

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

| | | |
|---------------------------------------|---|--------------------------------|
| APPLICATION TO CHANGE WATER |) | [DRAFT] PRELIMINARY |
| RIGHT NO. 76LJ 30164320 BY THE |) | DETERMINATION TO GRANT |
| DARLENE SANDERS FAMILY TRUST |) | CHANGE IN MODIFIED FORM |

The Darlene Sanders Family Trust (Applicant) submitted Application to Change an Existing Irrigation Water Right No. 76LJ 30164320 to change Statement of Claim No. 76LJ 147164-00 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) on November 4, 2024. The Department published receipt of the application on its website on November 13, 2024. A preapplication meeting was held between the Department and the Applicant and their representative Lori Moran on August 20, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Checklist on September 5, 2024. The Department delivered the Department-completed technical analyses on October 19, 2024. The Department sent the Applicant a letter identifying an error in the Department-completed Technical Analyses on November 15, 2024. The Application was determined to be correct and complete as of November 26, 2024. An Environmental Assessment for this application was completed on January 24, 2025.

INFORMATION

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

Application as filed:

- Change Preapplication Meeting Form, Form 606P.
 - Including attachments presented by the Applicant at the preapplication meeting and submitted along with the preapplication meeting form.
- Application to Change a Water Right, Form 606.

- Attachments/Maps/Figures:
 - Department-completed Surface Water Change Technical Analyses Report based on information provided in the Preapplication Checklist, dated October 19, 2024.
 - Two 2024 Crop Year Maps, one annotated for Form 606 Questions 18 and 19, and one annotated for Form 606 Question 32.
 - DNRC Examination Report Claim Map for Statement of Claim No. 76LJ 147164-00 applicable to Form 606 Questions 18 and 19.
 - Aerial Photo Map notating “Field Under Pivot” applicable to Questions 18 and 19.
 - DNRC Examination Report Claim Map and Review Abstract for Statement of Claim No. 76LJ 30126953 applicable to Form 606 Question 19. (DNRC determined this claim is not supplemental)
 - Ronan Irrigation LLC Center Pivot Sprinkler System Design Map, Specifications, and Estimates applicable to Form 606 Questions 19, 32, 33, 35, and 39.
 - U.S. Department of Agriculture - Natural Resource Conservation Service EQIP Program Center Pivot Project Documentation (six pages) and Installation Plans/Drawings (six pages) applicable to Form 606 Questions 32, 33, 35, and 39.

Information within the Department’s Possession/Knowledge

- Administrative file for Statement of Claim No. 76LJ 147164-00.
- DNRC Water Sciences Bureau Irrigation and Conveyance Loss Calculator application report, generated by Kalispell Water Resource Specialist Travis Wilson on October 18, 2024.
- Flathead County Water Resources Survey, State Engineer’s Office, June, 1965.
- US Department of Agriculture Aerial Photograph No. 979-214 dated September 23, 1979.
- The Department also considered the following information which is not included in the administrative file for this Application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents.
 - DNRC Technical Memorandum: Development of standardized methodologies to determine Historic Diverted Volume, 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).

For the purposes of this document:

| | |
|---|--|
| Department or DNRC means the Department of Natural Resources and Conservation | |
| AF means acre-feet | CFS means cubic feet per second |
| EQIP means the Environmental Quality Incentives Program | FOF means finding(s) of fact |
| NRCS means Natural Resource Conservation Service | GPM means gallons per minute |
| IWR means the Irrigation Water Requirements program/software | IL means irrecoverable losses |
| USDA means the United States Department of Agriculture | POD means point of diversion |
| NIR means net irrigation requirement | PVC means polyvinyl chloride |
| VFD means variable frequency drive | HP means horsepower |

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes to change Statement of Claim No. 76LJ 147164-00. Statement of Claim No. 76LJ 147164-00 is for irrigation of 160.0 acres from May 1 through November 1, annually, at a flow rate of 2.23 CFS up to a total volume that “shall not exceed the amount put to historical and beneficial use” from Patrick Creek. The purpose and source for this claim is irrigation use from Patrick Creek. Table 1 summarizes the details of Statement of Claim No. 76LJ 147164-00.
2. Another water right, Statement of Claim No. 76LJ 147163-00, has an overlapping place of use in the N2NWSW of Section 2, Township 27N, Range 21W with Statement of Claim No. 76LJ 147164-00 (see FOF 11 for further discussion).

| Table 1: Summary of Water Right Proposed for Change | | | | | | | | | |
|--|---------------|------------|-----------------|--|---------------|---------------------------|---------------|---------------------------------|---|
| Water Right Number | Priority Date | Purpose | Flow Rate (CFS) | Volume (AF) | Maximum Acres | Period of Diversion & Use | Source Name | Point and Means of Diversion | Place of Use |
| Statement of Claim 76LJ 147164-00 | June 7, 1963 | Irrigation | 2.23 | “The total volume of this water right shall not exceed the amount put to historical and beneficial use.” | 160.0 | 05/01 – 11/01 | Patrick Creek | NESWSW Sec 2, T27N, R21W (Pump) | SW Sec 2, T27N, R21W N2NW Sec 11, T27N, R21W |

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to add an additional (second) POD to Statement of Claim No. 76LJ 147164-00 located in the NENENW of Section 11, Township 27 N, Range 21 W, Flathead County

(Figure 1). The existing POD is located in the NESWSW of Section 2, Township 27 N, Range 21 W, Flathead County (Figure 1). The proposed POD will be a pump on Wiley's Slough approximately 2,300-feet downstream from the existing POD. Patrick Creek flows into Wiley's Slough and the proposed POD will divert water from Wiley's Slough, which will be used as a natural carrier for Patrick Creek water. The proposed POD will serve as the primary POD for Statement of Claim 76LJ 147164-00 and will supply a new center pivot sprinkler irrigation system. This center pivot sprinkler system will operate wholly within the historical place of use. Department approval is not necessary to alter the irrigation method as long as the new method of irrigation will occur entirely within the historical place of use. The existing POD and pump will be retained for use when water is available at that location to supply the existing handline irrigation risers. The Applicant stated in their application that they will not operate the existing pump and the new pump simultaneously. Table 2 summarizes the details of the proposed change.

4. No changes to the place or purpose of use are proposed in this change and there is no storage component of this water right. The project is in the Flathead River Basin (76LJ) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

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

THE APPROPRIATOR SHALL NOT OPERATE THE TWO POINTS OF DIVERSION SIMULTANEOUSLY BECAUSE DOING SO WOULD EXCEED THE HISTORICALLY DIVERTED FLOW RATE OF THIS WATER RIGHT.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT FOR EACH POINT OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE KALISPELL WATER RESOURCES REGIONAL

OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATELY.

| Table 2: Summary of Proposed Changes | | | | | | | | | |
|---|---------------|------------|-----------------|--|---------------|---------------------------|---------------|--|-------------------------------|
| Water Right Number | Priority Date | Purpose | Flow Rate (CFS) | Volume (AF) | Maximum Acres | Period of Diversion & Use | Source Name | Point and Means of Diversion | Place of Use |
| Statement of Claim 76LJ 147164-00 | June 7, 1963 | Irrigation | 2.23 | “The total volume of this water right shall not exceed the amount put to historical and beneficial use.” | 160.0 | 05/01 – 11/01 | Patrick Creek | NESWSW Sec 2, T27N, R21W (Pump) | SW Sec 2, T27N, R21W |
| | | | | | | | | <u>NENENW</u> <u>Sec 11,</u> <u>Twp 27N,</u> <u>Rge 21W</u> <u>(Pump)</u> | N2NW Sec 11, T27N, R21W |

*Bold underlined text identifies the water right element proposed for change. In this application, the proposed change is to add an additional POD.

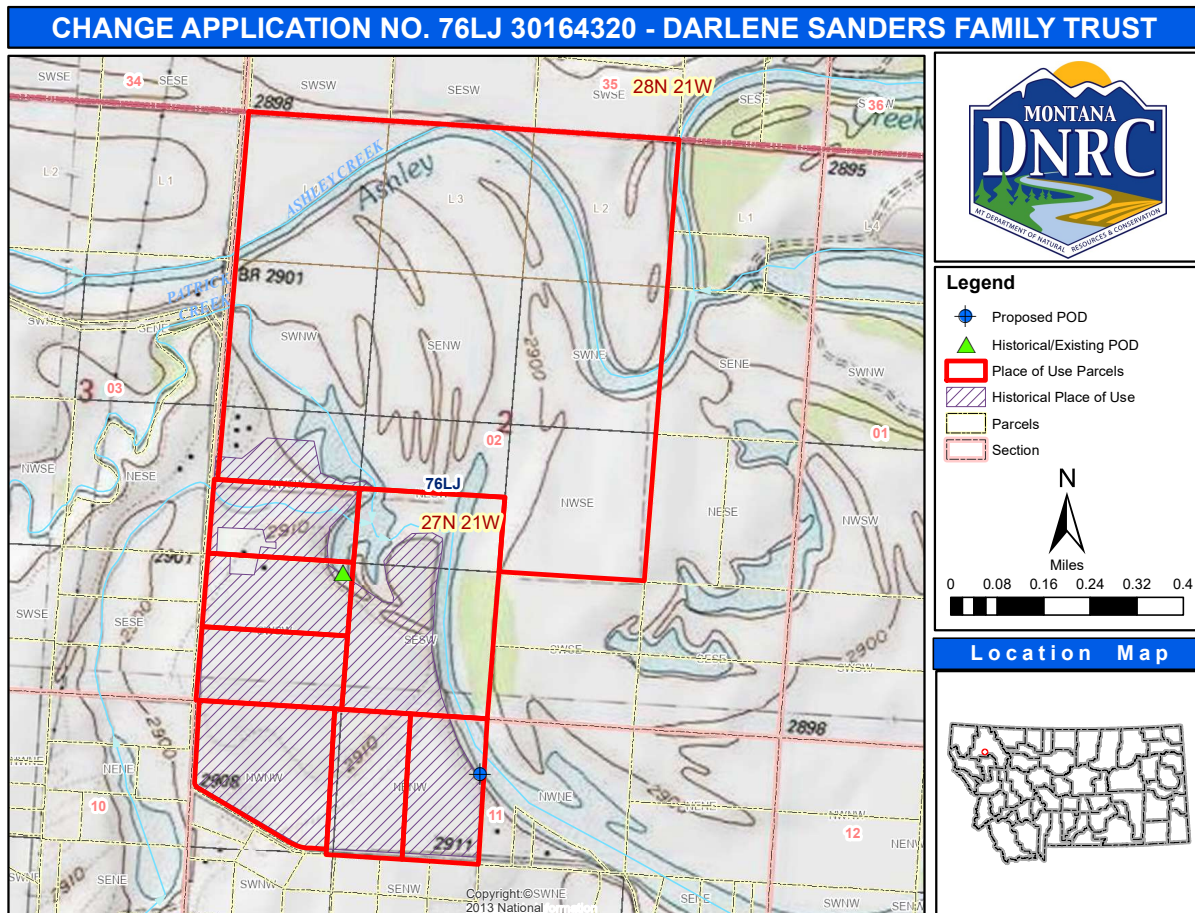


Figure 1: Map of place of use parcels, existing point of diversion, and the proposed point of diversion.

CHANGE CRITERIA

6. 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.

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

HISTORICAL USE

FINDINGS OF FACT

8. The historical use of this water right was proven by the applicant and calculated by the DNRC following the methods described in ARM 36.12.1902 Change Application – Historic Use. The Applicant is the original claimant and has firsthand knowledge of the historical use of the water right which was used to irrigated various crops including wheat, barley, Kentucky blue grass, mint, peas, lentils, and alfalfa. The Applicant used primarily wheeline sprinklers along with some handline sprinklers to irrigate the place of use. This Statement of Claim does not involve storage.

Adjudication status:

9. Basin 76LJ, including Statement of Claim No. 76LJ 147164-00, has not been decreed by the Water Court. The enforceable priority date of Statement of Claim No. 76LJ 147164-00 is June 7, 1963.

Historical place of use and historically irrigated acres:

10. Statement of Claim No. 76LJ 147164-00 was examined by the DNRC on October 14, 2008, where 154.32 acres were found. The Applicant agrees that the examined 154.32 acres more accurately describe the historical place of use than the originally claimed 160.0 acres. Table 3 summarizes the historical use of Statement of Claim No. 76LJ 147164-00.

Table 3: Summary of historical use of Statement of Claim No. 76LJ 147164-00

| Water Right No. | Historical Purpose | Maximum Historical Acres | Historical Place of Use | Historical Point of Diversion | Maximum Historical Flow Rate (CFS) | Historically Consumed Volume (AF) | Historically Diverted Volume (AF) |
|------------------------|---------------------------|---------------------------------|---|--------------------------------------|---|--|--|
| 76LJ 147164-00 | Irrigation | 154.32 | SW Sec 2, T27N, R21W (85 acres) N2NW Sec 11, T27N, R21W (69 acres) | NESWSW Sec 2, Twp 27N, Rge 21W | 2.05 (919.6 GPM) | 180.7 | 240.9 |

11. Statement of Claim No. 76LJ 147163-00 has an overlapping place of use in the N2NWSW of Section 2, Township 27N, Range 21W with the subject Statement of Claim No. 76LJ 147164-00. The Applicant, who has first-hand knowledge of the historical use of these water rights, states that use of Statement of Claim No. 76LJ 147163-00 on the overlapping area was discontinued when Statement of Claim No. 76LJ 147164-00 originally went into use in 1963. Statements of

Claim No. 76LJ 147163-00 and 76LJ 147164-00 were never truly supplemental to each other on the overlapping claimed place of use. Therefore, all consumed volume associated with the overlapping acres will be assigned to Statement of Claim No. 76LJ 147164-00.

Historical period of use & period of diversion:

12. The Applicant states in their application that they historically irrigated from May 1 through the irrigation season and into the fall typically through early October but sometimes as late as November 1 to recharge the soil to eliminate the need to irrigate in the early spring prior to May 1. The Department finds May 1 to November 1 to be the historical period of diversion and use.

Historical consumptive volume:

13. The consumed volume for irrigation is based on the net irrigation requirement calculated with data from the Creston weather station in the USDA NRCS Irrigation Water Requirements program. The NIR was multiplied by a county-wide management factor to produce an adjusted NIR representative of actual crop yields. Crop consumption was determined by multiplying the adjusted NIR by the irrigated acres. Crop consumption was then divided by the field efficiency (70% for sprinkler irrigation per ARM 36.12.115) to calculate the field applied volume (Table 4, column J). The total consumed volume for irrigation is the crop consumption plus irrecoverable losses, which are 10% for sprinkler irrigation (Table 4, column I). The total non-consumed volume is the field applied volume minus the total consumed volume (Table 4, column K).

Historical diverted volume:

14. Per ARM 36.12.1902(10), the historically diverted volume is equal to the sum of the historical field application volume and historical conveyance loss volume. There are no historical conveyance losses considered for the historical use of Statement of Claim No. 76LJ 147164-00 because the historical means of conveyance is closed pipe, therefore, the historical diverted volume is equal to the historical field application volume (Table 5).

| Table 4: Historical use. | | | | | | | | | | |
|---------------------------------|--------------|---------------------------------|---------------------------------|-------------------------|------------------------------|----------------------------|----------------|-----------------------------------|----------------------------------|---------------------------------------|
| A | B | C | D | E | F | G | H | I | J | K |
| Irrigation Method | Acres | IWR NIR (in)¹ | Mgmt. Factor² | Field Efficiency | Crop Consumption (AF) | Applied Volume (AF) | IL (AF) | Total Consumed Volume (AF) | Field Applied Volume (AF) | Total Non-consumed Volume (AF) |
| Sprinkler (Wheel line) | 154.32 | 14.97 | 0.876 | 0.70 | 168.6 | 240.9 | 12.0 | 180.7 | 240.9 | 60.2 |

¹ Creston IWR Weather Station

² Flathead County Historical Use Management Factor (1964-1973), from ARM 36.12.1902.

| Table 5: Historic Diverted Volume of Statement of Claim No. 76LJ 147164-00. | | | |
|--|--------------------------------------|-------------------------------|-----------------------------------|
| Water Right No. | Field Application Volume (AF) | Conveyance Loss Volume | Historical Diverted Volume |
| 76LJ 147164-00 | 240.9 | N/A | 240.9 |

Historical flow rate:

15. The Applicant, who is also the original claimant, has first-hand knowledge of the historical operation of this water right and stated in their application that irrigation was historically accomplished by five wheeline and two handline sprinkler segments. The output of the sprinkler segments were as follows:

- i. Wheelines total output 2.05 CFS (919.6 GPM):
 - a. Three lines with 31 sprinkler heads, with 13/64-inch nozzles emitting 7.6 GPM for a per line output of 235.6 GPM and a total output of 706.8 GPM (31 heads x 7.6 GPM x 3 lines = 706.8 GPM);
 - b. One line with 20 sprinkler heads, with 13/64-inch nozzles emitting 7.6 GPM for a total output of 152.0 GPM (20 heads x 7.6 GPM x 1 line = 152.0 GPM); and,
 - c. One line with 28 sprinkler heads, with 13/64-inch nozzles emitting 7.6 GPM for a total output of 212.8 GPM (28 heads x 7.6 GPM x 1 line = 212.8 GPM).
- ii. Handlines total output 0.61 CFS (274.5 GPM):
 - a. One line with 28 sprinkler heads, with 5/32-inch nozzles emitting 4.5 GPM for a total output of 126.0 GPM (28 heads x 4.5 GPM x 1 line = 126.0 GPM); and,
 - b. One line with 33 sprinkler heads, with 5/32-inch nozzles emitting 4.5 GPM for a total output of 148.5 GPM (33 heads x 4.5 GPM x 1 line = 148.5 GPM).

The Applicant went on to explain that they only ran four of the five wheelines at a time and never ran the wheelines and the handlines simultaneously. Given that information, the maximum historically diverted flow rate is 2.05 CFS (919.6 GPM), which is equivalent to the total flow of the four highest emitting wheelines (3 lines x 235.6 GPM + 1 line x 212.8 GPM = 919.6 GPM). On the application form, the Applicant stated they would need the claimed 2.23 CFS to accomplish this project. The Department finds that the maximum historically diverted flow rate is 2.05 CFS, not the claimed and requested 2.23 CFS.

ADVERSE EFFECT

FINDINGS OF FACT

16. The Applicant proposes to add a second POD to Statement of Claim No. 76LJ 147164-00. The new POD will divert water from Wiley’s Slough approximately 2,300-feet downstream from the existing POD. Patrick Creek flows into Wiley’s Slough and the proposed POD will divert water from Wiley’s Slough, which will be used as a natural carrier for Patrick Creek water. The historical diverted and consumed volumes of 240.9 AF/year and 180.7 AF/year, respectively, were found for sprinkler irrigation (wheeline and handline) of the 154.32-acre historical place of use.

17. This change proposes adding a new (second) POD downstream of the existing POD with no changes proposed to the purpose or place of use. Therefore, only water rights between the existing POD and the proposed POD were considered for adverse effect. The Department queried all water rights between the existing POD and the proposed POD (Table 6) and found one water right. This water right is also owned by the Applicant.

| Table 6: Water rights considered for adverse effect (water rights between the proposed POD and the existing POD) | | |
|---|--------------------------------------|-----------------|
| Water Right Number | Purpose | Flow Rate (CFS) |
| 76LJ 30126953 | STOCK / LIVESTOCK DIRECT FROM SOURCE | 0.08* |

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

18. This change will not increase the amount of flow or volume diverted or consumed, nor will it change the purpose or place of use. The Department determines that the timing and location of return flows to any hydraulically connected surface water source will not change because no change in place of use is proposed.

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

THE APPROPRIATOR SHALL NOT OPERATE THE TWO POINTS OF DIVERSION SIMULTANEOUSLY BECAUSE DOING SO WOULD EXCEED THE HISTORICALLY DIVERTED FLOW RATE OF THIS WATER RIGHT.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT FOR EACH POINT OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM

PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATELY.

20. Since there will be more flow in the reach of Patrick Creek/Wiley's Slough between the new and existing PODs, and thus the reach containing Statement of Claim No. 76LJ 30126953 after the proposed change, the Department finds no adverse effect to existing water users within the area of potential adverse effect.

BENEFICIAL USE

FINDINGS OF FACT

21. The Applicant proposes to add a new (second) POD which will contribute to irrigation of the historical place of use using a new center pivot sprinkler irrigation system. The historical diverted and consumed irrigation volumes were quantified per ARM 36.12.1902 in the Historical Use section above. The proposed beneficial use is to continue to irrigate within the historical place of use.

22. The Applicant stated in their application that this project requires 2.23 CFS, which is the originally claimed flow rate. The Department found that the historically diverted flow rate is 2.05 CFS, not the claimed and 2.23 CFS. Further, the Applicant demonstrates in their application that:

- i. The pump at the new POD will divert 1.83 CFS (see FOF 26 for further discussion);
- ii. The pump at the existing POD will divert up to 0.61 CFS (see FOF 15 for further discussion) to supply the two existing handline sprinkler segments; and,
- iii. The two pumps at the two PODs will never be operated simultaneously.

This supports a maximum beneficial use flow rate for the proposed project of 1.83 CFS, and not the requested 2.23 CFS.

23. The Department finds that the proposed change in POD supports the continuation of the historically proven irrigation purpose, which is a beneficial use of water per § 85-2-102(5)(a), MCA, but that the Applicant only proved a need for 1.83 CFS of flow rate rather than the requested 2.23 CFS.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

24. The Applicant proposes to add a new (second) POD in the NENENW of Section 11, Township 27N, Range 21W to Statement of Claim No. 76LJ 147164-00. The new POD will be a pump that will serve a center pivot sprinkler irrigation system. This center pivot sprinkler system will operate wholly within the historical place of use. Use of the pump at the existing POD will continue to supply two existing handline sprinkler systems when water is available at that pump site. The Applicant stated they will not operate the existing pump and the new pump at the same time.

25. The existing pump at the existing POD, which the Applicant will continue to use to operate two existing handlines, is a 50-HP GE model 5K324YK156. This pump was historically used to run combinations of wheeline and handline sprinkler systems up to 919.6 GPM. If this pump proves too large to operate just the two handlines, the Applicant has stated they will seek a downsized pump for that location. The two handlines consist of 28 heads and 33 heads, respectively. All heads use 5/32-inch nozzles rated at 4.5 GPM per head, for a total demand of 274.5 GPM.

26. The new diversion and conveyance system is associated with a new center pivot sprinkler irrigation system designed for the Applicant by USDA NRCS Professional Engineer Logan Prochazka under the NRCS Environmental Quality Incentives Program. The full system designs and specifications as detailed in the USDA NRCS EQIP project documentation, as well as the documentation generated by the equipment vendor, Ronan Irrigation, LLC, were provided with the application. The pumping station will consist of a Cornell 4RB with a 40-HP motor equipped with a Dan Foss 480V VFD connected to an 8-inch screened intake pipe. Water will be conveyed from the pump to the center pivot through an 8-inch PVC water main. The Reinke Center Pivot 2065 has seven towers and an end swingarm with spans consisting of 6-5/8-inch galvanized steel

pipe. The maximum flow rate for the system using the equipment provided by the vendor is 1.83 CFS (821.8 GPM).

27. The Department finds that the new POD is capable of diverting, conveying, and distributing the proposed flow rate of 1.83 CFS (821.8 GPM) and that the two PODs combined can provide the historically proven annual volume of 240.9 AF.

POSSESSORY INTEREST

FINDINGS OF FACT

28. The Applicant signed the affidavit on the application form affirming they have possessory interest in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

29. 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

30. 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

31. 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).

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

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

32. 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)(“Once an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 55 -57 (Colo.,1999); *Farmers Reservoir and Irr. Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); *Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic 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

33. 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.

34. 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

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).

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).

35. 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.

36. 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).

37. 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).

38. 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).

39. 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. 8).

40. 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”).

41. 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 No. 76LJ 147164-00 to be a diverted volume of 240.9 AF, a historically consumed volume of 180.7 AF, and flow rate of 2.05 CFS. (FOF Nos. 8-15)

42. Based upon the Applicant's comparative analysis of historical water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(b), MCA. (FOF Nos. 16-20)

BENEFICIAL USE

43. 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).

44. 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 240.9 AF of diverted volume and 1.83 CFS flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. Section 85-2-402(2)(c), MCA (FOF Nos. 21-23)

ADEQUATE MEANS OF DIVERSION

45. 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).

46. 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. 24-27)

POSSESSORY INTEREST

47. 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.

48. 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. 28).

[DRAFT] PRELIMINARY DETERMINATION

Subject to the terms and analysis in this [DRAFT] Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76LJ 30164320 should be GRANTED WITH MODIFICATIONS subject to the following.

The Department determines the Applicant may add an additional point of diversion to Statement of Claim No. 76LJ 147164-00 in the NENENW of Section 11, Township 27 N, Range 21 W, in Flathead County. The Applicant requested 2.23 CFS of flow rate to accomplish this project; The Department finds that the flow rate needed is 1.83 CFS, not 2.23 CFS, and therefore must grant this change with modifications. The table below summarizes the details of the change granted with modifications.

| Summary of the Granted Change (bold underlined text identifies the changed water right elements) | | | | | | | | | |
|---|---------------|------------|-----------------|-------------|---------------|---------------------------|---------------|--|---|
| Water Right Number | Priority Date | Purpose | Flow Rate (CFS) | Volume (AF) | Maximum Acres | Period of Diversion & Use | Source Name | Point and Means of Diversion | Place of Use |
| Statement of Claim 76LJ 147164-00 | June 7, 1963 | Irrigation | 1.83* | 240.9** | 154.32** | 05/01 – 11/01 | Patrick Creek | NESWSW Sec 2, T27N, R21W (Pump) | SW Sec 2, T27N, R21W (92.0 acres) |
| | | | | | | | | <u>NENENW Sec 11, Twp 27N, Rge 21W (Pump)</u> | N2NW Sec 11, T27N, R21W (68.0 acres) |

**Departmental modification: the Applicant requested a flow rate 2.23 CFS, however, they only proved a maximum historically diverted flow rate of 2.05 CFS and that the new point of diversion can only pump 1.83 CFS.*

***The volume and maximum acres values reflect DNRC historical use findings.*

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

THE APPROPRIATOR SHALL NOT OPERATE THE TWO POINTS OF DIVERSION SIMULTANEOUSLY BECAUSE DOING SO WOULD EXCEED THE HISTORICALLY DIVERTED FLOW RATE OF THIS WATER RIGHT.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT FOR EACH POINT OF DIVERSION. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN

MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE CHANGE. THE RECORDS MUST BE SENT TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATELY.

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant with Modifications pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this [INSERT DATE].

/ORIGINAL SIGNED BY JAMES FERCH/

James Ferch, Manager
Kalispell Regional Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this [INSERT DATE], by first class United States mail.

DARLENE SANDERS FAMILY TRUST
621 SOMERS STAGE RD
KALISPELL MT 59901-7954

TRAVIS WILSON
Kalispell Regional Office, (406) 752-2288