

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

APPLICATION TO CHANGE WATER RIGHT) NO. 41H 30135552 BY BIG SKY RESORT) LLC)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On August 29, 2019, Big Sky Resort LLC (Applicant) submitted Application to Change Water Right No. 41H 30135552 to change Provisional Permit No. 41H 87314 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. A deficiency letter was sent to the Applicant on June 26, 2019, and the Applicant responded August 29, 2019. The Application was determined to be correct and complete as of February 10, 2020. An Environmental Assessment for this Application was completed and posted on the Department’s website on June 4, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606 – Application to Change an Existing Irrigation Water Right, and attachments
 - Maps of the existing and proposed projects

Information within the Department’s Possession/Knowledge

- Water right records
- Environmental Assessment
- Department Technical Report
- Administrative Rules of Montana (ARM)
- U.S. Geological Survey topographic maps and aerial photos owned by the Department or publicly-available
- Environmental Assessment dated June 4, 2020

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. The Applicant proposes to change the place of use for the Provisional Permit 41H 87314-00 to have the flexibility for snowmaking on all of the ski area within the watershed. The water right is used for recreation, snowmaking, near the town of Big Sky, Montana, in Gallatin County. Provisional Permit 41H 87314-00 is an unperfected permit.

2. A table of the permitted elements of the water right proposed to be changed follows:

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

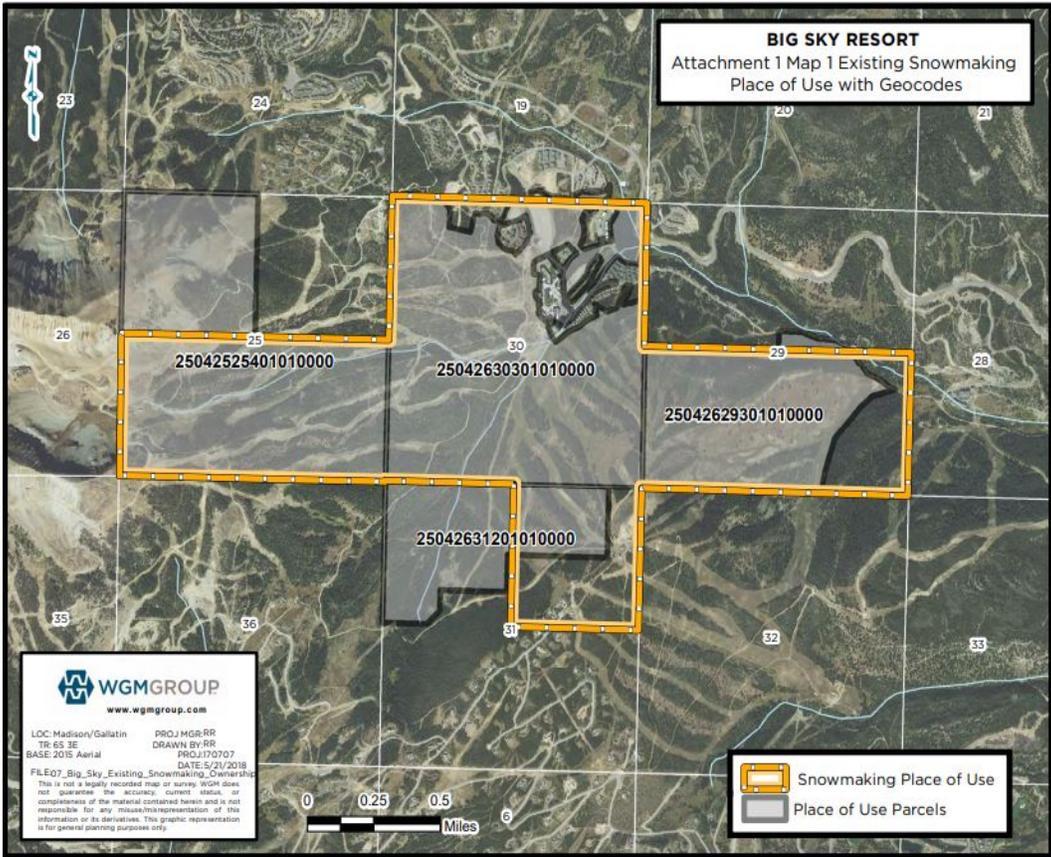
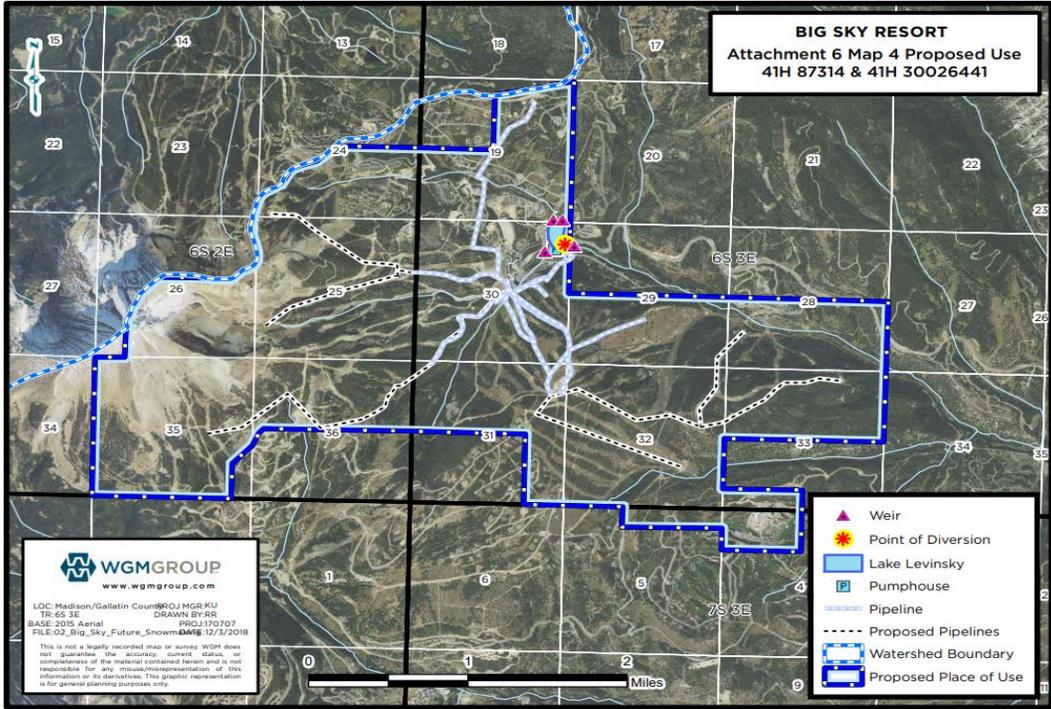
WR Number	Purpose	Flow Rate	Volume	Period of Diversion/ Period of Use	Point of diversion	Place of use	Priority date
41H 87314	RECREATION/ SNOW MAKING	ON STREAM RESERVOIR	100.00 AC-FT	APRIL 15 TO JUNE 30 OCTOBER 1 to APRIL 15	SENESE Sec. 30 T6S R3E	S2 Sec. 29, Sec. 30, T6S R3E & NE Sec 31 T6S R3E	SEPTEMBER 30, 1993

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change the place of use for Provisional Permit 41H 87314-00 to produce snow on new acres not included in the current place of use. Change application 41H 30135552 and 41H 30116528 are two concurrent changes for provisional permits 41H 87314-00 and 41H 30026441, which are for the same place of storage and for the same place of use for snowmaking. No additional water is needed for this project; the snowmaking will be limited to the volumes associated to each water right being changed in this process. The point of diversion, purpose of use, and place of storage is not changing. Also, no changes will be made to the period of use and means of conveyance.

4. The map below shows the proposed place of use:



CHANGE CRITERIA

3. 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.

4. 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).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

5. *Water Rights* - The water right to be changed is Provisional Permit No. 41H 87314. Provisional Permit 41H 87314 is an unperfected permit, so historic use information has not been developed. The source is the Middle Fork of the West Fork of the Gallatin River and the means of diversion is an on-stream reservoir. A pump diverting from Lake Levinsky is the secondary pumping location. No more than 100 AF can be diverted for snow making proposed with this permit.

6. *Places of Use* – 41H 87314 is an unperfected permit, historic use information has not been developed. No more than 100 AF can be diverted for snow making purposed with this permit on the described place of use of the S2 of Section 29, Section 30, T6S R3E and the NE of Section 31, T6S R3E, Gallatin County.

7. *Flow Rate* – 41H 87314 has an on-stream dam as a means of diversion. No flow rate is assigned for on-stream dams.

8. *Consumptive Volume* – This is an unperfected permit that was granted at a time we did not assign consumptive volume, so this has not yet been determined. Some history in the file explains how Wright Water Engineers, Inc. authored a study detailing the consumptive demands of the snowmaking process for Big Sky Resort. The report asserts on dry years, the snowmaking system is 35% consumptive. The consumptive losses are associated with initial nozzle losses and subsequent watershed losses. Nozzle losses occur from evaporation and sublimation. Watershed losses include ongoing evaporation and sublimation losses once the snow has been applied to the ground surface or snowpack. Lake Levinsky is the secondary pumping location. 41H 87314-00 has an on-stream dam for a point of diversion. Water is diverted by a dam across the Middle Fork of the West Fork of the Gallatin River and is stored, creating Lake Levinsky. 35 AF is thought to be consumed (35% of the snowmaking portion is considered consumed, based on the study, but this is pending any more specific information that could come with the permit completion information). Big Sky Resort has a water use agreement with Big Sky Water and Sewer District (BSW&SD) to use water from two wells (Cascade Wells 5 & 6) permitted under 41H 100737-00 to make up the consumptive evaporation loss of 20 AF from Lake Levinsky. Big Sky Resort can use the wells from October 20th to January 20th. Groundwater from Cascade Wells 5 & 6 is discharged into the Middle Fork of the West Fork of the Gallatin River, where it then flows downstream to Lake Levinsky.

9. *Diverted Volume (Field Efficiency and Conveyance)* - 41H 87314-00 is an unperfected permit, historic use information has not been developed. Lake Levinsky is the secondary pumping location. No more than 100 AF can be diverted for snowmaking purposes with this permit. Water is diverted by a dam across the Middle Fork of the West Fork of the Gallatin River and is stored, creating Lake Levinsky. No

more than 100 AF can be diverted with this permit for snow making and recreation purposes and the capacity of Lake Levinsky is 221 AF (see table below for water use).

Lake Levinsky Water Balance		
Capacity = 221 AF		
41H 87314-00	100 AF	Recreation = Snowmaking
	<u>121 AF</u>	Total Use
41H 30026441	60 AF	Commercial = Snowmaking
	61 AF	Fishery (instream flow below dam)
41H 100737-00	20 AF	Municipal BSW&SD water right provides evaporative loss amount

10. *Period of Diversion/Use* – Provisional Permit No. 41H 87314-00 has a period of diversion from April 15 to June 30 and a period of use from October 1 to April 15 for snow making purposes and to fill the place of storage, Lake Levinsky. Lake Levinsky is the secondary pumping location. Water is diverted by a dam across the Middle Fork of the West Fork of the Gallatin River, creating Lake Levinsky.

11. 41H 87314 is an unperfected permit, historic use information has not been developed. No more than 100 AF can be diverted for snow making purposed with this permit on the described place of use of the S2 of Section 29, Section 30, T6S R3E and the NE of Section 31, T6S R3E, Gallatin County. See the table below.

WR Number	Purpose	Flow Rate	Volume	Period of Diversion/ Period of Use	Point of diversion	Place of use	Priority date
41H 87314	RECREATION/ SNOW MAKING	ON STREAM RESERVOIR	100.00 AC-FT	APRIL 15 TO JUNE 30 OCTOBER 1 to APRIL 15	SENE NE Sec. 30 T6S R3E	S2 Sec. 29, Sec. 30, T6S R3E & NE Sec 31 T6S R3E	SEPTEMBER 30, 1993

FINDINGS OF FACT – Adverse Effect

12. Wright Water Engineers, Inc authored a study detailing the consumptive demands of the snowmaking process for Big Sky Resort. The report asserts on dry years, the snowmaking system is 35% consumptive. No additional water is needed for this project, the snowmaking will be limited to the volume associated to 41H 87314-00 in this process. Water is diverted and stored in Lake Levinsky from April 15th to June 30th. If a call for water is made during this time, Applicant asserts that water can be released from Lake Levinsky to satisfy downstream water rights. Legally stored water is not subject to call. Outside of this period when diversion is not allowed, the outlet will be adjusted so outflows from the Lake equal the inflows, with an existing water measurement condition ensuring no water is diverted outside of the period of diversion. Water can be pumped from Lake Levinsky for snowmaking from October 1st to April 15th. A meter is installed on the supply line from the pumphouse to track the diverted snowmaking volume. The meter will be monitored throughout the period of use to make sure the diverted volume is not exceeded. Applicant has provided measurement reports in adherence to the original conditions applied to the Provisional Permit. Conditions for Provisional Permit 41H 87314-00 will be carried forward upon authorization of the change. See the condition below:

WATER MEASUREMENT REQUIREMENT - UNIQUE TYPE

THIS PERMIT IS SUBJECT TO THE CONDITION THAT THE PERMITTEE SHALL INSTALL ADEQUATE FLOW METERING DEVICES IN ORDER TO COMPLY TO THE FOLLOWING REQUIRMENTS. A WATER MEASURING DEVICE SHALL BE INSTALLED AT EACH OF THE THREE INLETS TO MEASURE THE FLOW INTO LAKE LEVINSKY AND ANOTHER DEVICE INSTALLED AT THE OUTLET FROM LAKE LEVINSKY. WRITTEN RECORDS MUST BE TAKEN DAILY FROM EACH MEASURING DEVICE. A WRITTEN RECORD OF THE DATE, FLOW RATE, AND VOLUME OF WATER PUMPED FROM LAKE LEVINSKY FOR SNOW MAKING MUST ALSO BE KEPT. ALL OF THE AFOREMENTIONED WRITTEN RECORDS SHALL BE SUBMITTED BY JULY 1ST OF EACH YEAR OR UPON REQUEST TO THE BOZEMAN WATER RESOURCES REGIONAL OFFICE.

13. Provisional Permit 41H 87314-00 is an unperfected permit; no full analysis on consumption is being completed in this application, though some file documentation indicates

that the permit was analyzed as 100% consumptive, and then later the credited non-consumptive amount was used for the newer permit for snowmaking (41H 30026441). No additional water is needed for this project, the snowmaking purpose will be limited to the volume associated to Provisional Permit 41H 87314-00. The point of diversion, purpose of use, and place of storage is not changing. Also, no changes will be made to the period of use and means of conveyance. Applicant has provided measurement reports in adherence to the original conditions applied to the Provisional Permit. Conditions for Provisional Permit 41H 87314-00 will still apply in this application.

14. The Department finds the proposed change will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit, certificate, or a state water reservation has been issued.

BENEFICIAL USE

FINDINGS OF FACT

15. Applicant proposes to use water for recreation/snow making. Water has been appropriated for snowmaking every year since the permit was issued. Some annual measurement reports were not supplied to the DNRC, but water was still used in these years. Applicant provided measurement reports in adherence to the measurement condition assigned to Provisional Permit 41H 87314-00. The measurement reports do demonstrate that the full amount of permitted volume was put to beneficial use, so while this is still unperfected, this demonstrates the need for the full amount of 100 AF. The Applicant wants flexibility on where to apply snow, so this change in place of use is so the entire ski area is represented. Recreation and snow making is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

16. The means of diversion is an on-stream dam. The Department does not assign flow rates to diversions consisting of on-stream dams since the dam has the ability to appropriate all flow at a given time.

17. There is no change in the purpose of 41H 87314-00, the flow rate and volume of 100 AF is needed to continue the beneficial use. The Department finds the use of water for Recreation (snow making) as a beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

18. Water is diverted by a dam across the Middle Fork of the West Fork of the Gallatin River between April 15th and June 30th and is stored on-stream in Lake Levinsky. Lake Levinsky is a rolled earthfill dam with a dam crest of 52 feet, at an elevation of 7429 feet, and a length of 400 feet, creating a normal reservoir surface area of 9.8 acres (with a 221 AF capacity). The dam is classified as a high hazard dam, requiring annual engineer inspections and oversight from the MT DNRC Dam Safety Program. When the temperature drops below 30 degrees, which can be as early as late October, water is pumped from the Lake into a 12-inch main supply pipeline by a 250-horsepower pump. Smaller lateral pipelines branch off from the main supply line to the ski runs. These laterals provide water to high pressure snow gun nozzles and snowmaking fans. Snow accumulates near the snow guns and is spread and groomed on the ski runs. Applicant provided measurement reports in adherence to the measurement condition assigned to Provisional Permit 41H 87314-00. Big Sky Resort has three flow measurement devices on the inlets and one on the outlet of Lake Levinsky. The measurement reports do demonstrate that the full amount of permitted volume was put to beneficial use, so while this is still unperfected, this demonstrates the need for the full amount of 100 AF.

19. The Department finds the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

21. 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

22. 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, at ¶¶43-

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

45.²

23. 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 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

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

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

24. 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. 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. 411 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

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.)

subject to appropriation by subsequent water users).⁵

25. 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).

26. 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.

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).

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

27. 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. 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.

28. 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).

29. 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).

30. 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).

31. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .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., supra; 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”).

32. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Beneficial Water Use Permit No. 41H 87314 of 100 AF of diverted volume The Department does not assign flow rates to diversions consisting of on-stream dams since the dam has the ability to appropriate all flow at a given time. (FOF Nos. 5-11)

33. Based upon the Applicant’s comparative analysis of historic water use and planned use 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. 12-14)

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); 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).

35. Applicant proposes to use water for recreation (snow making) which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence a diverted volume of 100 AF is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 15-17).

ADEQUATE MEANS OF DIVERSION

36. 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).

37. 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

38. 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

39. 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. 41H 87314-00 should be **GRANTED** subject to the following.

The appropriator is authorized to change the place of use of Provisional Permit 41H 87314-00. The amount of water shall not exceed a diverted volume of up to 100 AF per year for recreation for snowmaking purposes. The period of diversion is April 15 to June 30, and the period of use is October 1 to April 15. The point of diversion will remain in the SENENE of Section 30, T6S R3E, Gallatin County. The authorized place of use is described in the table below:

N2NW	Section 4	TWP 07 S	RGE 03E
N2NE	Section 5	TWP 07 S	RGE 03E
NENNENW	Section 5	TWP 07 S	RGE 03E
E2SW	Section 19	TWP 06 S	RGE 02E
S2	Section 24	TWP 06 S	RGE 02E
	Section 25	TWP 06 S	RGE 02E
SE	Section 26	TWP 06 S	RGE 02E
E2SW	Section 26	TWP 06 S	RGE 02E
S2	Section 28	TWP 06 S	RGE 03E
S2	Section 29	TWP 06 S	RGE 03E
	Section 30	TWP 06 S	RGE 03E
N2	Section 31	TWP 06 S	RGE 03E
E2SW	Section 31	TWP 06 S	RGE 03E
	Section 32	TWP 06 S	RGE 03E
N2	Section 33	TWP 06 S	RGE 03E
S2S2SW	Section 33	TWP 06 S	RGE 03E
	Section 35	TWP 06 S	RGE 02E
N2	Section 36	TWP 06 S	RGE 02E

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 4th day of June, 2020.

/Original signed by Kerri Strasheim/
Kerri Strasheim, Regional Manager
Bozeman Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this DATED this 4th day of June, 2020, by first class United States mail.

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