Change Application 43O 30152542 was recently authorized for a stock claim owned by the Applicant on the Antler Ditch. The Applicant provided ditch measurements for that application. Using Manning's Equation ($Q = 1.5/n \times A \times R^{2/3} \times S^{½}$) and ditch dimensions provided by the Applicant in that previous application (width = 10 feet, depth = 2 feet, slope = 0.004, Manning's n value = 0.025), the ditch capacity was estimated to be 95 CFS. The ditch dimensions provided by the Applicant for this current Change Application (top width = 17.33, bottom width = 9.33 feet, and depth = 1.17 feet) differ from the dimensions used on the preceding change. Since the Department made a previous determination on the capacity of Antler Ditch, the ditch dimensions used for previous change 43O 30152542 will be used to evaluate ditch capacity and conveyance losses on the current proposed Change Application.

18. Statement of Claim 43O 208965-00 and Change Authorization 43O 20896500 were for 54.17 CFS. The Post Decree version of Statement of Claim 43O 208965-00 as stipulated in Water Court Case 43O-161 and as described in the Water Master's Report identify a flow rate of 50.79 CFS for Statement of Claim 43O 208965-00. Information submitted with Change Application 43O 30161500 estimated the capacity of the Antler Ditch as 110 CFS using Culvert Studio for modeling. This modeling technique provided a similar result to the estimate of the ditch capacity arrived at using Manning's Equation. Both estimates support that Antler Ditch is capable of carrying the 50.79 CFS used for Statement of Claim 43O 208965-00. The flow rate based on the capacity of the ditch equates to 11.22 GPM/AC. The DNRC adjudication standard for statements of claim is 17 GPM/AC. The Department finds the Antler Ditch is capable of carrying the flow rate of 50.79 CFS used in Statement of Claim 43O 208965-00 and proposed for Change Application 43O 30161500.

19. Water was historically diverted for irrigation from April 1 to October 31 of each year. Statement of Claim 43O 208965-00 originally had a period of use of January 1 to December 31 of each year. Implied claim 43O 30146954 for stock use from Antler Ditch with a period of diversion and period of use from January 1 to December 31 was created based on a Master's Report filed on December 12, 2019, for Water Court Case 43O-161. The period of diversion and period of use for Statement of Claim 43O 208965-00 was amended to April 1 to October 31 per DNRC standards for irrigation in ARM 36.12.112. Water was diverted in the Antler Ditch year-round, with irrigation water being diverted for approximately 214 days per year based on the period of diversion. The Applicant used water for 138 days per year to irrigate the number of acres and achieve approximately three cuttings of grass, alfalfa, corn, barley and mixed cover crops.

20. Statement of Claim 208965-00 is not supplemental to any other water rights. Land owned by the Applicant may be a place of use for the Crow Tribal Right and the Applicant may be able to use that right. However, the Applicant currently does not use the Crow Tribal Right and relies entirely on their private rights to irrigate the historical and proposed place of use in this application. Statement of Claim 43O 208965-00 is the only active state-based irrigation water right on the Antler Ditch. Information indicates that some tribal water rights also use the Antler Ditch as a means of conveyance. However, there is no information for the Department to quantify those rights. All conveyance losses were assigned to Statement of Claim 43O 208965-00. Conveyance loss is defined as the portion of water diverted at the headgate that does not arrive at the irrigated place of use due to seepage and evapotranspiration from the ditch. Based on GIS measurements, the entire length of the ditch from the headgate to the end of the last field irrigated under 43O 208965-00 is approximately 46,531.48 feet (8.81 miles). The Department broke the ditch into three segments.

21. The first segment is 18,334.23 feet in length and extends from the headgate in the SWSWSW Section 17 along the upper border of the fields in Sections 9, 10, 16, and 17. Conveyance losses for this segment of ditch were calculated using the full flow rate of 50.79 CFS. The second segment is 7,616.46 feet long beginning in the NW Section 10 and running through fields in Sections 2, 3, and 10. Conveyance losses were not calculated for this segment of ditch because fields on both sides of the ditch are being served by the ditch so those losses would be accounted for in the consumptive use calculations. The third segment is 20,580.79 feet beginning

in Govt Lot 5 / SENE Section 3 where the ditch extends through an area with no irrigated fields and continues to the northeast along the upper border of irrigated fields in the SE Section 35 and in Section 36, T8S, R34E. There are approximately 1,210.38 AC irrigated under the first two segments of the ditch and approximately 821.18 AC under the third segment of ditch. Taking the flow rate of 50.79 CFS divided by 2,031.6 AC gives 0.025 CFS/AC (11.22 GPM/AC). At 0.025 CFS/AC, the Department calculated that the flow rate over the last segment of ditch is 20.53 CFS (0.025 CFS/AC x 821.18 AC). Conveyance losses for the first ditch segment were calculated using a flow rate of 50.79 CFS and conveyance losses for the third ditch segment were calculated using a flow rate of 20.53 CFS.

22. Conveyance loss is calculated using the method in ARM 36.12.1902(10) and is the sum of Seepage Loss, Vegetation Loss, and Ditch Evaporation. Parameters used in calculating conveyance loss are: ditch length = 18,334.23 feet (first segment) and 20,580.79 feet (third segment); wetted perimeter = 14 feet; width = 10 feet; depth = 2 feet; flow rate = 50.79 CFS (first segment) and 20.53 CFS (third segment); days irrigated = 138; ditch loss rate (silty clay loam) = 0.7; Adjusted Net Evaporation from April 1 through October 31 = 1.6 feet (19.2 inches) as taken from the Gridded Monthly NetEvap layer in Converge. Ditch dimensions, days irrigated, and ditch loss rate were provided by the Applicant; ditch segment lengths were calculated by the Department from information provided by the Applicant.

a. Seepage loss[A] is calculated as (wetted perimeter)(ditch length)(loss rate)(days)/(square feet per acre). For the first segment, seepage loss calculated as (14 ft x 18,334.23 ft x 0.7 x 138 days)/(43,560 ft^2/AC) is 569.2 AF. For the third segment, seepage loss calculated as (14 ft x 20,580.79 ft x 0.7 x 138 days)/(43,560 ft^2/AC) is 639.0 AF. The total seepage loss attributed to 43O 208965-00 is 1,208.2 AF (569.2 AF + 639.0 AF).

b. Vegetation loss[B] is calculated as (% loss per mile)(flow in CFS)(days ditch is flowing)(ditch length in miles)*2. In this equation, the unit conversion constant 2 is the number of AF/Day/CFS rounded up from 1.98. For the first segment, vegetation loss calculated as (0.0075 x 50.79 CFS x 138 days x (18,334.23 ft / 5,280 mi) x 2) is 365.1 AF. For the third segment, vegetation loss calculated as (0.0075 x 20.53 CFS x 138 days x (20,580.79 ft / 5,280 mi) x 2) is 165.6 AF. The total vegetation loss attributed to 43O 208965-00 is 530.7 AF (365.1 AF + 165.6 AF).

c. Ditch evaporation[C] is calculated as (surface area of ditch [length*width in ft.])(evaporation rate in ft/acre/yr, period adjusted)/(square feet per acres). For the first segment, the ditch evaporation calculated as (10 x 18,334.23)(1.6 ft)/(43,560 ft^2/AC) is 6.7 AF. For the third segment, the ditch evaporation calculated as (10 x 20,580.79)(1.6 ft)/(43,560 ft^2/AC) is 7.6 AF. The total ditch evaporation attributed to 43O 208965-00 is 14.3 AF (6.7 AF + 7.6 AF).

d. The conveyance losses total 1,753.2 AF (1,208.2 AF+ 530.7 AF + 14.3 AF).

Table 6. Conveyance Losses for the Antler Ditch

[A] Seepage Loss	Ditch Wetted Perimeter (ft)	Ditch Segment Length (ft)	Ditch Loss Rate (ft^3/ft^2/day)	Days Irrigated	***Seepage Loss (AF)***
	14	1: 18,334.23 3: 20,580.79	0.7	138	*1: 569.2* *3: 639.0* ***Total: 1,208.2***
[B] Vegetation Loss	% Loss/Mile	Historical Flow Rate Per Segment (CFS)	Days Irrigated	Ditch Segment Length (mi)	***Vegetation Loss (×2) (AF)***
	0.0075	1: 50.79 3: 20.53	138	1: 3.47 3: 3.90	*1: 365.1* *3: 165.6* ***Total: 530.7***
[C] Ditch Evaporation	Ditch Width (ft)	Ditch Segment Length (ft)	Period Adjusted Evaporation Factor (ft)	***Ditch Evaporation (AF)***	**Seasonal Conveyance Loss (AF) (A+B+C)**
	10	1: 18,334.23 3: 20,580.79	1.6	*1: 6.7* *3: 7.6* ***Total: 14.3***	1,208.2 + 530.7 + 14.3 = **1,753.2**

23. The Department uses the following formula to determine the Historical Diverted Volume: (Volume $_{\text{historic consumptive use}}$/On-farm efficiency) + Volume $_{\text{conveyance loss}}$ = Historical Diverted Volume. (Volume $_{\text{historic consumptive use}}$/On-farm efficiency) is also known as the field applied volume. The field applied volume is 3,272.5 AF (Table 5). Volume $_{\text{conveyance loss}}$ is 1,753.2 AF (Table 6). The Department finds the Historical Diverted Volume is 5,025.7 AF (3,272.5 AF + 1,753.2 AF).

Table 7. Historically diverted volume of Statement of Claim 43O 208965-00

Field Application Volume	Conveyance Loss Volume	Historically Diverted Volume
3,272.5 AF	1,753.2 AF	5,025.7 AF

24. The Department finds the following historical use for Statement of Claim 43O 208965-00 shown in Table 8.

Table 8. Summary of historical use finding for Statement of Claim 43O 208965-00

WR #	Priority Date	Flow Rate	Diverted Volume	Irrigated Acres	Consumptive Volume	Place of Use	Point of Diversion
43O 208965-00	June 11, 1914	50.79 CFS	5,025.7 AF	2,031.6 AC	1,963.5 AF	See Table 1	SWSWSW Section 17 T09S R34E, Big Horn County

FINDINGS OF FACT – Adverse Effect

25. The Applicant proposes to add 105.5 AC of irrigation outside of the historical POU and remove 195.6 AC within the historical POU. Under the proposed change, 1,836.0 AC within the historical POU footprint will remain. The added acres include 27.9 AC of pivot irrigation on the Antler Ditch in Sections 2, 3, 10, 16 and 17, T9S, R34E, and in Sections 35 and 36, T8S, R34E, and 77.6 AC to the south of the Little Bighorn River in Section 16, T9S, R34E. The 77.6 AC south of the Little Bighorn River includes 62.2 AC of pivot irrigation and 15.4 AC of flood irrigation. The total acres irrigated historically under this water right prior to this change are 2,031.6 AC. The total acres proposed for irrigation if the change is authorized are 1,941.5 AC.

26. The volume that will be applied for the retained acres is the number of retained acres multiplied by the historical field applied volume per acre. The field applied volume of the historically irrigated acres is equivalent to 1.61 AF/AC (FOF 16). The field applied volume, not including irrecoverable losses, for the retained acres is 2,956.0 AF (1,836 AC x 1.61 AF/AC). The historical consumptive volume of the historical acres is equivalent to 0.97 AF/AC (FOF 16). The consumptive volume for the retained acres is 1,780.9 AF (1,836 AC x 0.97 AF/AC).

27. According to the Montana DNRC Change Application Manual, updated March 11, 2024, pg. 84-85, 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 Applicant proposes to add new acres of irrigation: 90.1 AC of pivot irrigation and 15.4 AC of flood irrigation. The Department will calculate the consumptive volume of the proposed added acres.

28. The proposed consumptive volume was calculated by the Department using the methodology in ARM 36.12.1902. The Big Horn County Current County Management Factor of 90.2% was determined from the DNRC Change Application Manual, updated March 11, 2024,

page 172. This management factor differs from the management factor listed in ARM 36.12.1902. The Big Horn County Current County Management Factor listed in ARM 36.12.1902 is 88.1%. The 90.2% management factor was used in the Technical Report, dated September 4, 2024, for this Change Application. The IWR values found in ARM 36.12.1902 will be used in this Preliminary Determination document and will differ from the Technical Report. The difference in these calculations does not impact the findings made by the Department. The historical consumptive use of Statement of Claim 43O 208965-00 is greater than the calculated consumptive use under the proposed change using either county management factor. Based on 90.1 AC of new pivot irrigation, an IWR for pivot irrigation at the Wyola, MT weather station in Big Horn County of 21.89 inches, and a current county management factor of 88.1%, the consumptive volume for these acres is 144.8 AF (90.1 AC x 21.89 in/12 in/ft x 0.881). For the pivot irrigation acres, the Department will use 90% efficiency based on new sprinkler/pivot infrastructure for the purpose of evaluating consumptive volume. The Department adds 10% of field applied volume to account for irrecoverable losses in sprinkler/pivot irrigation systems. Using a 90% efficiency, the field applied volume is 160.9 AF (144.8 AF/0.9), and the irrecoverable losses are 16.1 AF (160.9 x 0.1). The total consumptive volume for the proposed pivot acres including irrecoverable losses is 160.9 AF (144.8 AF + 16.1 AF).

29. Based on 15.4 AC of new flood irrigation, an IWR for flood irrigation at the Wyola, MT weather station in Big Horn County of 19.19 inches, and a current county management factor of 88.1%, the consumptive volume for these acres is 21.7 AF (15.4 AC x 19.19 in/12 in/ft x 0.881). The Department will use 55% efficiency based on contour ditch irrigation with 1.5-3.0% design slope for the purpose of evaluating consumptive volume. The Department adds 5% of field applied volume to account for irrecoverable losses in flood irrigation systems. Using a 55% efficiency, the field applied volume is 39.4 AF (21.7 AF/0.55), and the irrecoverable losses are 2.0 AF (39.4 AF x 0.05). The total proposed consumptive volume including irrecoverable losses is 23.7 AF (21.7 AF + 2.0 AF).

Table 9. Consumed volume and field applied volume for the proposed new acres

Proposed Pivot Acres	**Big Horn County IWR Center Pivot Irrigation Seasonal ET**	**Management Factor Percentage 1997 - 2006 (Proposed use)**	**Proposed Irrigated Acres**	**Proposed Consumed Volume (PCV) *(Excluding IL)***	**On- Farm Efficiency**	**Field Applied Volume (PCV/% Efficiency)**	**Proposed Irrecoverable Losses (IL):** *Pivot, 10%*	**PCV *(Including IL)***
	21.89 in	88.1%	90.1 AC	144.8 AF	90%	160.9 AF	16.1 AF	160.9 AF
Proposed Flood Acres	**Big Horn County IWR Flood Irrigation, Wheeline & Handline Seasonal ET**	**Management Factor Percentage 1997 - 2006 (Proposed use)**	**Proposed Irrigated Acres**	**Proposed Consumed Volume (PCV) *(Excluding IL)***	**On- Farm Efficiency**	**Field Applied Volume (PCV/% Efficiency)**	**Proposed Irrecoverable Losses (IL):** *Flood, 5%*	**PCV *(Including IL)***
	19.19	88.1%	15.4 AC	21.7 AF	55%	39.4 AF	2.0 AF	23.7 AF
			TOTAL:	**166.5 AF**	**TOTAL**:	**200.3 AF**	**TOTAL:**	**184.6 AF**

30. For the retained historical acres, the field applied volume is 2,956.0 AF and the proposed consumptive volume is 1,780.9 AF (FOF 26). The total proposed field applied volume is 3,156.3 AF (2,956.0 AF + 160.9 AF + 39.4 AF). The proposed consumptive volume of the additional 90.1 pivot acres and 15.4 flood acres is 184.6 AF (160.9 AF + 23.7 AF). The Department finds the total proposed consumptive volume is 1,965.5 AF (1,780.9 AF + 184.6 AF).

31. The historical consumptive volume is 1,963.5 AF (FOF 16, Table 5 & Table 8). The Department finds the proposed consumptive volume proposed by this change is less than the historical consumptive volume (1,963.5 AF – 1,959.1 AF = 4.5 AF). Using the incorrect values from the Technical Report, the proposed consumptive volume was 1,963.4 AF. The proposed consumptive volume is less than the historical consumptive volume. The calculated proposed consumptive volume in the Technical Report is also less than the historical consumptive volume.

32. The Applicant proposes to add a POD in the NWSENW Section 16, T9S, R34E. The proposed POD is a headgate approximately 2.0 miles downstream from the existing POD on the Little Bighorn River. Proposed POD 2 has a maximum capacity of 5 CFS. The Applicants plan to divert 1.96 CFS at POD 2 to irrigate 62.2 AC of new pivot irrigation and 15.4 AC of new flood

irrigation. Water will be piped from the headgate to the fields for irrigation so there will be no conveyance losses associated with the proposed POD. There are no water rights between the historical POD and the proposed POD. In order to utilize the proposed POD, the flow rate in the Antler Ditch will be reduced by the flow rate used at proposed POD 2 when in use. The Applicant proposes adding a staff gage to the existing POD, the Antler Ditch headgate, and a flow meter at the proposed POD, in order to monitor the flow rate diverted at each point. Should the change be authorized, the Department will add the conditions to this change as follows:

1. THE COMBINED FLOW RATE OF BOTH POINTS OF DIVERSION SHALL NOT EXCEED THE HISTORICAL FLOW RATE OF 50.79 CFS.

2. ANYTIME AFTER THIS RIGHT IS ISSUED AND COMPETITION FOR WATER ON THE SOURCE BECOMES AN ISSUE, THE DEPARTMENT MAY REQUIRE THE APPROPRIATOR TO INSTALL A WATER USE MEASURING DEVICE AND SUBMIT THE RECORDS OF THE FLOW RATE OR VOLUME OR BOTH OF ALL WATER DIVERTED.

33. The Applicant proposes to add 27.9 AC of pivot irrigation on the Antler Ditch in Sections 2, 3, 10, 16 and 17, T9S, R34E. The Applicant will also retire 195.6 AC from irrigation by the Antler Ditch. The total proposed diverted volume of water is the volume diverted in the Antler Ditch and the volume diverted at POD 2 in the NWSENW Section 16, T9S, R34E. The volume diverted in the Antler Ditch is taken as the historical diverted volume for Statement of Claim 43O 208965-00, minus the volume diverted for the retired acres, plus the diverted volume for the new pivot acres. Given that the Antler Ditch will continue to be operated in its historical manner and the full 50.79 CFS flow rate may be diverted in the ditch at any time, the Department will not consider changes in the conveyance loss calculations. The volume that will no longer be diverted for the retired acres is the number of retired acres multiplied by the historical field applied volume per acre (FOF 16); the volume is 314.9 AF (195.6 AC x 1.61 AF/AC). The volume that will be added for the new acres is calculated as the field applied volume for the new acres (((27.9 AC x 21.89 in/12 in/ft x 0.881)/.9); the new volume added to the Antler Ditch is 49.8 AF. The total proposed volume diverted in the Antler Ditch calculated as the historical diverted volume minus

the volume that will no longer be diverted for the retired acres, plus the volume that will be diverted for the new acres is 4,760.6 AF (5,025.7 AF – 314.9 AF + 49.8 AF).

34. The volume diverted at POD 2 is taken as the diverted volume for the new added acres of irrigation, including 62.2 AC of pivot irrigation and 15.4 AC of flood irrigation. There are no conveyance losses associated with POD 2 because it is an entirely piped system. Therefore, the volume diverted at POD 2 is equal to the field applied volume for the new acres of irrigation. The field applied volume for these acres was calculated by the Department using the consumptive use methodology in ARM 36.12.1902. The values calculated in FOF 35-36 will differ than those found in the Technical Report due to the incorrect county management factor previously used.

35. Based on 62.2 AC of new pivot irrigation from POD 2, an IWR for pivot irrigation at the Wyola, MT weather station in Big Horn County of 21.89 inches, a current county management factor of 88.1%, the proposed consumptive use, not including irrecoverable losses, for these acres is 100.0 AF (62.2 AC x 21.89 in/12 in/ft x 0.881). Using a 90% efficiency for new pivot/sprinkler infrastructure, the field applied volume is 111.1 AF (100.0 AF/0.9). The proposed diverted volume for the proposed pivot acres from POD 2 is 111.1 AF. The field applied volume for the new flood acres from POD 2 is 39.4 AF (FOF 29). The proposed diverted volume for the proposed flood acres from POD 2 is 39.4 AF. The Department finds the total diverted volume proposed at POD 2 is 150.5 AF (111.1 AF + 39.4 AF).

36. The Department finds the total proposed diverted volume for Change Application 43O 30161500 is 4,911.1 AF (4,760.6 AF + 150.5 AF). The Department finds the proposed diverted volume is 114.6 AF less than the historical diverted volume (5,025.7 AF - 4,911.1 AF = 114.6 AF). The calculated proposed diverted volume in the Technical Report is also less than the historical diverted volume.

Table 10. Historical volume values compared to proposed volume values

	Field Applied Volume	**Consumed Volume**	**Diverted Volume**
Historical	3,272.5 AF	1,963.5 AF	5,025.7 AF
Proposed	3,156.3 AF	1,959.1 AF	4,911.1 AF
Difference (Historical Minus Proposed)	**116.2 AF**	**4.5 AF**	**114.6 AF**

37. The Little Bighorn River is the hydraulically connected surface water for the purposes of evaluating return flow. The historical field applied volume was 3,272.5 AF of which 1,963.5 AF was consumed. The difference, 1,309.0 AF, returned to the Little Bighorn River annually. The proposed field applied volume is 3,156.3 AF of which 1,959.1 AF will be consumed. The difference, 1,197.2 AF, will return to the Little Bighorn River annually. The Applicant proposes to decrease diverted and applied volume, and the consumptive use volume will decrease. Annual return flows were modeled; the proposed changes will not enlarge the flow rate or consumptive use of the original right and return flows will enter back into the source where they have historically returned upstream of or at the location of the next downstream appropriator. Monthly volumes that will return to hydraulically connected surface waters under proposed practices will not be modeled unless the application receives an objection. Water not diverted under the proposed change will be left instream; the amount of water left instream as a result of this change is 114.6 AF.

38. The area of potential adverse effect is from the Antler Ditch headgate in the SWSWSW Section 17, T9S, R34E to a point in the NWNENE of Section 32, T8S, R35E where the Little Bighorn River crosses the northern section boundary. This is the approximate area where return flows reach the river. Table 11 is a list of water rights on the Little Bighorn River within the area of potential adverse effect. There are no water rights between the historical POD and the proposed POD. This change will not impact the Applicant's ability to make call. Should valid call be made on the Applicant's water right, they have the ability to close the headgate on both PODs and completely cease diversion.

Table 11. Water rights within the area of potential adverse effect

Water Right #	Owners	Purpose	Flow Rate (CFS)
43O 185300-00	SUNLIGHT RANCH CO	Stock	0.00**
43O 185306-00	SUNLIGHT RANCH CO	Stock	0.3*
43O 185316-00	SUNLIGHT RANCH CO	Stock	0.03
43O 185325-00	SUNLIGHT RANCH CO	Stock	0.00*
43O 185334-00	CLAREN J NEAL; LYLE M NEAL	Stock	0.00*
43O 185505-00	SUNLIGHT RANCH CO	Irrigation	13.20
43O 187657-00	SUNLIGHT RANCH CO	Stock	0.00*
43O 189156-00	JOCELYN J TYLER	Stock	0.00*
43O 189164-00	SUNLIGHT RANCH CO; RICHARD M TORRENS	Stock	0.00*
43O 208256-00	ROLAND E PRICE; S KELLY PRICE	Stock	0.00**
43O 30145513	SUNLIGHT RANCH CO	Stock	0.00*

* Calculated by DNRC: Flow rate assigned for livestock direct from source as 132.6 GPM (0.3 CFS) for the first right, zeroed out on all others, based upon Department-standard back calculation of flow rate used for the livestock direct from source water rights based on annual volume (214 AF)

**43O 185300-00 and 43O 208256-00 are stock rights from ditches – the flow rate is covered by the associated irrigation water rights

39. The Applicant proposes to add a staff gage at the historical POD, the Antler Ditch headgate, and a flow meter at the proposed POD, in order to monitor the flow rate diverted at each POD. The Applicant proposes to calibrate the staff gage through industry standard practices. The flow rates at each POD will be recorded during the irrigation season and records will be maintained for seven (7) years. The Department is not requiring the Applicant to report these measurements annually.

40. The proposed change will not increase the historical consumptive use of Statement of Claim 43O 208965-00. The Department finds there will be no adverse effect to existing water rights as a result of this change. Because the Antler Ditch will continue to be operated, 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

41. The Applicant proposes to divert water for irrigation. Irrigation is a recognized beneficial use under § 85-2-102, MCA.

42. The Applicant proposes to use 50.79 CFS and 4,911.1 AF diverted volume. This flow rate is supported by the Big Horn County WRS, Water Court Case 43O-161, and the Water Master's Report. The volume was calculated by the Department using the formulas and equations in ARM and policy (FOF 33-36).

43. The Department finds the proposed flow rate and volume are the amounts needed for irrigation and that irrigation is a beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

44. The Applicant historically diverted 50.79 CFS of water through the over 8-mile-long Antler Ditch. The Antler Ditch is controlled by two (2) 36-inch headgates and is capable of carrying the full flow rate diverted by the Applicant (FOF 18). The Antler Ditch will continue to be used to convey water to the 1,836.0 AC within the historical POU footprint which will continue to be irrigated and to the new 27.9 AC of pivot irrigation on the Antler Ditch in Sections 2, 3, 10, 16, and 17, T9S, R34E, and in Sections 35 and 36, T8S, R34E, which are being added through this change. The total number of acres irrigated from the Antler Ditch if this change is authorized are 1,863.9 AC which is less than the 2,031.6 AC historically irrigated from the Antler Ditch. The 27.9 AC of new pivot irrigation from the Antler Ditch is primarily correcting inaccurate legal land descriptions and acre totals in the Post Decree version of Statement of Claim 43O 208965-00. No new infrastructure is being added on the Antler Ditch. The Applicant uses a combination of pumps, lateral and secondary ditches to convey water from the Antler Ditch to individual fields. The Applicant uses a combination of center pivots, wheel lines, and gated pipes to irrigate acres from the Antler Ditch.

45. The new POD 2 is an entirely piped system from the 24-inch headgate on the Little Bighorn to the 77.6 AC of new irrigation south of the river. After diversion at the headgate, water is conveyed through 14-inch pipe to a second culvert which can divert water for flood irrigation of the 15.4 AC or for pivot irrigation of the 62.2 AC. The pivot was designed by Big Sky Irrigation Inc. and is capable of irrigating the entirety of the acres proposed for pivot irrigation from POD 2. The Applicants plan to divert 1.96 CFS or 881.8 GPM at POD 2 which is the total of the 620 GPM

for the pivot and 261.8 GPM to flood irrigate the 15.4 AC (881.8 GPM / 448.8 GPM/CFS = 1.96 CFS). The proposed diverted flow rate at POD 2 is less than the capacity of the headgate.

46. The Department finds the existing and proposed diversions means are adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

48. 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]

49. 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]

50. 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

[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).

[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

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]

51. 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.*

[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.)

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]

52. 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.

53. 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-.

54. 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

[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).

> 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).

55. 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.

56. 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).

57. 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).

58. 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).

59. 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 16).

60. 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").

61. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 43O 208965-00 to be a diverted volume of 5,025.7 AF, a historically consumed volume of 1,963.5 AF, and flow rate of 50.79 CFS. (FOF 12-24)

62. 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 25-40)

BENEFICIAL USE

63. 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).

64. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 4,911.1 acre-feet of diverted volume and 50.79 CFS flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF 41-43).

ADEQUATE MEANS OF DIVERSION

65. 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).

66. 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 44-46)

POSSESSORY INTEREST

67. 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.

68. 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 47).

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 30161500 should be GRANTED subject to the following.

The Department determines the Applicant may change Statement of Claim 43O 208965-00 by adding a point of diversion and places of use. The proposed point of diversion is NWSENW Section 16, T9S, R34E, Big Horn County. The proposed place of use includes 27.9 AC in Sections 2, 3, 10, 16, and 17, T9S, R34E, and in Sections 35 and 36, T8S, R34E, and 77.6 AC in Section 16, T9S, R34E. The Applicant proposes to remove 195.6 AC from the place of use generally in Sections 1, 2, 3, 10, 11, and 16, T9S, R34E, and Sections 35 and 36, T8S, R34E, Big Horn County. The total number of irrigated acres will be 1,941.5 AC. The historical headgate in SWSWSW Sec. 17, T9S, R34E will continue to be used. The Applicant will divert 4,911.1 AF of water at 50.79 CFS for the purpose of irrigation. The flow rate at the historical headgate will be reduced by the amount necessary at the proposed headgate. If granted, the Change Authorization will be subject to the following conditions:

1. THE COMBINED FLOW RATE OF BOTH POINTS OF DIVERSION SHALL NOT EXCEED THE HISTORICAL FLOW RATE OF 50.79 CFS.

2. ANYTIME AFTER THIS RIGHT IS ISSUED AND COMPETITION FOR WATER ON THE SOURCE BECOMES AN ISSUE, THE DEPARTMENT MAY REQUIRE THE APPROPRIATOR TO INSTALL A WATER USE MEASURING DEVICE AND SUBMIT THE RECORDS OF THE FLOW RATE OR VOLUME OR BOTH OF ALL WATER DIVERTED.

NOTICE

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

DATED this 31st day of December 2024.

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 PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 2nd day of January 2025, by first class United States mail.

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