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

*** * * * * * ***

APPLICATION TO CHANGE WATER RIGHT NO. 40A 30154792 BY TABER RANCH, LLC	)))	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

*** * * * * * ***

On January 28, 2022, Taber Ranch (Applicant) submitted Application to Change Water Right No. 40A 30154792 to change Groundwater Certificate No. 40C 30107479 to the Lewistown 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 Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated April 6, 2022. The Applicant responded with information dated April 27, 2022. The Application was determined to be correct and complete as of June 15, 2022. An Environmental Assessment for this Application was completed on September 28, 2022.

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
    - Legal land descriptions of additional stock tanks
    - Applicant supplemental responses to items ST.1.F, ST.1.G, ST.2.D, ST.2.F, ST.4.D, ST.5.A, ST.5.C
- Letter from Glenn Berg granting permission for stock tanks to be on his property (letter dated November 4, 2021)
- Maps: Packets of FSA and County Ownership maps detailing new and existing tank locations.

Information Received after Application Filed

- Applicant's Deficiency Response dated April 6, 2022

Information within the Department's Possession/Knowledge

- General abstract of existing water right
- Existing water right file for Groundwater Certificate No. 40A 30107479
- Environmental Assessment dated September 28, 2022
- DNRC Map dated March 11, 2022
- Technical Report
- Deficiency Letter dated March 22, 2022

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 RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant is proposing to change Groundwater Certificate No. 40A 30107479, which lists a flow rate of 20 gallons per minute (GPM) and volume of 8.50 (AF) of groundwater for stock use with a priority date of September 8, 2008. The period of use and the period of diversion is January 1-December 31. The point of diversion is a well located in NENWNE Section 36, T6N, R16E, Wheatland County and the places of use for the currently authorized 11 stock tanks are as follows:

Table 1 – Current Places of Use

ID	TRS	Quarters
1	6N 16E S36	NENWNE
2	6N 16E S36	NENWNE
3	6N 17E S16	NESESW
4	6N 17E S19	NWNWNE
5	6N 17E S19	NWSWSE
6	6N 17E S20	NWNESE
7	6N 17E S21	NWSESW

8	6N 17E S28	SWSENE
9	6N 17E S29	NWNWSW
10	6N 17E S29	SENENE
11	6N 17E S30	SESWNW

The places of use are generally located 20 miles southwest of Shawmut, MT.

CHANGE PROPOSAL

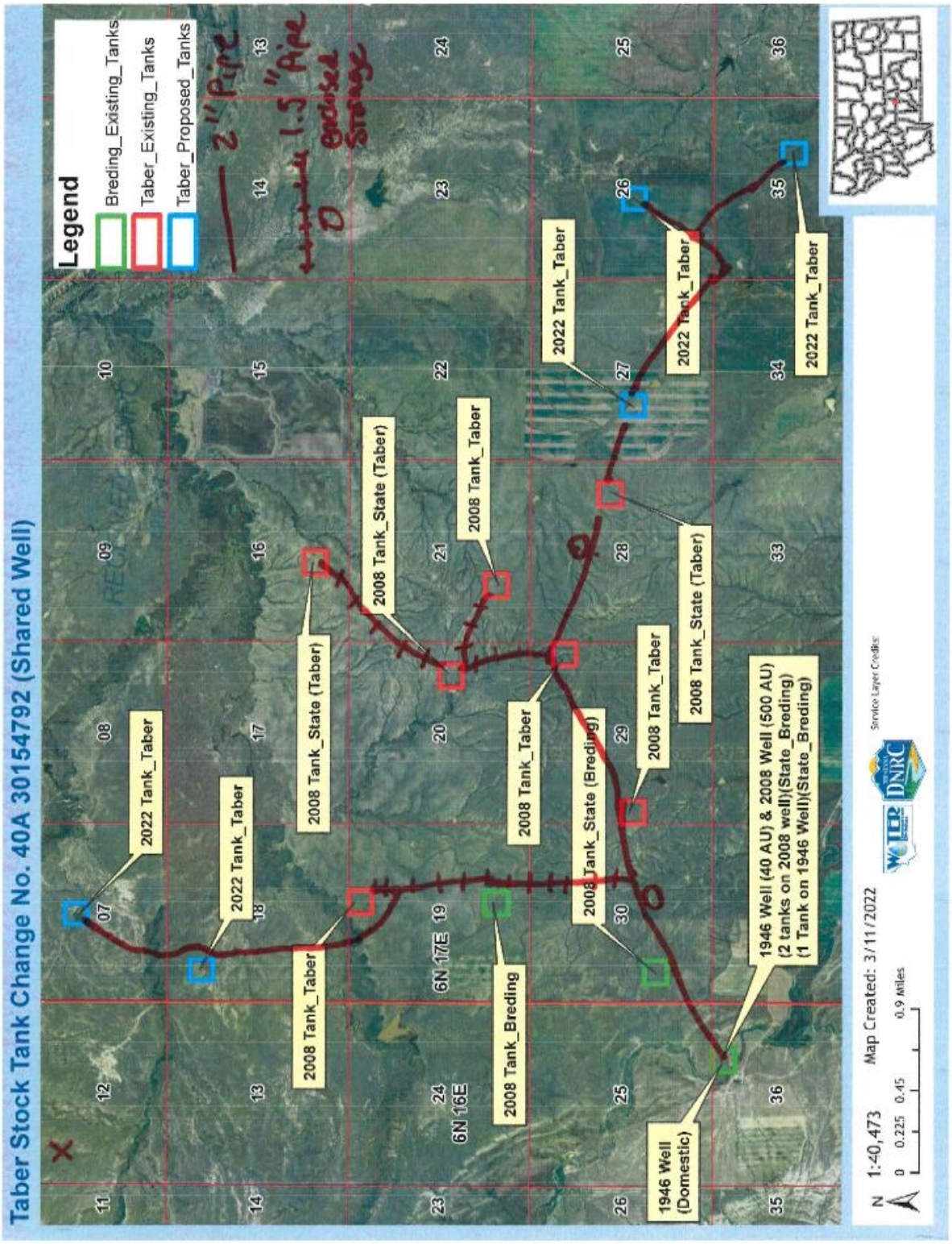
FINDINGS OF FACT

2. Applicant proposes to add five stock tanks to an existing system of stock tanks drawing from a single well. The existing system is spread across multiple parcels with varying ownership within a large two-township area, however all proposed stock tanks being added in this change are located on parcels owned by the Applicant or involve parcels for which permission has been granted for involvement in this change.

3. Groundwater Certificate No. 40A 30107479 is not supplemental to, associated with, or considered a combined appropriation with any other water rights.

4. Groundwater Certificate No. 40A 30107479 is for a well with 11 stock tanks and is associated with GWIC ID# 243725 in the Montana Ground Water Information Center. The five new (proposed) places of use all involve adding new stock tanks via extending existing pipelines connected to a well located in the NENWNE Section 36, T6N, 16E. There are no additional animal units involved and may only consist of evaporation from stock tank surface area (a non-measurable amount), so no adverse effect is expected. The Applicant is proposing to add five additional stock tanks to an existing pipeline system for pasture management and more efficient grazing. The additional places of use will be as follows:

1 tank: SENWNW Section 18, T6N, R17E, Wheatland County
1 tank: SESENW Section 7, T6N, R17E, Wheatland County
1 tank: NENWSW Section 27, T6N, R17E, Wheatland County
1 tank: NENESW Section 26, T6N, R17E, Wheatland County
1 tank: NWNWSE Section 35, T6N, R17E, Wheatland County


Taber Stock Tank Change No. 40A 30154792 (Shared Well)
Legend
Breding_Existing_Tanks
Taber_Existing_Tanks
Taber_Proposed_Tanks
2" Pipe
1.5" Pipe
enclosed storage
2022 Tank_Taber
2022 Tank_Taber
2008 Tank_State (Taber)
2008 Tank_Taber
2008 Tank_Taber
2008 Tank_State (Taber)
2008 Tank_Taber
2008 Tank_Taber
2008 Tank_State (Breding)
2008 Tank_State (Taber)
2022 Tank_Taber
2022 Tank_Taber
2022 Tank_Taber
2008 Tank_Breding
1946 Well (Domestic)
1946 Well (40 AU) & 2008 Well (500 AU)
(2 tanks on 2008 well)(State_Breding)
(1 Tank on 1946 Well)(State_Breding)
6N 16E
6N 17E
N
1:40,473
0 0.225 0.45 0.9 Miles
Map Created: 3/11/2022
Service Layer Credits:

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. The water right proposed for change is Groundwater Certificate No. 40A 30154792. The Applicant is proposing to add five additional stock tanks and is not proposing to change other elements of this water right. The water has historically filled 11 stock tanks. The tanks have float/shut off valves used to control flow. The priority date for Groundwater Certificate No. 40A 30154792 is September 8, 2008. The certificate being changed was issued for a volume of 8.5 AF and a flow rate of 20 GPM per year. Year-round stock water use for 500 AU consumes up to 8.5 AF per annum pursuant to the standards in ARM 36.12.115(2)(c) (15 GAL/AU/DAY x 500 AU x 366 DAYS/325,851 GAL/AF). The Applicant submitted response to question ST.2.D anticipates that a flow rate of 10 GPM is able to be continuously diverted from the well. The well can produce 16.1 AF at 10 GPM if ran continuously (10 GPM x 525,600 MIN/YR / 325851 GAL/AF). Stock use is considered 100% consumptive.

8. The Department's historical use findings for Groundwater Certificate No. 40A 30154792 are summarized in the table below:

Table 2 – Current Water Right Details

WR Number	Purpose	Flow Rate	Volume (Diverted/ Consumptive)	Period of Use	Point of diversion	Place of use	Priority date
40A 30107479	Stock	10.00 GPM	8.50 AC-FT	JAN 1-DEC 31	6N 16E S36 NENWNE	See Table 1 (above)	09/08/2008

FINDINGS OF FACT – Adverse Effect

9. Groundwater Certificate No. 40A 30154792 was filed for stock watering use of 500 AU from January 1 to December 31 at a flow rate of 20 GPM up to a volume of 8.5 AF. The beneficial use of 8.5 AF is within DNRC standards for 300 AU. No additional animal units will be grazed within the applicant's grazing pastures under the proposed change, only the location where the water is used will change. When cattle are shifted to new pastures, the previous pasture's water supply will be turned off to avoid additional evaporative losses. The historic consumptive volume of 8.5 AF under Groundwater Certificate 40A 30157492 will not be exceeded. The addition of five new stock tanks will not increase the flow rate or volume. The well pump produces no more

than 10 GPM, less than the historical flow rate. Proposed tanks will not be used simultaneously with existing tanks, that is to say that the number of tanks in use at any given time will remain the same to prevent additional evaporative losses from surpassing the historic volume. This will be accomplished via use of both line valves and float valves at each tank, as well as stops/drains at each tank.

10. If call is made, the Applicant has the ability to stop the flows with a valve and cease pumping to the added tanks.

11. The Department finds there will be no adverse effect resulting from the proposed change under the terms and conditions set out in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

12. The existing water right is for stock use, which is a recognized consumptive beneficial use per § 85-2-102(5) MCA.

13. By adding five additional stock tanks, the Applicant will be able to utilize grazing pastures more efficiently and promote better grazing and stock management.

14. This stock water right has historically been used to provide 8.5 AF of consumed water at a rate of 10 GPM for 500 AU from January 1-December 31. This volume is consistent with the historical practice and the flow rate of 10 GPM and will not change. The Applicant plans to continue to use the stock watering system to provide water to 500 AU year-round under this change.

15. The Department finds the proposed addition of five stock tanks for the purposes of appropriating a volume of 8.5 AF of stock water at a flow rate of 10 GPM to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

16. The diversion system consists of a well capable of producing a flow rate of 10 GPM according to a historic use affidavit dated April 27, 2022. The new system will include the addition

of five additional tanks. There will be a total of 16 stock tanks listed on this water right after this change.

17. The well has a 5-inch PVC casing from a depth of 7 – 75 feet and an 8-inch steel casing from -2 – 23 feet with 1/16 x 3.5 inch perforations from a depth of 30-75 feet. The static water level was measured at 17 feet and total depth of 75 feet according to the well log listed in the Montana Ground Water Information Center database.

18. Water will be conveyed to the stock tanks through two-inch pipes.

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

POSSESSORY INTEREST

FINDINGS OF FACT

20. The Applicant signed the affidavit on the application form affirming the applicant 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 and the new stock tanks will be located.

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 ¶¶43-45.[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

---

[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).

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]

---

[3]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

[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

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-G76I By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); 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]

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

---

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).

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.

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 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.

28. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right No. 40A 30154792 of 8.5 AF diverted volume and 10 GPM flow rate with a consumptive use of 8.5 AF. (FOF Nos. 5-6)

29. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 7-9)

BENEFICIAL USE

30. 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. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, 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).

31. 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 8.5 acre-feet of diverted volume and 10 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule/other standard. §85-2-402(2)(c), MCA (FOF Nos. 10-12)

ADEQUATE MEANS OF DIVERSION

32. 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).

33. 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. 16-19)

POSSESSORY INTEREST

34. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

35. 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. 40A 30154792 should be granted subject to the following.

The Department has determined that the Applicant may add five places of use at which stock watering tanks will be located. The locations of the additional places of use are as follows:

1 tank: SENWNW Section 18, T6N, R17E, Wheatland County

1 tank: SESENW Section 7, T6N, R17E, Wheatland County

1 tank: NENWSW Section 27, T6N, R17E, Wheatland County

1 tank: NENESW Section 26, T6N, R17E, Wheatland County

1 tank: NWNWSE Section 35, T6N, R17E, Wheatland County

The point of diversion consists of an existing well located in NENWNE Section 36, T6N, R16E, Wheatland County. The period of use and period of diversion is January 1-December 31. The flow rate is 10 GPM and the volume is 8.5 AF per annum for stock use.

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 13th day of October 2022.

/Original signed by Steven B Hamllton/
Steven B. Hamilton, Regional Manager
Lewistown Water Resources 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 13th day of October 2022, by first class United States mail.

Taber Ranch, LLC
Attn: Eugene Taber
PO Box 61
Shawmut, MT 59078

_____

Matt Schmidt, (406) 538-7459