

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

APPLICATION TO CHANGE WATER RIGHT
NO. 41B 30162751 BY DAVID J.
HAGENBARTH, JAMES F. HAGENBARTH,)
HAGENBARTH LAND MONTANA LP, AND)
MONTANA BOARD OF LAND)
COMMISSIONERS

PRELIMINARY DETERMINATION TO
GRANT CHANGE

On December 27, 2023, David J. Hagenbarth, James F. Hagenbarth, Hagenbarth Land Montana LP, and Montana Board of Land Commissioners (Applicants) submitted Application to Change Water Right No. 41B 30162751 to change Groundwater Certificate No. 41B 31321 00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Application was determined to be correct and complete as of March 21, 2024. An Environmental Assessment for this application was completed on 4/23/2024.

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 Stock Tank
- Attachments
 - Photo: Well Control and Flowmeter
 - Photo: Typical Place of Use-Stock Tank
 - DNRC Improvement Request Form- Submitted to Dillon Central Land Office
- Maps:
 - Proposed Place of Use and Conveyance Map, undated
 - Existing Stock Water System, undated

Information Received after Application Filed

- Approved and Signed Improvement Request Form and Email correspondence with Charles Maddox with the Dillon Central Land Office, January 16, 2024.

Information within the Department's Possession/Knowledge

- Aerial photos
- Water right records
- DNRC Technical Report
- Groundwater Change Report By Attila Fohnagy, Groundwater Hydrologist Water Management Bureau from Application 41B 30102793
- Statute and administrative rules

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 of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; GPD means gallons per day; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year; POD means point of diversion; POU means place of use; AU means animal units (1 beef cow = 1 AU).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to add one place of use to Groundwater Certificate No. 41B 31321 00. Certificate 41B 31321 00 was issued a flow rate of 30 GPM and volume of 48.39 AF for 2250 AUs. In 2017, after the Change Authorization No. 41B 30102793 the proposed volume was found to be 38.30 AF. The period of use and period of diversion are both January 1-December 31. The three points of diversion are located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 1, Township (T) 6 South (S), Range (R) 9 West (W) and consists of a developed spring with a sump and two groundwater wells. There are seventeen stock tanks in the existing system located in Sections 12, 14, 17, 19, 20, 22, 28, 29, T5S, R8W and Sections 24, 25, 26, 27, 35, 36, T5S, R9W. Water is conveyed to the places of use by means of an extensive stock watering system including six storage tanks and approximately 17.9 miles of buried conveyance pipes.

Table 1: WATER RIGHT PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
41B 31321 00	Stock	30 GPM	38.30 AF	1/1-12/31	NESWNW Sec 1, T6S, R9W (Developed Spring and Two Wells)	Sections 12, 14, 17, 19, 20, 22, 28, 29 T5S, R8W and Sections 24, 25, 26, 27, 35, 36, T5S, R9W	January 22, 1981

2. Certificate No. 41B 31321 00 has a previous Change Authorization 41B 30102793 which was issued April 18, 2017. This change added two groundwater well diversions located in NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 1, T6S, R9W. These new points of diversion are used rotationally with the developed spring to provide the stock watering system with higher water quality during times when the spring may contain sediment or algae. This change also added seven new stock tanks located in Sections 24, 27, 35 of T5S, R9W and Sections 17 and 19 T5S, R8W, Beaverhead County. Six storage tanks were also added to facilitate water distribution to the system. Information from Change Authorization 41B 30102793 will be used to inform aspects of this application.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The proposed change is to add one place of use and corresponding conveyance structure to Groundwater Certificate 41B 31321 00. The current stock watering system is issued for seventeen stock tanks, three points of diversion, and conveyance structures to distribute the diverted volume of 38.30 AF at a flow rate of 30 GPM. This proposed change will result in one additional place of use in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 2, T6S, R9W, Beaverhead County, to the existing stock watering system. The Applicant’s volume and flow rate will remain constant at 38.30 AF and a flow rate of 30 GPM. The period of diversion and period of use will remain unchanged from January 1-December 31. Figure 1. shows the elements of the proposed change.

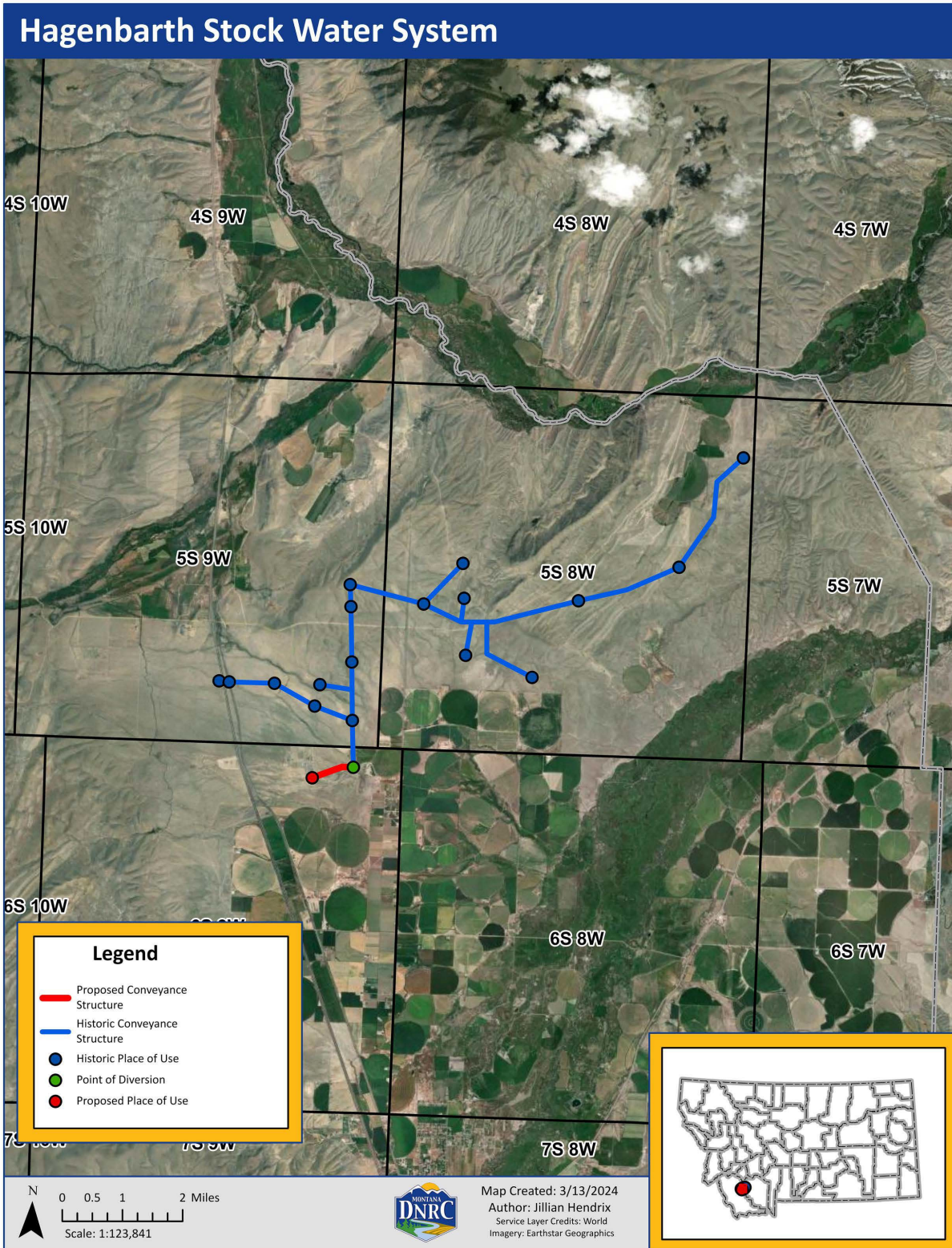


Figure 1. Existing and proposed elements of the stock watering systems for Certificate No. 41B 31321 00.

CHANGE CRITERIA

4. 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.

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

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

6. Groundwater Certificate 41B 31321 00 has a priority date of January 22, 1981. The certificate has a Change Authorization 41B 30102793, that was issued April 18, 2017. Project Completion for the Change Authorization was received December 13, 2021, and the Department verified the project December 14, 2021. The existing system consists of three points of diversion and seventeen stock tanks to water 2250 AUs. The developed spring and two groundwater wells that make up the PODs are located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 1, T6S, R9W. Based off information gathered from Change Authorization 41B 30102793 after project completion and verification, the seventeen stock tanks are distributed in Sections 12, 14, 17, 19, 20, 22, 28, 29, T5S, R8W and Sections 24, 25, 26, 27, 35, 36, T5S, R9W (see Figure 1). The Department finds this to be an accurate assessment of the place of use.

7. The historic points of diversion are a developed spring and two groundwater wells located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 1, T6S, R9W. Per Change Authorization 41B 30102793, the flow rate has remained unchanged at 30 GPM even after the addition of two new points of diversion; these points of diversion are used redundantly to ensure water quality throughout the entire period of diversion. Water is conveyed from the points of diversion through an extensive underground piping system consisting of approximately 17.9 miles of pipe to the stock tanks. Because these pipes are sealed, the Department finds no conveyance loss for the historical diversions.

8. The Department finds the issued period of diversion and period of use of January 1st - December 31st is reasonable and more likely than not given the purpose for the Certificate.

9. The total historically consumed volume is 38.3 AF, based on ARM 36.12.115 of 15 GPD per AU with 2250 AU using this watering system.

10. The Departments finds the historic use for stock purposes to be 30 GPM and a diverted volume of 38.30 AF.

ADVERSE EFFECT

FINDINGS OF FACT

11. The proposed change will serve the same number of animal units as was perfected at the time of Project Completion for Change Authorization 41B 30102793 (2250 AUs). The volume of water for this proposed use is 38.30 AF annually and the flow rate is 30 GPM.

12. A Groundwater Change Report was compiled for Change Authorization 41B 30102793. That report, done by DNRC staff Attila Folnagy, found that there would be sufficient water available for the water rights within the radius of influence for them to operate without adverse effect. The points of diversion, pumping schedule, flowrate, etc. are remaining unchanged in Change Application 41B 30162751 so the report done by Folnagy is sufficient, and the findings will remain unchanged.

13. All stock tanks are equipped with valves, a float system and a meter to maintain consistent water usage and to monitor the volume of water appropriated in the system.

14. The per DNRC standards for livestock, both historic and proposed uses are 100% consumptive. The applicant proposes to water the same 2250 AU after the change.

15. The Department finds that use of water will not increase under the proposed addition of a stock tank and no adverse effects will result from this change.

BENEFICIAL USE

FINDINGS OF FACT

16. The proposed change is the addition of a stock tank to aid in rotational watering for 2250 AUs, the flow rate is 30 GPM, and the diverted/consumed volume is 38.30 AF. These components are all unchanged from the most recent authorized version (from Change Authorization 41B 30102793).

17. Per MCA 85-2-102 (5)(a) stock water is considered a beneficial use.

18. The Department finds the proposed amount of water and the purpose for which the water will be used to be a beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

19. Adequacy of diversion was deemed adequate under Change Authorization 41B 30102793. As noted in FOF 12, the points of diversion, pumping schedule, flowrate, etc. will remain unchanged from the Authorization.

20. The Department finds the means of diversion construction and operation of the appropriation works are adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

21. The Applicants signed the affidavit on the application form affirming the Applicants have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department File)

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

22. 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

23. 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

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

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

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, ¶ 44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); *Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum*, Pgs. 8-22 (Adopted by

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

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

25. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g., Hohenlohe*, ¶ 44; *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *Popham v. Holloron*, 84 Mont. 442, 275 P. 1099, 1102 (1929); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909); *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731; *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; ARM 36.12.101(56) (Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by

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.)

subsequent water users).⁵

26. 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.

27. In *Royston*, the Montana Supreme Court confirmed that an Applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

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).

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

29. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 41B 31321 00 to be a diverted volume of 38.3 AF, a historically consumed volume of 38.3 AF and flow rate of 30 GPM. (FOF Nos. 6—10)

30. 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)(b), MCA. (FOF Nos. 11—15)

BENEFICIAL USE

31. 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).

32. In *Sitz Ranch v. DNRC*, the applicant could only demonstrate need for 200 to 300 acre-feet of water but requested 800 acre-feet. *Sitz Ranch v. DNRC*, DV-10-13390, 2-3, Fifth Judicial District Court, Order Affirming DNRC Decision (2011). The court upheld DNRC’s decision that the applicant requested more water than could be beneficially used and thus did not prove beneficial use.

33. Applicant proposes to use water for stock which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 38.3 acre-feet of diverted volume and 30 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule/other standard. Section 85-2-402(2)(c), MCA (FOF Nos. 16—17).

ADEQUATE MEANS OF DIVERSION

34. 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).

35. 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. 18—19)

POSSESSORY INTEREST

36. 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.

37. 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. 20).

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. 41B 31321 00 should be Granted subject to the following. An additional place of use (stock tank) is authorized to be in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 2 Township 6S Range 9W, Beaverhead County. The periods of diversion and use are from January 1-December 31. The maximum flow rate is 30 GPM with a maximum annual volume of 38.30 AF.

NOTICE

The 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 24th day of April, 2024

/Original signed by Jennifer Daly/
Jennifer Daly, Manager
Helena Regional Office
Montana Department of Natural Resources and Conservation

REVISED 12-2023

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 24th day of April, 2024, by first class United States mail.

JAMES AND DAVID HAGENBARTH
PO BOX 1128
DILLON MT 59725-1128

HAGENBARTH LAND MONTANA LP
PO BOX 1128
DILLON MT 59725-1128

MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA MT 59620-1601

HELENA Regional Office, (406) 444-6999