

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

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**APPLICATION TO CHANGE WATER RIGHT )  
NO. 41A 30147256 BY DOUBLE C RANCH ) PRELIMINARY DETERMINATION TO  
HOLDINGS LLC ) GRANT CHANGE**

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On November 18, 2019, Double C Ranch Holdings LLC (Applicant) submitted Application to Change Water Right No. 41A 30147256 to change a Non-Filed Water Project 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 May 15, 2020.

The Department held a phone conference with the Applicant's consultant, Deborah Stephenson on July 30, 2020. The Applicant submitted a minor amendment related to the historical flow rate of the spring on August 5, 2020. An Environmental Assessment for this Application was completed on September 4, 2020.

**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
- Non-Filed Water Project Addendum
- Maps: ESRI Base map showing proposed developed spring, pipelines, additional stock tanks, separate Groundwater Certificate information.
- Montana Sage Grouse Habitat Conservation Program review

Information Received after Application Filed

- Minor Amendment received August 5, 2020

Information within the Department's Possession/Knowledge

- Aerial photos and topographic maps
- Water right records

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- DNRC Technical Report
- Montana Natural Heritage Program Species of Concern List
- Statute and administrative rules
- Environmental Assessment dated September 4, 2020

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).

### **WATER RIGHT TO BE CHANGED**

#### **FINDINGS OF FACT**

1. The Applicant proposes to add two additional places of use to a non-filed stockwater project. The Applicant proposes to install a pipeline system that will be gravity fed from the historical point of diversion, a spring located in the SESENE of Sec. 35, T14S, R3W, Beaverhead County, to two stock tanks. Tank 1 is located in the SWNE Sec. 35, T14S, R3W, and Tank 2 is located in the SESWSW Sec. 26, T14S, R3W, both in Beaverhead County. The source for the point of diversion was historically an undeveloped spring that has since been developed as of 2019. The livestock will continue to use the pasture where the spring is located but will no longer drink directly from the spring, and the water that was historically used at the spring will now be piped to the tanks.

Table 1: WATER RIGHT PROPOSED FOR CHANGE

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Volume</b>	<b>Period of Use</b>	<b>Point of diversion</b>	<b>Place of use</b>	<b>Priority date</b>
Non-Filed Water Project	Stock			01/01-12/31	SESENE Sec 35 T14S R3W	SESENE Sec 35 T14S R3W	09/23/1926  (Non-enforceable) *

\* This Non-Filed Water Project is non-enforceable because it was an exempt claim that was not filed during the original claim filing period, (before April 30, 1982), the late claim filing period (1993-July 1, 1996), the SB355 claim filing period, or the HB110 claim filing period, does not have an enforceable priority date and is subordinate to all filed water rights (timely-filed pre-1973 claims, groundwater certificates, and DNRC permits).

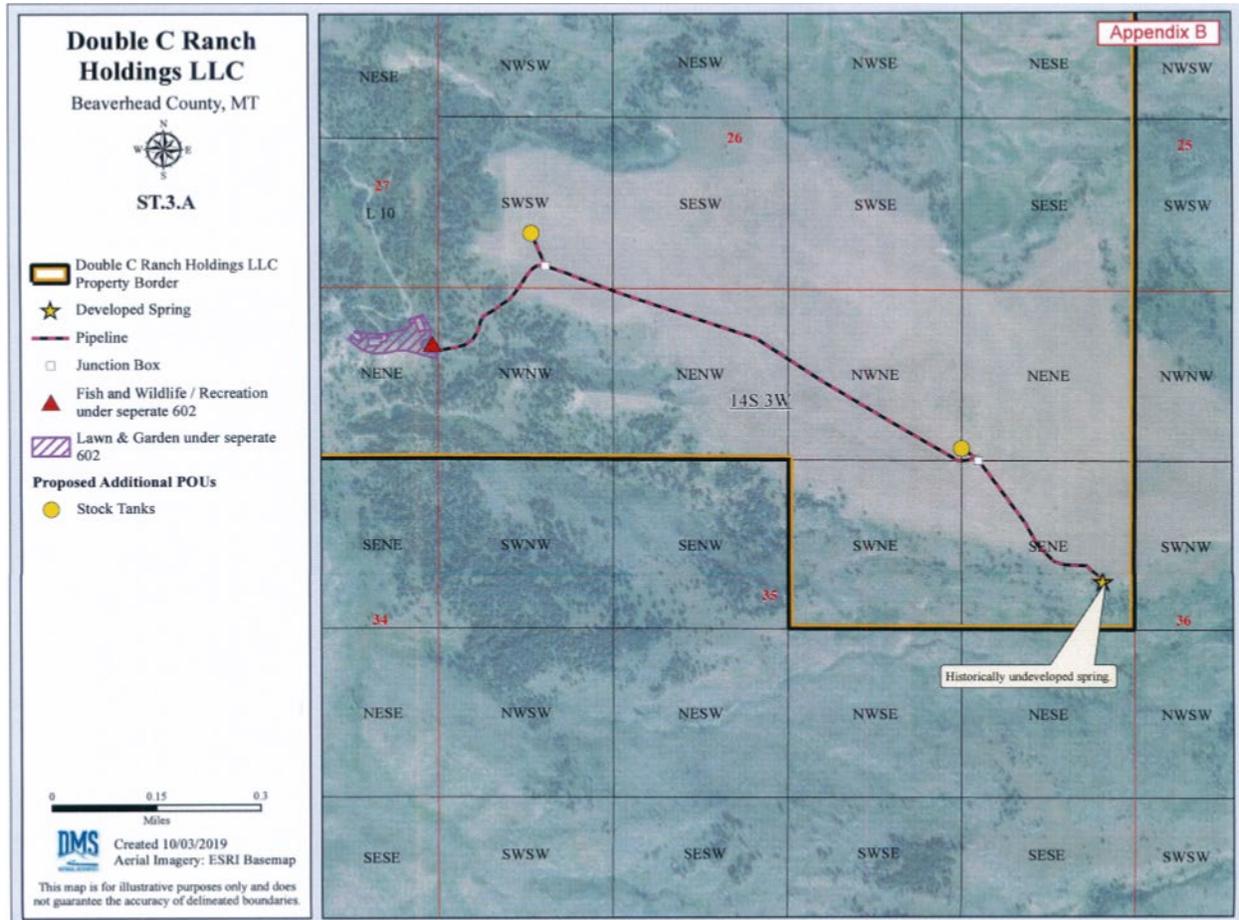
**CHANGE PROPOSAL**

**FINDINGS OF FACT**

2. The Applicant proposes to add two additional places of use, and change the source from an undeveloped surface right, to a developed spring groundwater right for a non-filed water project.
3. The Applicant has installed a pipeline system that is gravity fed from the historical point of diversion, located in the SESENE of Sec. 35, T14S, R3W, Beaverhead County. The pipeline starts at the historical point of diversion as a 2" HDPE, running approximately 1,000 ft northwest then converts to a 1 ½" HDPE to deliver water to Tank 1 located in the SWNENE Sec. 35, T14S, R3W, Beaverhead County. From Tank 1 the 1 1/2" pipeline continues northwest approximately 3,800 ft to deliver water to Tank 2 located in the SESWSW Sec. 26, T14S, R3W, Beaverhead County. Both tanks are fiberglass, 10 feet in diameter by 2 feet tall with a 1,140-gallon capacity. Both tanks are equipped with Watson brand 1 ¼ inch valves and 6 inch pan floats.
4. The source for the point of diversion was historically an undeveloped spring (surface water), that has since been developed (groundwater) as of 2019. The livestock will continue to use the pasture where the spring is located but will no longer drink from the spring. The water that was historically used at the spring will be piped to the tanks. The developed spring and pipeline system is intended to move the cattle off the source to the two stock tanks for better pasture management.
5. The developed spring will also be the point of diversion for an associated Groundwater Certificate (Certificate No. 41A 30147273 for lawn and garden irrigation and recreation), submitted at the same time as this application, November 18, 2019.
6. No flow rate was identified in the Application materials; however, a minor amendment was submitted August 5, 2020 identifying a historical flow rate of 8.0 GPM.
7. Non-filed water projects do not have enforceable priority dates and are subordinate to all adjudicated statements of claim and new appropriations (groundwater certificates and permits)..

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Figure 1: MAP OF PROPOSED PROJECT AREA (DEPARTMENT FILE)



## **CHANGE CRITERIA**

8. 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

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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.

9. 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*

10. The water right proposed for change is a non-filed water project related to 300 animal units (cattle) that historically drank from an undeveloped spring located in the SESENE of Sec. 35, T14S, R3W, Beaverhead County

11. There are no supplemental rights associated with this change. A Notice of Completion of Groundwater Development (Certificate No. 41A 30147273) was submitted at the same time as

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this change application on November 18, 2019. The stated use for 41A 30147273 is lawn and garden irrigation and recreation.

12. The Non-Filed Water Project Addendum submitted with this change application indicated historical water use based on 300 beef cows, which equals 300 Animal Units (AU). The Department used Adjudication standards for livestock use of 30 GPD per AU to calculate a volume of 10.06 acre-feet (AF). The volume is considered to be 100% consumptive.

13. No flow rate was identified in the change application; however, the Applicant amended the Application on August 5, 2020 identifying a historical flow rate of 8 GPM.

14. The Department finds the following historic use.

<b>WR Claim #</b>	<b>Priority Date</b>	<b>Diverted Volume</b>	<b>Flow Rate</b>	<b>Purpose (Total Acres)</b>	<b>Consump. Use</b>	<b>Place of Use</b>	<b>Point of Diversion</b>
Non-Filed Water Project	N/A	10.06 AF	8.0 GPM	Stock	10.06 AF	SESENE Sec 35 T14S R3W	SESENE Sec 35 T14S R3W

***FINDINGS OF FACT – Adverse Effect***

15. Historical use is 8.0 GPM up to 10.06 AF for stock watering of 300 AU from January 1 to December 31. No additional animal units will be grazed within the Applicant's pastures under the proposed change, only the location where the water is used will change. The historic flow rate of 8.0 GPM and volume of 10.06 AF will not be exceeded. Valves will be used to control flow to the tanks. If call is made, the Applicant has the ability to stop the flow from the pipelines.

16. The volume of 10.06 AF conforms to the DNRC adjudication standard of 30 gallons per day per animal unit (300 AU's), based on a period of use of January 1 through December 31. The flow rate of 8.0 GPM is based on the historical flow rate of the undeveloped spring and the capacity of the pipeline system. This historical flow rate of 8.0 GPM was determined by a bucket test conducted by the Applicant when the spring was put to use and undeveloped. The developed spring and pipeline system were built to ensure that the historical flow rate remained the same.

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17. The Department finds there will be no adverse effects from the proposed change. No other water right holders utilize the spring source proposed for change.

18. There are no non-use issues.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

19. The existing project is for stock use with a flow rate of 8.0 GPM, and a volume of 10.06 AF, which is a recognized beneficial use under statute. §85-2-102(5), MCA.

## **ADEQUATE DIVERSION**

### **FINDINGS OF FACT**

20. The Applicant states that they used a bucket and stopwatch measurement to arrive at the historical 8 GPM use. If done correctly, this type of direct measurement is very accurate.

21. Most engineering references recommend a roughness coefficient of 140 – 150 for smooth plastic pipe. The Department used 140, since it's a stock tank system and might not be the same quality as a new municipal system (higher number = smoother).

22. Hydraulic radius is the cross-sectional-area divided by the wetted perimeter. For a pipe flowing full, the hydraulic radius is  $D/4$ , one-fourth of the diameter.

23. Energy slope,  $S$ , equals the friction loss,  $hf$  (ft), divided by the length,  $L$  (ft). For this application – spring-pipeline-stock tank – we can approximate  $S$  as the difference in elevation divided by the pipe length.

24. The Department georeferenced the map from the application and measured a length of about 1,400 feet for the first segment of the pipeline. Using quick elevations from Google Earth, the Department estimated a drop of about 30 feet over this length, so  $S = 30 / 1400 = 0.021$  ft/ft. Both measurements were rough cuts (the application materials state the 2-inch pipe segment is 1,000 feet).

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25. The Department looked at only the first segment of the pipeline because it has the largest diameter, the applicant reported a pipe diameter of 2 inches (0.1667 feet) for this segment.

26. Using these values, Hazen-Williams returns a velocity of 3.13 ft/sec, which is reasonable. It depends on what the system is used for, but most water velocities in pipes should not exceed 3 – 8 ft/sec.

27. For a 2-inch pipe, this velocity corresponds to a flow rate of 0.068 CFS or about 31 GPM – if the pipe is flowing full.

28. The Applicant states that the system is limited by what the spring produces. The spring produces an 8 GPM flow rate.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

29. The Applicant signed the affidavit on the application form affirming the applicant has possessory interest in the property where the water is to be put to beneficial use. (Department file)

### **CONCLUSIONS OF LAW**

#### **HISTORIC USE AND ADVERSE EFFECT**

30. 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

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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).<sup>1</sup>

31. 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 ¶¶43-45.<sup>2</sup>

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

<sup>2</sup> 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).

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32. 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.<sup>3</sup> 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 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).<sup>4</sup>

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

<sup>4</sup> 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

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33. 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 ¶144; 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-G76l 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

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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.)

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right and is subject to appropriation by subsequent water users).<sup>5</sup>

34. 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).

35. 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

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<sup>5</sup> 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).

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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).

36. 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.

37. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of the Non-Filed Water Project of 10.06 diverted volume and 8 GPM flow rate with a consumptive use of 10.06 acre-feet. (FOF Nos. 10-14)

38. 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. 15-18)

### BENEFICIAL USE

39. 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-

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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).

40. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 10.06 acre-feet of diverted volume and 8.0 GPM flow rate of water requested is the amount needed to sustain the beneficial use. (FOF No. 19)

#### ADEQUATE MEANS OF DIVERSION

41. 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. 6<sup>th</sup> 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).

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42. 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. 20-28)

### **POSSESSORY INTEREST**

43. 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

44. 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. 29)

### **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. 41 A 30147256 should be granted subject to the following. Additional places of use (stock tanks) are authorized to be located in the (1) SWNENE Sec 35 and (2) SESWSW Sec 26, T14S, R3W; Beaverhead County. The source will change from surface water to groundwater. The periods of diversion and use are from January 1 through December 31. The maximum flow rate for the Applicants' water right claim is 8.0 GPM with a maximum annual volume that shall not exceed 10.06 AF per year. This right is subordinate to all timely filed water right claims and new appropriations of water.

### **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

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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 11<sup>th</sup> day of September 2020

/Original signed by Bryan Gartland/  
Bryan Gartland, Manager  
Helena Regional Office  
Department of Natural Resources  
and Conservation

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**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 \_\_\_\_ day of \_\_\_\_\_ 20\_\_, by first class United States mail.

DOUBLE C RANCH HOLDINGS LLC  
19050 S. VALLEY RD  
LIMA MT 59739

DEBORAH STEPHENSON  
DMS NATURAL RESOURCES  
602 S. FERGUSON AVE SUITE 2  
BOZEMAN MT 59718

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Helena Regional Office, (406) 444-6999