

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

<p>APPLICATION TO CHANGE WATER RIGHT NO. 41E 30148132 BY USDA FOREST SERVICE AND USDI BUREAU OF LAND MANAGEMENT</p>	}	<p>PRELIMINARY DETERMINATION TO GRANT CHANGE</p>
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On January 21, 2020, USDA Forest Service and USDI Bureau of Land Management (Applicants) submitted Application to Change Water Right No. 41E 30148132 to change Water Right Statement of Claim No. 41E 54725-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated July 17, 2020. The Applicant responded with information dated September 11, 2020. The Application was determined to be correct and complete as of August 19, 2021, at which time the Applicants were provided with the Department's technical reports. An Environmental Assessment for this Application was completed on August 24, 2021.

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
- Maps
- Montana Sage Grouse Habitat Conservation Program review

Information Received after Application Filed

- Deficiency e-mail response dated September 11, 2020

Information within the Department's Possession/Knowledge

- Aerial photos and topographic maps
- Water right records, including files for the Statement of Claim proposed to be changed

- USDA Web Soil Survey
- DNRC Technical Report
- Montana Natural Heritage Program Species of Concern List
- Statute and administrative rules
- Adopted Environmental Assessment dated May 19, 2016 (Change No. 41E 30071675)
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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 change Statement of Claim No. 41E 54725-00

Table 1: WATER RIGHT PROPOSED FOR CHANGE

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
41E 54725	Stock	N/A	N/A	06/01-10/31	Three diversion points located in the S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 2 T5N, R5W. SESE and NESWSE Sec.3, T5N, R5W	NESWSE Sec. 3 and SESE Sec. 3 and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 2, T5N, R5W	04/12/1906

CHANGE PROPOSAL

FINDINGS OF FACT

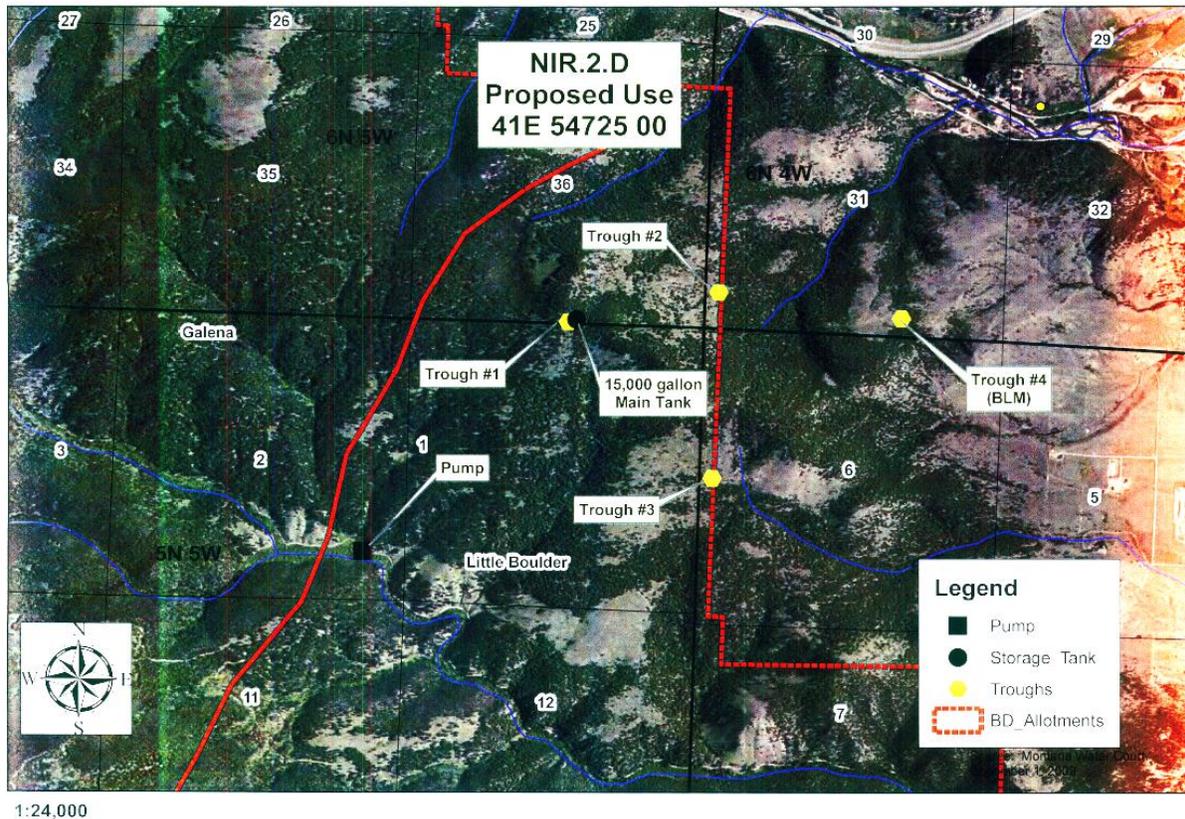
2. The Applicants propose to change the point of diversion and the place of use for Statement of Claim No. 41E 54725-00. The current purpose is for stock watering direct from source, with a priority date of April 12, 1906. The periods of use and diversion are June 1 to October 31. The historic points of diversion are direct from source from the North Fork of the

Little Boulder River located in the S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 2, T5N, R5W, and the SESE and NESWSE Sec. 3, T5N, R5W, Jefferson County.

3. The Applicants propose to split the use of this water right claim between stock watering direct from source and a pump and stock tank system. Trough #1 of the pump and tank system will be located by the main distribution tank in the SESESW Sec 36, T6N, R5W. Trough #2 will be located in the SESESE Sec 36, T6N, R5W; Trough 3 will be located in the E $\frac{1}{2}$ E $\frac{1}{2}$ NESE Sec 1, T5N, R5W. Both Trough #2 and Trough #3 are on Forest Service land close to the border with USDI Bureau of Land Management (BLM) property. Trough #4 will be located on BLM property in the S $\frac{1}{2}$ SWSE Sec 31, T6N, R4W. The pump system is intended to move a portion of the stock (168 AU) off stream to reduce riparian impacts of stock grazing at the source. The source for the current and proposed point of diversion is the North Fork of the Little Boulder River located in the SESE Sec 2, T5N, R5W, in Jefferson County. In addition to the proposed pump and tank system, the three direct from source points of diversion will be retained as was historically practiced to collectively water 509 animal units (AU). To allow for management flexibility during grazing rotations, the full period of diversion and use will be retained although the proposed use for the tank system is a transitory 45 days within the historic period.

4. The Applicants propose diverting 1.8 GPM for 45 days to a centralized 15,000-gallon storage tank located in the SESESW Sec 36, T6N, R5W, in Jefferson County. Two distribution pipelines connected to the storage tank deliver water to four 1,100-gallon troughs via 14,540 lineal-feet of 1.5-inch diameter plastic pipe. The proposed volumetric use, both diverted and consumed, is 4.68 AF/year. A flow rate of 1.8 GPM will be diverted to the stock tanks, the remaining flow rate will be left instream for the remaining stock.

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



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).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

7. Statement of Claim 41E 54725-00 was decreed by the Montana Water Court with an unquantified volume, based on the amount of water consumptively used for stock watering purposes at a rate of 30 gallons per day per animal unit. No flow rate was decreed by the Water Court for livestock drinking directly from the source. Based on historic grazing records maintained by the Butte District of the Beaverhead/ Deer Lodge National Forest, the pre-1973 carrying capacity of the North Fork Little Boulder River Allotment was 509 animal units (AUs). The period of use was decreed by the Water Court for 153 days, but the Applicant typically put

this to use for 100 days within the 153 day period of use. Based on the Adjudication standard of 30 gallons per animal unit per day, and because stock is considered 100% consumptive, the historic diverted and consumed volume is 4.68 AF, a flow rate of 1.8 GPM will be diverted to the stock tanks, the remaining flow rate will be left instream for the remaining stock.

8. There are no supplemental water rights.

9. The Department’s findings for historic use are detailed in Table 2.

Table 2: HISTORIC USE FOR STATEMENT OF CLAIM NO. 41E 54725-00

WR Claim #	Priority Date	Diverted Volume	Flow Rate	Purpose	Consump. Use	Place of Use	Point of Diversion
41E 54725-00	4/12/19 06	4.68 AF	10.6 GPM	Stock	4.68 AF	S½S½ SEC 2, T5N, R5W SESE SEC 3, T5N, R5W NESWSE SEC 3 T5N, R5W	S½S½ SEC 2, T5N, R5W SESE SEC 3, T5N, R5W NESWSE SEC 3 T5N, R5W

FINDINGS OF FACT – Adverse Effect

10. The proposed overall operation will serve the same number of animal units as was historically practiced (509 AU). The pump system is intended to move approximately 168 AU off stream to less vulnerable parts of the allotment to reduce riparian impacts of stock grazing at the source. The Applicants propose to utilize the tank system for a transitory 45-day period within the overall period of use. The remaining stock will continue to water direct from source.

11. The period of use will not change, but the stock will be moved to a different pasture and will not be using the tank system. The Applicants will retain the full period of use from June 1st to October 31st to ensure management flexibility.

12. Proposed use calculations:

10.6 GPM/226.67 AF/Day = 0.04676 AF per day x 100 days = 4.68 AF)

Total Proposed Volume Anticipated = 4.68 AF

Total Historic Volume Consumed and Diverted = 4.68 AF

13. The historic and proposed uses are 100% consumptive. The Department finds the use of water will not increase under the proposed system.

14. The Applicants will not be able to call water rights it couldn't previously call. There will be no greater access to the water as a result of the proposed change.

15. Each trough has a float shut off valve that only allows water to flow into the troughs when the float drops. When the troughs are full the pump will shut down before the 8 hour run cycle is complete.

16. There are no non-use issues.

BENEFICIAL USE

FINDINGS OF FACT

17. The Applicants propose to split the use of this water right claim between stock watering direct from source and a pump and stock tank system. Trough #1 of the pump and tank system will be located by the main distribution tank in the SESESW Sec 36, T6N, R5W. Trough #2 will be located in the SESESE Sec 36, T6N, R5W; Trough 3 will be located in the E½E½NESE Sec 1, T5N, R5W. Both Trough #2 and Trough #3 are on Forest Service land close to the border with USDI Bureau of Land Management (BLM) property. Trough #4 will be located on BLM property in the S½SWSE Sec 31, T6N, R4W. The pump system is intended to move a portion of the stock (168 AU) off stream to reduce riparian impacts of stock grazing at the source. The source for the current and proposed point of diversion is the North Fork of the Little Boulder River located in the SESE Sec 2, T5N, R5W, in Jefferson County. In addition to the proposed pump and tank system, the three direct from source points of diversion will be retained as was historically practiced to collectively water 509 animal units (AU). To allow for management flexibility during grazing rotations, the full period of diversion and use will be retained although the proposed use for the tank system is a transitory 45 days within the historic period.

18. The existing project is for stock use with a volume of 4.68 AF, based on 30 GPD per AU (509) based on Supreme Court rules from claims exam and is a recognized beneficial use under statute. §85-2-102(5), MCA. A flow rate of 1.8 GPM will be diverted to the stock tanks, the remaining flow rate will be left instream for the remaining stock.

ADEQUATE DIVERSION

FINDINGS OF FACT

19. The Applicants propose diverting up to 1.8 GPM for a transitory period of 45 days to a 15,000-gallon storage tank located in the SESESW Sec 36, T6N, R5W, in Jefferson County. Two distribution pipelines connected to the storage tank deliver water to four 1,100-gallon troughs via 14,540 lineal feet of 1.5-inch diameter plastic pipe.

20. At the proposed new point of diversion, located in the SESE Sec 2, T5N, R5W, the Applicants propose using a Grundfos 10S30-34, 3 HP, 230 Volt submerged pump, model number CB30412MC, with a 3HP Franklin Motor. The pump performance curve indicates the pump has the capability to pump 1.78 GPM of water at a pressure of 780 feet of head or 338 PSI. The pipeline from the division point to the storage tank (Line A) has an elevation gain of 745.94 FT. The distance along Line A from the pump to the storage tank is 6,595.47 LF. The head loss through a 1.5-inch diameter plastic pipe over 6,595.47 LF is calculated to be approximately 66 feet of head or 20 PSI. To accommodate the high pressures needed to compensate for the elevation gain, Line A is constructed of 2,275 LF of 1.5-inch diameter polyethylene pipe and 4,320 Linear Feet of 1.5-inch diameter schedule 80 PVC pipe.

21. The calculated total pressure required to convey water from the point of diversion to the storage tank is 812 feet of head or 352 PSI. The pump performance curve indicates the proposed operating pressure is higher than the optimum operating pressure for the Grundfos 10S30-34, 3 HP pump. The pump curve does indicate the pump can produce the proposed flow rate of 1.8 GPM.

22. Water is distributed from the 15,000-gallon storage tank to four 1,100-gallon troughs through a system of gravity driven supply pipelines. Trough #1 will be located adjacent to the storage tank in the SESESW of Sec 36 T6N R5W. Water is supplied to Trough #2, located in the SESESE of Sec 36 T6N R5W, and Trough #4, located in the S½SWSE of Sec 31 T6N R4W, by the pipeline labeled Line B. Line B has an overall length of 7,756.33 LF and an elevation drop of

769.10 FT. To accommodate the high pressures due to the elevation, Line B is constructed of 2,600 LF of 1.5-inch diameter polyethylene pipe and 5,157 LF of 1.5-inch diameter schedule 80 PVC pipe.

23. Water is supplied to Trough #3, located in the E½E½NESE Sec 1 T5N R5W, by the pipeline labeled Line C. Line C has an overall length of 6,785.39 LF and an elevation drop of 443.39 FT. To accommodate the high pressures due to the elevation, Line C is constructed of 3,956 LF of 1.5-inch diameter polyethylene pipe and 2,830 LF of 1.5-inch diameter schedule 80 PVC pipe.

POSSESSORY INTEREST

FINDINGS OF FACT

24. The Applicants have signed the affidavit on the application form affirming the applicants have 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

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 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

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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).

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 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

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

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

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 ¶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); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

29. Although the level of analysis may vary, analysis of the extent to which a proposed change

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.)

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).

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 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. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

32. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 41E 54725 of 4.68 diverted volume and 1.8 GPM flow rate for the tank diversion with a consumptive use of 4.68 acre-feet. (FOF Nos. 8-10)

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. 7-16)

BENEFICIAL USE

34. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) 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. AR. 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 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 4.68 acre-feet of diverted volume and 1.8 GPM flow rate of water requested for the stock tanks is the amount needed to sustain the beneficial use. (FOF No. 17-18)

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. 19-23)

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. 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. 41E 30148132 should be granted subject to the following. Additional places of use (stock tanks) are authorized to be in the (1) SESESW Sec 36, T6N, R5W (2) SESESE Sec 36, T6N, R5W (3) E½E½NESE Sec 1, T5N, R5W, Jefferson County. The periods of diversion and use are from June 1 through October 31. The maximum flow rate for the Applicants' water right claim is 10.6 GPM with a maximum annual volume that shall not exceed 4.68 AF per year.

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 _____ day of _____ 20__.

/Original signed by Jenn Daly/
Jenn Daly, Acting Regional Manager
Helena 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 ____ day of _____ 20__, by first class United States mail.

USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
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USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
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