

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

APPLICATION TO CHANGE WATER) **PRELIMINARY DETERMINATION TO
RIGHT NO. 41N 30105071 BY THE) **GRANT CHANGE
GALATA WATER USERS ASSOCIATION)****

On February 3, 2016, The Galata Water Users Association (Applicant) submitted Application to Change Water Right No. 41N 30105071 to change Provisional Permit No. 41N 3082 to the Havre 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 April 26, 2016. An Environmental Assessment for this Application was completed on May 17, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606
- Maps and aerial photos
- Photos of diversion works
- Well logs
- Galata Water Users Association service area

Information Received after Application Filed:

- Pump specifications

Information within the Department's Possession/Knowledge

- File for Provisional Permit No. 41N 3082
- Environmental Assessment dated May 17, 2016
- Verification abstract

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to add a second and third point of diversion and repurpose 11.3 AF of the historical stock volume for the new purpose of agricultural spraying for the following Provisional Permit (Table 1 below):

Table 1-Miscellaneous information for Provisional Permit 41N 3082.

WR Number	Purposes	Flow Rate (gpm)	Volume (AF)	Period of Use	Point of Diversion	Place of Use	Priority Date
41N 3082	Multiple Domestic, Stock	200.0	117.9	01/01-12/31	SWSNW S21 35N 3E	Townships 34N 3E, 33N 2W, 33N 1W, 33N 1E, 33N 2E, 33N 3E, 33N 4E, 32N 1W, 32N 1E, 32N 2E, 32N 3E, 32N 4E, 31N 3E, 31N 4E	7/22/1974

CHANGE PROPOSAL

FINDINGS OF FACT

2. The Applicant proposes to add a second and third point of diversion to Permit 41N 3082. Permit 41N 3082 only has the original well listed as a point of diversion. The original well was replaced by a second well (east well) in 2002 which must be added to Permit 41N 3082. A second point of diversion was added in 1976 (west well), and this point of diversion must also be added to Permit 41N 3082. The GWUA has used two points of diversion since 1976 in order to satisfy the Montana Department of Environmental Quality public water supply redundant well requirement. The pump was removed from the abandoned well.

Well	Date Drilled	Pump HP	GWIC ID	MDEQ ID
East	2002	10	Not Listed	WL004 Well 3 East

West	1976	7.5	46042	WL003 Well 2 West
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3. The Applicant also proposes to add a beneficial use to the Permit for the purpose of agricultural spraying. Because consumptive use cannot increase, the Applicant will retire 11.3 AF of the historical stock volume. Agricultural spraying will be added to the Water Right with an assigned volume of 11.3 AF. Both the purpose of agricultural spraying and stock are considered to be 100.0% consumptive. There is no increase in consumptive use as proposed.

4. The layout below depicts the GWUA service area (place of use), the points of diversion, booster pump locations, and the conveyance system.

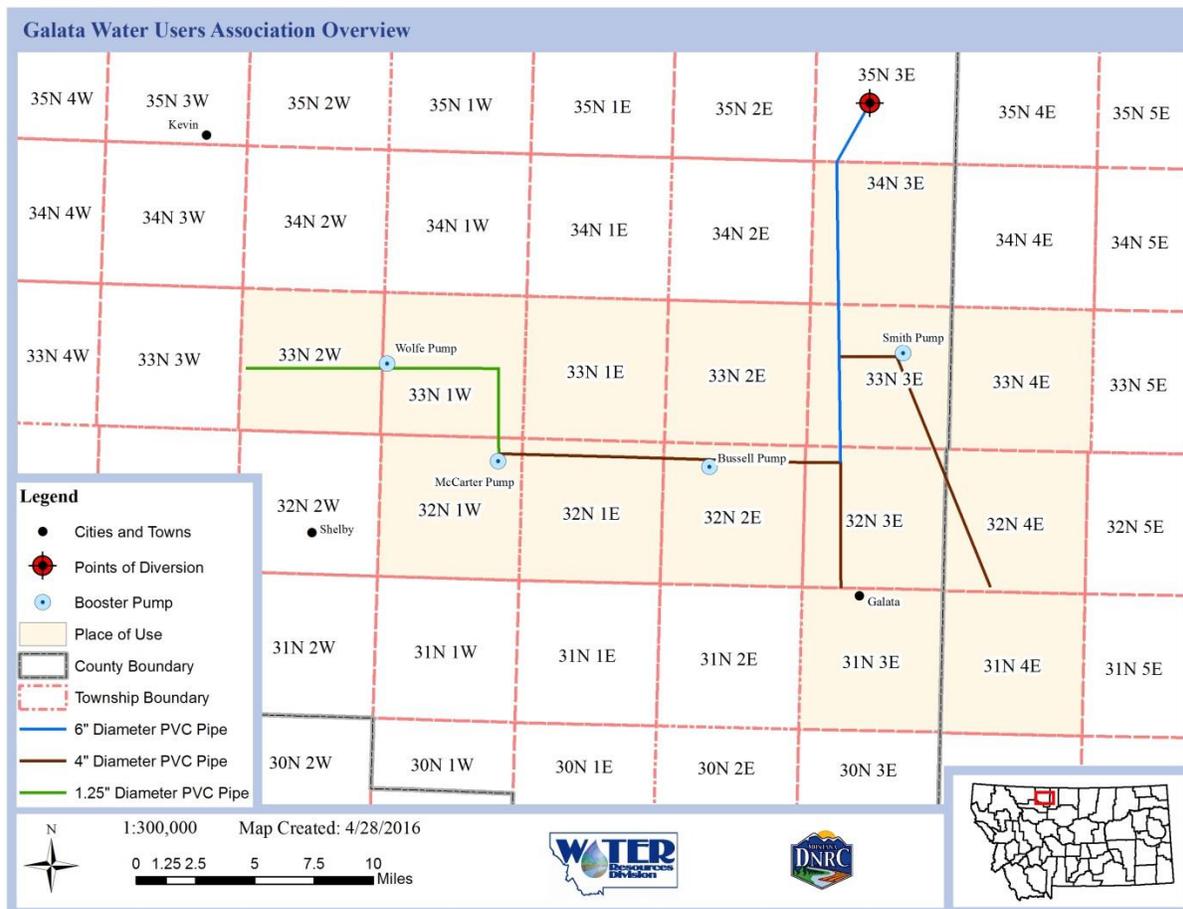


Figure 1-An overview of the Galata Water Users Association service area, points of diversion, and the deliverance system.

CHANGE CRITERIA

5. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant’s burden to prove change criteria by a preponderance of evidence is “more probably 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.

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

7. The Galata Water Users Association has operated two points of diversion since 1976 in accordance with the Montana Department of Environmental Quality public water supply redundant well requirement. Both of the points of diversion are located in the Southwest quarter of the Southeast quarter of the Northwest quarter of Section 21, Township 35 North, Range 3 East, Toole County. The original well was drilled to a depth of 338.0 feet and then plugged to 296.5 feet in 1974, and remained operational until 2002. A second well (west well) was drilled to a depth of 290.0 feet in 1976 and remains operational today, but it needs to be added to the Water Right. In 2002, a third well (east well: replacement to the original 1974 well) was drilled to a depth of 290.0 feet and must also be added to the Water Right.

8. The two wells were operated in an alternating pumping schedule. Specifically, one pump was turned on at a 200.0 gpm flow for approximately two hours followed by a two hour period of no pumping. The next call for water would be directed to the other well, and this alternating pumping pattern would be repeated. Pumped water was conveyed through approximately 62.0 miles of buried PVC pipe throughout the service area to provide water for 75.0 homes as well as stock users. Four booster pumps are located throughout the system. When the system could no longer transport water through the pipelines via gravity, the booster pumps were used to increase pressure and deliver water to the users.

9. Historically, approximately 75 members were served by the GWUA. Connections from the main pipelines to the members usually consisted of a pit containing a backflow preventer and a restriction orifice. The members used the water for domestic purposes and/or stock watering.

10. The GWUA has been collecting system-wide measurement data since 1993, and selected measurement data was submitted in the application and verification materials. During the period of measurement, the maximum volume achieved by the GWUA for the purposes of multiple domestic and stock was 117.9 AF in 2007. The purpose of multiple domestic was assigned a volume of 75.0 AF per year during the verification process completed on April 7th of 2016

according to ARM 36.12.115 (2) (a). The remaining volume of 42.9 AF was assigned to the purpose of stock. In order to justify the stock volume, the GWUA conducted a survey to collect information on the number of stock owned within the service area, in which 63 members responded. The results from this survey are included in Table 2 on the following page. According to the survey count and standards laid forth in ARM 36.12.101 (3), the assigned stock volume is a reasonable estimate. Both multiple domestic and stock purposes are considered to be 100.0% consumptive.

Table 2-Total stock count collected through a survey conducted by the GWUA.

	Animal Unit Month (ARM 36.12.101 (3))	Count	Volume (AF)
Beef Cow	1.0	2,260.0	38.4
Horses	1.5	28.0	0.7
Chickens	3.3X10 ⁻³	30,000.0	1.7
Other	1.0	13.0	0.2
Total (AF)			41.0

11. The Department calculates the historical consumptive volume in acre-feet (HCV AF) to be 117.9 AF based on historical measurements and verification of the underlining permit.

12. Based on the flow rate of 200.0 gpm up to 117.9 AF of diverted volume and a consumed volume of 117.9 AF, the Department finds the following historical use for Provisional Permit No. 41N 3082 (Table 3):

Table 3-Historical use for Provisional Permit 41N 3082.

Water Right #	Source	Flow Rate	Consumptive Use	Diverted Volume	Purposes
41N 3082	Groundwater	200.0 gpm	117.9 AF	117.9 AF	Multiple Domestic, Stock

FINDINGS OF FACT – Adverse Effect

13. Applicant proposes to add a second and third point of diversion to Provisional Permit No. 41N 3082. The original well was drilled in 1974 and is included as the point of diversion for Provisional Permit No. 41N 3082. This well was taken out of service in 2002, when a replacement well was drilled, still needing to be added to the Water Right. An additional point

of diversion that needs to be added to the Water was drilled in 1976 and has been operational since that time.

14. Applicant also proposes to add the purpose of agricultural spraying to Provisional Permit No. 41N 3082. The amount of water requested for the proposed use of agricultural spraying is 11.3 AF. The consumptive use for a water right cannot increase as a result of a proposed change, therefore the Applicant proposes to reduce the historical stock volume from 42.9 AF to 31.6 AF for perfected Provisional Permit 41N 3082. The flow rate is to remain at 200.0 gpm.

15. The historical and proposed uses are 100.0% consumptive. There are no increases proposed to the historical consumptive volume or historical flow rate. There will be no change in the rate or timing of depletions to the source because there are no return flows associated with the project.

16. The Department finds the Applicant has proven 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.

17. IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41N 30105071 THE DEPARTMENT FINDS THE FOLLOWING CONDITION IS NECESSARY TO MEET THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT § 85-2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

**WATER MEASUREMENT RECORDS REQUIRED

THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. 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 WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

18. SUBMIT RECORDS TO:

HAVRE WATER RESOURCES OFFICE

PO BOX 1828

HAVRE, MT

PHONE: 406-265-5516

FAX: 406-265-2225

BENEFICIAL USE

FINDINGS OF FACT

19. The perfected permit is for both stock and multiple domestic uses which are recognized as beneficial uses under § 85-2-102(4)(a), MCA. The Applicant is proposing to add another recognized beneficial use, agricultural spraying, to the permit without increasing consumptive use or flow rate.

20. The GWUA will continue to supply water for the purpose of multiple domestic at the historical volume of 75.0 AF which supplies each home with 1.0 AF of water per year. A reduction in the historical stock volume will occur so that adding 11.3 AF of agricultural spraying to the permit does not increase consumptive use from historical to proposed. The volume of 11.3 AF for agricultural spraying was determined through a survey, in which 63 users responded, and the total volume necessary totaled 9.5 AF. This volume was then scaled up to represent 75 users. The proposed project will beneficially use a consumptive volume totaling 117.9 AF, which includes 75.0 AF for multiple domestic, 31.6 AF for stock, and 11.3 AF for agricultural spraying.

21. The Department finds that the uses of multiple domestic, stock, and agricultural spraying are beneficial uses, and that a flow rate of 200.0 GPM, a diverted volume of 117.9 AF, and a consumed volume of 117.9 AF are reasonable to sustain members' needs for the GWUA.

ADEQUATE DIVERSION

FINDINGS OF FACT

22. The wells have been operated and constructed according to the Montana Department of Environmental Quality public water supply redundant well requirement. The wells are co-located approximately 70.0 feet apart in the same aquifer. Installed in the west well is a Grundfos 75S75-12 7.5 HP pump, while the east well has a Grundfos 150S100-5 10.0 HP pump. A totalizing flow meter monitors the volume of water pumped from the two wells, and monthly flow meter records are kept. Near the supply wells is a 10,000.0 gallon cistern, which begins to fill once water reaches a pre-determined level in the tank. The two wells are operated in an alternating pumping schedule. Specifically, one pump is turned on at a 200.0 gpm flow for approximately two hours followed by a two hour period of no pumping. The next call for water is directed to the other well, and this alternating pumping pattern is repeated. From the cistern, water gravity-flows or is pumped through 62.0 miles of buried PVC piping. This piping consists of 15.3 miles of 6-inch diameter, 32.5 miles of 4-inch diameter, and 14.2 miles of 1.25-inch diameter PVC. There are four booster pumps located throughout the system, including a Smith pump, Bussell pump, McCarter pump, and Wolfe pump which increase pressure where needed.

23. The Department finds the proposed means of diversion, construction and operation of the diversion works to be adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

24. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

25. 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, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

26. 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

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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, at ¶¶43-45.²

27. 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, at ¶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

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. §85-2-234, MCA

Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶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

28. 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, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton 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.)

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; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 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

29. 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 ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

30. 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

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, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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).

31. 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. Admin.R.M. 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. Admin.R.M. 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. Admin.R.M. 36.12.1901 and 1903.

32. Based upon the Applicant’s evidence of historical use, the Applicant has proven by a preponderance of the evidence the historical use of Water Use Permit No. 41N 3082 of 117.9 AF diverted volume and 200.0 gpm flow rate with a consumptive use of 117.9 acre-feet. (FOF Nos. 7—12)

33. 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. §85-2-402(2)(b), MCA. (FOF Nos. 13—18)

BENEFICIAL USE

34. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§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. Admin.R.M. 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, Montana First Judicial District Court (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, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (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); Toohy 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).

35. The Department may issue a change authorization for less than the amount of water requested, but may not issue a change authorization for more water than is requested or more water than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

36. The Department can also consider waste in a change proceeding. Hohenlohe at ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

37. Matter of Application for Permit No. 76LJ-24668 by Hammell (DNRC Proposal for Decision 1981)(Applicant requested enough water to irrigate 22 acres. Permit was reduced because applicant only provided evidence that 5 acres would actually be irrigated.)

38. Applicant proposes to use water for stock, domestic, and agricultural spraying which are recognized beneficial uses. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock, domestic, and agricultural spraying are beneficial uses and that 117.9 acre-feet of diverted volume and 200.0 gpm flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 19—21)

ADEQUATE MEANS OF DIVERSION

39. 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).

40. 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. 22—23)

POSSESSORY INTEREST

41. 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 Admin.R.M. 36.12.1802

42. 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. 24)

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. 41N 30105071 should be **GRANTED** to allow for the addition of two points of diversion, both located in the Southwest quarter of the Southeast quarter of the Northwest quarter of Section 21, Township 35 North, Range 3 East, and to repurpose a volume of 11.3 AF from the historical purpose of stock for the new purpose of agricultural spraying subject to the following.

IN THE MATTER OF APPLICATION TO CHANGE A WATER RIGHT NO. 41N 30105071
THE DEPARTMENT FINDS THE FOLLOWING CONDITION IS NECESSARY TO MEET
THE STATUTORY CRITERIA FOR CHANGES OF WATER RIGHT SET FORTH AT § 85-
2-402, MCA AND ALLOW FOR ISSUANCE OF THE CHANGE AUTHORIZATION:

**WATER MEASUREMENT RECORDS REQUIRED

THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF THE FLOW RATE AND VOLUME OF WATER USED. 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 WATER RESOURCES REGIONAL OFFICE. THE WATER USER SHALL MAINTAIN THE MEASURING

DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:
HAVRE WATER RESOURCES OFFICE
PO BOX 1828
HAVRE, MT
PHONE: 406-265-5516
FAX: 406-265-2225

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 17th day of August, 2016

/Original signed by Matt Miles/

Matt Miles, Deputy Regional Manager
Havre Regional Office
Department of Natural Resources & Conservation