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

COMBINED APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
41H 30148637 AND CHANGE 41H 30148636
BY LAZY TJ ENTERPRISES LLC

PRELIMINARY DETERMINATION TO
GRANT COMBINED APPLICATION

On February 26th, 2020, Lazy TJ Enterprises LLC (Applicant) submitted a Combined Application for Beneficial Water Use Permit No. 41H 30148637 and Change 41H 30148636 to the Bozeman Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The permit (41H 30148637) proposes to supply a new subdivision with groundwater for multiple domestic and lawn and garden irrigation purposes at a maximum flow rate of 370 gallons per minute (GPM) up to 93.6 acre-feet (AF) of diverted volume per annum. The change application (41H 30148636) proposes to change existing irrigation water right 41H 15887-00 to an aquifer recharge purpose to offset depletions to potentially affected surface water sources. 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 September 21, 2020. The Applicant responded with information dated January 19, 2021. The applications were determined to be correct and complete as of August 27, 2021. An Environmental Assessment for this Application was completed on December 21, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Application to Change, Form 606-IR
- Affidavit and Certifications signed by: Brent Amunrud, Mark Amunrud, Erica Searl, Marcia J. Reavely
- Maps: Map depicting the proposed point of diversion and place of use
  Map depicting wells used for aquifer test and location of discharge line
• Attachments: Wells logs for GWIC ID 303146, 303150, 303151, 303152
• Aquifer Testing Addendum
• Basin Closure Addendum & Hydrogeologic Assessment
• Change in Purpose Addendum

Information Received after Application Filed:
• Corrected Form 633, Aquifer Test Data. Received by DNRC on April 1, 2021.
• Change Application 41H 30148636 Section 9: Affidavit and Certification, signed by Debra Amunrud. Received by DNRC on April 23, 2021
• Email communication, December 6, 2021, detailing email correspondence with Montana Department of Environmental Quality stating that a discharge permit is not required for the proposed infiltration gallery.

Information within the Department’s Possession/Knowledge
• Water Right File 41H 15887-00
• Water Resources Survey, Gallatin County, January 1953
• Aquifer Test Report dated May 6, 2021
• Depletion and Aquifer Recharge Report dated August 16, 2021
• Return Flow Report dated August 16, 2021
• Irrigation Change Application Technical Report dated August 27, 2021
• Groundwater Permit Application Technical Report dated August 27, 2021
• Letter Granting Aquifer Testing Requirement Variance from Department to Applicant dated August 27, 2021.

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Bozeman Regional Office at 406-586-3136 to request copies of the following documents.

• Return Flow Memo, dated April 1, 2016
• Consumptive Use Methodology Memo, dated March 17, 2010
• Historic Diverted Volume Memo, dated September 13, 2012
• Turf Grass Consumptive Use Methodology Memo, dated March 23, 2010

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, MCA).

**BASIN CLOSURE**

**FINDINGS OF FACT**

1. This permit application is for multiple domestic and lawn and garden irrigation purposes. This application is located within the Upper Missouri River Basin Legislative Closure, which was closed effective April 16, 1993.

2. The Applicant submitted a hydrogeologic assessment with the original application materials. A revised Form 633 was submitted with the January 20, 2021, Deficiency Letter Response. A variance request from aquifer testing requirements ARM 36.12.121(3)(b), 3(f), 3(h), and 3(j) was submitted on May 28, 2021. The variance request was granted on August 27, 2021, because the Department determined it had sufficient information to determine aquifer characteristics from available data.
CONCLUSIONS OF LAW

3. DNRC cannot grant an application for a permit to appropriate water within the Upper Missouri River Basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin. § 85-2-343(1), MCA. The Upper Missouri River Basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA). The proposed wells are located within the Upper Missouri River Basin closure area. This Application is for groundwater. The Application falls under the exceptions for the basin closure, § 85-2-343, MCA.

4. Pursuant to § 85-2-362, MCA, a combined application for new appropriations of groundwater in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. § 85-2-363, MCA. ARM 36.12.120. E.g., In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer (DNRC Final Order 2010, Combined Application) (combined application under §85-2-363, MCA, reviewed as a single unit).

5. In reviewing an application for groundwater in a closed basin, the District Court in Sitz Ranch v. DNRC observed:

The basin from which applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors. 

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7.
6. A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. E.g., In The Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee (DNRC Final Order 2011); In The Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen, (DNRC Final Order 2011)

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

7. The Montana Constitution expressly recognizes in relevant part that:

(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .
Preliminary Determination to Grant

Combined Application Nos. 41H 30148636 and 41H 30148637.

8. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

… the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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 use has 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 under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35.

9. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara
L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if in further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin R. Mont. (ARM) 36.12.207.

10. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, superseded by legislation on another issue:

    Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

    See also, Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order (2011). The Supreme Court likewise explained that:

    .... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

11. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.
12. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

PROPOSED APPROPRIATION

BENEFICIAL WATER USE PERMIT NO. 41H 30148637

FINDINGS OF FACT

13. The Applicant proposes to divert groundwater by means of 37 wells from January 1 to December 31 at a flow rate up to 10 GPM each, 370 GPM total, up to 93.6 AF, located in the NWNE, S2NENE, N2SENE, N2SWNE Section 2, T3S R5E, Gallatin County. The purposes are multiple domestic from January 1 to December 31 and lawn and garden irrigation from April 1 to October 31. The proposed multiple domestic purpose is for 37 single-family homes and up to 37 accessory dwelling units, for a total of 74 dwellings with a total diverted volume of 47.4 AF. The Applicant proposes to irrigate 0.5 acres of lawn and garden per lot on 37 lots, for a total of 18.5 acres with a diverted volume of 46.3 AF. The place of use is located in the NWNE, S2NENE, N2SENE, N2SWNE of Section 2, T3S R5E, Gallatin County.

14. The August 16, 2021, Depletion and Aquifer Recharge Report identified Bozeman Creek and Hyalite Creek as the hydraulically connected surface waters. Bozeman Creek is located approximately 1.7 miles east and Hyalite Creek is located approximately 1.5 miles west of the proposed points of diversion.

15. A portion of the proposed diverted volume will return to the source aquifer. The Applicant proposes to treat domestic wastewater with individual septic systems. Following DNRC standards for this method of wastewater treatment and disposal, 10 percent of the total 47.4 AF diverted volume for multiple domestic purposes will be consumed, equal to 4.7 AF, with 90 percent, or 42.6 AF, returning to the source aquifer. The August 27, 2021, Groundwater Permit Application Technical Report determined lawn and garden irrigation to be 70% consumptive, resulting in 29.9 AF consumed of the 46.3 AF diverted for lawn and garden irrigation.
16. The total consumptive use for the proposed project is 34.6 AF. The multiple domestic purpose will consume up to 4.7 AF and lawn and garden irrigation will consume up to 29.9 AF. The Applicant must deliver 49.0 AF to an infiltration gallery to offset depletions associated with the proposed use. The required mitigation volume is incorporated into conditions for this authorization. See the Adverse Effect and Beneficial Use Sections of this document for further discussion of the required aquifer recharge volume.

17. The Applicant proposed to measure the diverted volume and flow rate with meters installed on each well. In addition, the Applicant proposed to manage the proposed 37 wells collectively through the Homeowners Association. The following conditions were proposed by the Department and agreed to by the Applicant on November 17, 2021, by email:

**IMPORTANT INFORMATION**

**NOTIFICATION REQUIREMENT:** THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS PERMIT; 2) A COPY OF THE WELL LOG MUST BE SUBMITTED TO THE APPROPRIATOR; AND 3) A WATER RIGHT CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS, FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

**IMPORTANT INFORMATION**

INDIVIDUAL WELLS AUTHORIZED BY THIS PERMIT SHALL BE LIMITED TO A MAXIMUM FLOW RATE OF 10 GPM AND VOLUME OF 2.53 AF.

**IMPORTANT INFORMATION**

AQUIFER RECHARGE REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 49.0 AC-FT OF AQUIFER RECHARGE VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO BOZEMAN CREEK AND HYALITE CREEK. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE AQUIFER RECHARGE PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 41H 30148636 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT, EXCEPT FOR EMERGENCY USE, MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES.
WATER MEASUREMENTS REQUIRED – PROVISIONAL PERMIT
FOR EACH WELL, THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

IMPORTANT INFORMATION
WELL LOGS: THE APPROPRIATOR SHALL REQUIRE THE LANDOWNER PROVIDE A COPY OF THE WELL LOG TO THE APPROPRIATOR WITHIN 90 DAYS OF COMPLETION OF THE WELL. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE WELL LOG TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.
FIGURE 1: Overview map of the proposed place of use and point of diversion. The Zone of Influence (0.01 foot drawdown contour) from the proposed groundwater pumping is delineated in blue. The depletion points on Hyalite Creek and Bozeman Creek where depletions to hydraulically connected surface waters are expected to accrue are shown with green crosses.

Preliminary Determination to Grant
Combined Application Nos. 41H 30148636 and 41H 30148637.
FIGURE 2: Map of the proposed lot layout showing the proposed place of use and points of diversion.

Preliminary Determination to Grant
Combined Application Nos. 41H 30148636 and 41H 30148637.
Physical Availability

FINDINGS OF FACT

18. A 72-hour aquifer test was conducted by the Applicant’s consultant, beginning on August 14, 2019. Variances from aquifer testing requirements ARM 36.12.121 3(b), 3(f), 3(h), and 3(j) were requested because the maximum requested flow rate was not used for the aquifer test, no 8-hour drawdown and yield tests were conducted, drawdown was not measurable in the observation wells, and groundwater levels were not monitored at frequent intervals at least two days prior to the beginning of the aquifer test. These deficiencies did not affect the Department’s ability to determine aquifer characteristics and the variance request was granted on August 27, 2021.


20. The source aquifer is generally described as the Gallatin Valley Aquifer System that includes Quaternary and Tertiary sediments that act as a single aquifer at the basin scale (Aquifer Test Report, 2021). The pumping well (GWIC 303146) used for the aquifer test was completed at a depth of 156 feet below ground surface (bgs) in sand and large gravel with a static water level of 47.5 ft bgs. The pumping well was evaluated with a 72 hour aquifer test at a flow rate of 197 GPM. Drawdown for the proposed period of diversion was modeled by assigning an assumed monthly pumping schedule to four wells, representing the spatial distribution of the 37 proposed wells. Modeling indicates a total predicted drawdown of 15.2 feet, leaving 73.2 feet of available water column above the well perforations, assuming all wells are completed to a comparable depth (Aquifer Test Report, 2021).

21. Physical availability was evaluated by delineating a Zone of Influence (ZOI) corresponding to the 0.01 foot drawdown contour. The ZOI extends 18,400 feet from the proposed wells. The Aquifer Test Report estimated a groundwater flux of 91,027 AF through the ZOI annually.

22. Surface water physical availability was not analyzed as no net depletion is occurring as a result of this combined application.
CONCLUSIONS OF LAW

23. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

24. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson (DNRC Final Order 1990); In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean (DNRC Final Order 1994).

25. Applicant must prove that water is physically available on a year-around basis for application requesting a period of use from January 1 through December 31. In The Matter Of Application For Beneficial Water Use Permit No. 41K 30022398 By James L Hadley (DNRC Final Order 2008)(summer flow data only is not sufficient).

26. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 18-22)

Legal Availability:

FINDINGS OF FACT

Legal Availability of Groundwater

27. Modeling indicates that the 0.01 foot drawdown contour extends a distance of 18,400 feet from the proposed points of diversion. The annual flux through the zone of influence was estimated to be 91,027 AF/year (Aquifer Test Report, 2021). The August 27, 2021, Groundwater Permit Technical Report identified 1,734 active groundwater rights within the zone of influence for purposes of evaluating legal water availability. Of the total 1,734 water rights identified, 1,345 water rights were issued with a specific diverted volume. The remaining 389 water rights did not specify a diverted volume and required further analysis. Of the 389 water rights without a volume specified, 315 are Groundwater Certificates primarily issued during one of two time periods: (1) approximately 1973 – 1977, shortly after the Montana Water Use Act went into effect; and (2) approximately 2001 – 2008, which was a time period in which these certificates
were issued with remarks instead of flow rates or volumes. Currently, under § 85-2-306(3)(a)(iii), MCA, the maximum volume allowed under a Ground Water Certificate is 10 AF, so each of the 315 Certificates within the ZOI was assigned a volume of 10 AF, in order to conduct a conservative analysis. The remaining 78 water rights are 76 Statements of Claim and two Exempt Rights. Volumes were assigned to these rights using Department standards in ARM 36.12.115 based on their purposes. Irrigation rights without a volume decreed on the face of the water right abstract were assigned a volume of two acre-feet per acre, which is the upper end of the Department’s standard for diverted volume in Climatic Area IV: Moderately Low Consumptive Use, per ARM 36.12.115. The existing legal demand within the zone of influence is 12,776.3 AF per year (Groundwater Permit Technical Report, 2021).

28. The physical amount of groundwater available within the zone of influence is the estimated groundwater flux of 91,027 AF/year. The existing legal demand for groundwater within the zone of influence is 12,776.3 AF. The amount of water legally available is the difference between physical water availability (91,027 AF/year) and existing legal demand (12,776.3 AF/year) equal to 78,250.7 AF/year. The Applicant requested a maximum flow rate of 370 GPM and diverted volume of 93.6 AF, with 34.6 AF consumed. Groundwater is legally available in the amount requested.

Legal Availability of Surface Water

29. Depletions under this permit will be offset in full by the mitigation plan in this combined application. Net depletion from the proposed groundwater pumping will accrue to Bozeman Creek and Hyalite Creek, as identified in the August 16, 2021, Depletion and Aquifer Recharge Report. Since the mitigation will fully offset depletions from this permit, further analysis of legal availability for the depleted surface water sources is not required per ARM 36.12.1704(1)(a).

30. This mitigation plan is fully addressed in the Adverse Effect Section of the change application portion of this document.
CONCLUSIONS OF LAW

31. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;
(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

32. It is the applicant’s burden to present evidence to prove water can be reasonably considered legal available. E.g., Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005) )(it is the applicant’s burden to produce the required evidence.);
In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

33. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and groundwater and the
effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pgs. 7-8; In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility
Solutions LLC (DNRC Final Order 2006)(mitigation of depletion required), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, Opinion and Order (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and groundwater appropriators must prove unappropriated surface water, citing Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); In the Matter of Beneficial Water Use Permit No. 80175-76H by Tintzman (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, citing Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli (DNRC Final Order 1990)(since there is a relationship between surface flows and the groundwater source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to groundwater. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed groundwater appropriation. In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC (DNRC Final Order 2007) (permit denied); In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390,
34. Where a proposed groundwater appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation/aquifer recharge plan to offset depletions or by analysis of the legal demands on and availability of water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, Opinion and Order (June 23, 1994); In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC (DNRC Final Order 2006)(permits granted), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007)(permit granted), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion of 3 gpm and 9 gpm respectively to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping).
Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

35. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

36. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under § 85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 6.

37. In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management (DNRC Final Order 1991) (Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

38. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony (DNRC Final Order 2001).

39. Use of an infiltration gallery for historic irrigation water rights can offset year-around surface water depletions from proposed new groundwater appropriation to prove legal availability. E.g., In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville (DNRC Final Order 2011).

40. Consent of a downstream senior water right holder does not prove legal availability. Senior user cannot subrogate their right to a specific user and shift the burden to another junior
water right holder. In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee (DNRC Final Order 2011); In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen, (DNRC Final Order 2011)(permit conditioned on high flows to meet legal availability).

41. The Applicant has proven by a preponderance of the evidence that groundwater can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (FOF 27-28)

42. Based on the Applicant’s proposed mitigation/aquifer recharge plan, the Applicant has proven by a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (FOF 29-30)

43. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department.§ 85-2-311(1)(a)(ii), MCA.

**Adverse Effect**

**FINDINGS OF FACT**

44. The Aquifer Test Report identified zero water rights completed in the source aquifer that were predicted to experience greater than one foot of drawdown after five years of pumping of the proposed wells. The Groundwater Permit Technical Report calculated that groundwater was legally available within the modeled 0.01-foot zone of influence. The proposed use of groundwater will not adversely affect other groundwater appropriators.

45. As described previously in this document, the potentially affected surface water sources are Hyalite Creek and Bozeman Creek. The total consumption from the proposed use is 34.6 AF per year. Depletions under this permit will be offset in full by the mitigation plan in this combined application.

46. As part of this Combined Application, the Applicant submitted a Change Application to change surface water right 41H 15887-00 to a mitigation purpose to prevent adverse effect to
water rights of a prior appropriator under an existing water right, certificate, permit, or state water reservation. In order to mitigate net depletions in the permit and changes to return flows from the change application, the Applicant proposes to apply a portion of the historically consumed volume under 41H 15887-00 to an infiltration gallery located in the SENWNE of Section 2, T03S R05E, Gallatin County. The Depletion and Aquifer Recharge Report modeled the aquifer recharge pumping schedule and compared it to the modeled depletions. The infiltration gallery was modeled at a distance of 7,500 feet from Hyalite Creek and 9,400 feet from Bozeman Creek with parameters explained in the report and the recharge schedule shown below. The results are reproduced as Table 1. Note that Table 1 shows the aquifer recharge schedule, which mitigates the consumptive use proposed under permit 41H 30148636. Return flows were modeled separately and are addressed in FOF No. 130.

47. The Depletion and Aquifer Recharge Report indicates that stream depletion is expected to accrue on Hyalite Creek downstream of the southern boundary of Section 11, T3S R5E, and on Bozeman Creek downstream of the southern boundary of Section 6, T3S R6E (Depletion and Aquifer Recharge Report, 2021). Depletions, return flows, and aquifer recharge from the proposed use are expected to gradually accrue to the total calculated volumes through this reach to the confluence with the East Gallatin River.
### TABLE 1: Difference between Net Depletion and Modeled Aquifer Recharge for Proposed Infiltration Gallery

<table>
<thead>
<tr>
<th>Month</th>
<th>Aquifer Recharge Pumping Schedule (AF)</th>
<th>Modeled Accretion from Aquifer Recharge (AF)</th>
<th>Net Depletion (AF)</th>
<th>Difference Between Net Depletions and Accretion (AF)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hyalite Cr.</td>
<td>Bozeman Cr.</td>
<td>Hyalite Cr.</td>
<td>Bozeman Cr.</td>
</tr>
<tr>
<td>January</td>
<td>0.0</td>
<td>2.0</td>
<td>1.5</td>
<td>1.5</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>February</td>
<td>0.0</td>
<td>1.8</td>
<td>1.3</td>
<td>1.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>March</td>
<td>0.0</td>
<td>1.6</td>
<td>1.2</td>
<td>1.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>April</td>
<td>0.0</td>
<td>1.4</td>
<td>1.1</td>
<td>1.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>May</td>
<td>0.0</td>
<td>1.3</td>
<td>1.0</td>
<td>1.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>June</td>
<td>16.0</td>
<td>1.5</td>
<td>1.0</td>
<td>1.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>July</td>
<td>16.5</td>
<td>2.9</td>
<td>1.5</td>
<td>1.7</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>August</td>
<td>16.5</td>
<td>4.0</td>
<td>2.0</td>
<td>2.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>September</td>
<td>0.0</td>
<td>4.5</td>
<td>2.5</td>
<td>2.4</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>October</td>
<td>0.0</td>
<td>3.7</td>
<td>2.3</td>
<td>2.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November</td>
<td>0.0</td>
<td>2.9</td>
<td>2.0</td>
<td>2.0</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>December</td>
<td>0.0</td>
<td>2.4</td>
<td>1.7</td>
<td>1.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>49.0</strong></td>
<td><strong>30.0</strong></td>
<td><strong>19.0</strong></td>
<td><strong>19.7</strong></td>
</tr>
</tbody>
</table>

48. The Depletion and Aquifer Recharge Report concluded that the modeled aquifer recharge accretions will offset the net depletion.

49. In order to offset depletions to surface water from the proposed groundwater pumping, the Applicant proposes to apply a portion of the historically consumed volume of 41H 15887-00 to the infiltration gallery. The new consumption from the proposed use is 34.6 AF per year. Department Hydrologists determined that a volume of 49.0 AF delivered to the infiltration gallery during June, July, and August is required to offset year round depletions to Bozeman Creek and Hyalite Creek from the proposed use. Diverting 49 AF of the historically consumed volume into the infiltration gallery results in over-mitigation in some months, but models show that this mitigation plan offsets depletions in every month. The period of diversion for 41H 15887-00 is March 15 to November 15, and the proposed mitigation schedule is required to offset year round depletions from the new use.
50. The Department’s modeling shows that the proposed aquifer recharge mitigation plan will fully offset depletions to Hyalite Creek and Bozeman Creek in rate, location, and timing. The proposed mitigation plan will prevent adverse effect to Hyalite Creek and Bozeman Creek surface water rights due to groundwater pumping under permit 41H 30148637.

51. In order to prevent adverse effect to other appropriators, the Applicant proposed to measure water diverted under the proposed groundwater permit. The January 20, 2021, Deficiency Letter Response stated that all water use will be measured by totalizing flow meters installed on each well, prior to the first tap on each system. The total annual volume used for indoor and outdoor use will be recorded and archived by the homeowner’s association. By email on November 17, 2021, the Applicant also agreed to measure water diverted into the infiltration gallery under Change Application 41H 30148636. Use of water under this permit is conditioned upon the implementation of the aquifer recharge plan and the measurement requirements specifically described in this document. These conditions are included in FOF Nos. 17 and 97.

52. The Applicant identified a plan to prevent adverse effect during times of water shortage in the January 20, 2021, Deficiency Letter Response. Residents will be required to curtail lawn and garden irrigation to one application per week and encouraged to reduce overall water use. During severe water shortage periods, lawn and garden irrigation will be curtailed entirely. The Applicant stated that this plan will be included in the covenants and described in the HOA rules. The Applicant will honor all valid calls during times of water shortage.

CONCLUSIONS OF LAW

53. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc., ¶ 21.
54. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(8).

55. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. *Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision,* (2011) Pg. 4.

56. It is the applicant’s burden to produce the required evidence. *E.g., Id.* at Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.,* (DNRC Final Order 2005).

57. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a *de minimis* level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order,* (2011) Pg. 8; see also, *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009) (permit denied).

58. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant’s burden of proof. *Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order,* (2011) Pg. 11 (Court rejected applicant’s argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); *Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision,* (2011) Pgs. 3-4 (Court rejected applicant’s arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was “not an adverse effect because it’s not measureable,” and that the depletion “won’t change how things are administered on the source.”); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006) (adverse effect not required to be measureable but must be calculable); see also *Robert and Marlene Tackle v.*
After calculating the projected depletion for the irrigation season, the District Court in *Sitz Ranch v. DNRC* explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz’s own evidence demonstrates that about 8 acre-feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre-feet of water each season from the source upon which they rely.

The Department can and routinely does, condition a new permit’s use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-41I by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H-30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. E.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H30012025 and 41H30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), affirmed, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H30019215 by Utility Solutions, LLC, (DNRC Final Order 2007)* (permit conditioned to mitigate 6 gpm up to 9.73 AF of potential
depletion to the Gallatin River), *affirmed*, Montana River Action Network v. DNRC, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Beneficial Water Use Permit Application No. 41H-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*,( DNRC Final Order 2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC*. (DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).


Augmentation/ mitigation is also recognized in other prior appropriation states for various purposes. *E.g.* C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

61. The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

*E.g.*, *Combined Application for Beneficial Water Use Permit No. 76G-30050801 and Change Authorization 76G-30050805 by Missoula County* (DNRC Final Order 2012)(permit granted conditioned on mitigation of depletion ranging .8 to 7.4 gpm); *In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change
a Non-filed Water Right by Patricia Skergan and Jim Helmer (DNRC Final Order 2010, Combined Application)(permit granted conditioned on mitigation).

62. If the applicant seeks to use a mitigation plan to prove lack of adverse effect, the applicant must have a defined mitigation proposal at the time of application. It is the Applicant’s burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on this basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC (DNRC Final Order 2006) (permits granted based on plan for mitigation of depletion), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007) (permit granted on basis of plan for mitigation of depletion), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); §85-2-360 et seq., MCA.

63. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

64. A possibility of long term depletion of the aquifer, applicant may only appropriate therefrom if he augments the aquifer. The hastening of a foreseeable adverse effect (long term aquifer depletion) is in itself an adverse effect. In the Matter of Beneficial Water Use Permit No. 64545-76H by McBride (DNRC Final Order 1988).

65. The Department will evaluate whether an applicant’s proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet § 85-2-311(1)(b), MCA, in the permit proceeding. The applicant’s authority to use the water as proposed is assumed for the purposes
of the analysis. The authority of the applicant to use the offset water as proposed for the plan is not determined in the permit proceeding but is determined in any required application for change in appropriation. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department exactly what it proposes for a mitigation/aquifer recharge plan. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC (DNRC Final Order 2006), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); § 85-2-360 et seq.  

66. Pursuant to § 85-2-363, MCA, an applicant whose hydrogeologic assessment conducted pursuant to § 85-2-361, MCA, predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.  

67. Pursuant to § 85-2-362, MCA, an aquifer recharge plan must include: evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to §§75-5-410 and 85-2-364, MCA; where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; a description of the process by which water will be reintroduced to the aquifer; evidence of water availability; and evidence of how the aquifer recharge plan will be...
offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

68. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008).

69. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed appropriation as conditioned on Applicant’s plan. § 85-2-311(d), MCA. (FOF 49-50)

**Adequate Diversion**

**FINDINGS OF FACT**

70. The Applicant proposes to drill 37 individual wells for domestic use on 37 lots. The proposed wells will be approximately 150 feet deep with a maximum flow rate of 10 GPM per well. Well pump size will be limited to ½ horsepower pumps, which is adequate for pumping the requested 10 GPM and 2.53 AF per well from a depth of 150 feet (January 20, 2021, Deficiency Letter Response). The proposed well design is consistent with wells commonly found in the region for small domestic and lawn and garden irrigation purposes.

71. The production well used for the aquifer test was completed at a depth of 156 feet in sand and gravel, commonly referred to as the Gallatin Valley Aquifer System (GVAS) that functions as a single aquifer at the basin scale. The proposed wells will be completed to a similar depth as the aquifer test production well in the GVAS.
CONCLUSIONS OF LAW

72. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

73. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc. (DNRC Final Order 1999).

74. 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. In the Matter of Application for Beneficial Water Use Permit No. 41C-1133900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002).

75. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

76. 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. § 85-2-311(1)(c), MCA. (FOF 70-71)

Beneficial Use

FINDINGS OF FACT

77. The Applicant requested a maximum flow rate of 370 GPM for 37 points of diversion at a maximum flow rate of 10 GPM per well. The Applicant requested a diverted volume of 93.6 AF for multiple domestic and lawn and garden irrigation. Of the total 93.6 AF, 37 AF is for domestic use at 37 single family homes, 10.4 AF is for domestic use at 37 accessory dwelling units, and 46.3 AF is for lawn and garden irrigation of 0.5 acres per lot up to 18.5 acres total. Individual well design specifications are incorporated as conditions of this permit in FOF Nos. 17 and 97.
78. The Applicant provided additional information in the January 20, 2021, Deficiency Letter Response about estimated water use in each domestic water use component requested. The Applicant estimated one acre-foot per household for single family homes, consistent with the Department’s standard found in ARM 36.12.115(2)(a). For the optional accessory dwelling unit (ADU) per lot, the Applicant estimated an annual domestic volume of 0.28 AF, consistent with MT DEQ Circular 3 3.2.1.2(a). An annual volume of 0.28 AF per ADU equates to an average of 2.5 people per dwelling at a per capita volume of 100 gallons per day. The Applicant proposes to treat wastewater onsite with individual wastewater treatment systems. For individual wastewater treatment systems, the Department’s standard is 10 percent consumed. The total domestic diverted volume is 47.4 AF with a consumptive volume of 4.7 AF at 37 homes and 37 ADU’s.

79. The Applicant requested water for lawn and garden irrigation of 0.5 acres per lot, up to 18.5 acres total on 37 lots. The Applicant estimated the lawn and garden irrigation water requirement using 2.5 AF per acre, consistent with the Department’s standard in ARM 36.12.115(2)(b). The total diverted volume for irrigation of 18.5 acres of lawn and garden is 46.3 AF. The consumed portion of this water was calculated using the Department’s standard methodology for turf grass. An irrigation water requirement of 19.41 inches was computed for the Montana State University weather station and field application efficiency was estimated at 70 percent. Turf grass consumption is 29.9 AF (19.41 in x 1 ft/12 in x 18.5 acres).

CONCLUSIONS OF LAW

80. Under § 85-2-311(1)(d), MCA, an applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§ 85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

81. The amount of water under a water right 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, Lewis and Clark County (2003), affirmed on other grounds, 2005 MT 60, 326 Mont. 241, 108
Preliminary Determination to Grant
Combined Application Nos. 41H 30148636 and 41H 30148637.


82. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 3 (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).

83. It is the applicant’s burden to produce the required evidence. In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005); see also Royston; Ciotti; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7.

84. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as ‘lawn and garden irrigation’) which is a recognized beneficial use. § 85-2-102(5), MCA. "Domestic use" by DNRC rule means those water uses common to a household including: … (g) garden and landscaping irrigation up to five acres.” ARM 36.12.101(22). Applicant has proven by a preponderance of the evidence that multiple domestic is a beneficial use and that 93.6 AF of diverted volume and 370 GPM of water requested is the amount needed to sustain the beneficial use. (FOF 77-79)

Possessory Interest

FINDINGS OF FACT

85. The Applicant signed 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.

86. In the January 20, 2021, Deficiency Letter Response, the Applicant submitted Articles of Organization for Lazy TJ Enterprises LLC, demonstrating that Brent Amunrud, who signed the
application form, is the registered agent and has signatory authority for Lazy TJ Enterprises LLC. The members of Lazy TJ Enterprises LLC are Brent Amunrud, Erica Searl, Marcia J. Reavely, and Mark Amunrud.

87. The Applicant stated in the January 20, 2021, Deficiency Letter Response that the infiltration gallery and water measurement requirements will be operated by a Homeowners’ Association (HOA). The HOA will be the eventual owner and operator of the proposed groundwater appropriation. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

88. Pursuant to § 85-2-311(1)(e), MCA, an 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, or if the proposed use has 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 under the permit.

89. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:
   (a) the statements on the application and all information submitted with the application are true and correct and
   (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the
authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

90. 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. § 85-2-402(2)(d), MCA. (FOF 85-87)

CHANGE NO. 41H 30148636
WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

91. The Applicant proposes to change the purpose and place of use for a portion of Statement of Claim 41H 15887-00. The source of water for 41H 15887-00 is Hyalite Creek with a point of diversion in the SENWNW Section 14, T03S R05E, Gallatin County. The Hoy Ditch was historically used to convey water to the historical place of use for irrigation of 83 acres in the N2NE and S2NE Section 2, T03S R05E, Gallatin County between approximately June 1 and September 15. Statement of Claim 41H 15887-00 has a decreed flow rate of 282.74 gallons per minute (GPM) with a priority date of May 31, 1882. The elements of this water right as claimed are summarized in Table 8 below.

TABLE 8: Water rights proposed for change

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Purpose</th>
<th>Flow Rate</th>
<th>Volume</th>
<th>Period of Use</th>
<th>Point of diversion</th>
<th>Place of use</th>
<th>Acres</th>
<th>Priority date</th>
</tr>
</thead>
<tbody>
<tr>
<td>41H 15887-00</td>
<td>Irrigation</td>
<td>282.74 GPM(^1)</td>
<td>3/15 – 11/15</td>
<td>SENWNW SEC 14, T3S R5E, GALLATIN COUNTY</td>
<td>N2 NE SEC 2, T3S R5E, GALLATIN COUNTY</td>
<td>65</td>
<td>5/31/1882</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>S2NE SEC2, T3S R5E, GALLATIN COUNTY</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

\(^1\)GPM = Gallons per minute \(^2\)A specific volume has not been decreed. The total volume shall not exceed the amount put to historical and beneficial use.
92. The Applicant, Lazy TJ Enterprises, consists of four members; Brent Amunrud, Erica Searl, Marcia J. Reavely, and Mark Amunrud. The members of Lazy TJ Enterprises LLC own a portion of 41H 15887-00 equal to 97.67% of the total historically irrigated acres. Parcel 2 of Certificate of Survey 2888 under different ownership, is located in the southeast corner of the historical place of use for 41H 15887-00 and is 1.9284 acres in size, according to Montana Cadastral records. The Applicant clarified in an April 9, 2021, email that they did not include this historically irrigated acreage in the water planning calculations and do not intend to change the portion of the water right historically used on this parcel.

93. No supplemental water rights exist for 41H 15887-00; nor has this water right been subject of any previous change authorizations.

CHANGE PROPOSAL

FINDINGS OF FACT

94. The Applicant proposes to change the purpose and place of use of a portion of Statement of Claim 41H 15887-00 from irrigation to mitigation to offset depletions associated with Groundwater Permit Application 41H 30148637. The new place of use will be an infiltration gallery located in the in the SENWNE Section 2, T03S R05E, Gallatin County. The Applicant proposes to divert 70 AF of water into an infiltration gallery from June 1 to August 31 of each year to offset consumption associated with Groundwater Permit Application 41H 30148637 and to mimic historical return flows that would have accrued from irrigation of 43 acres historically served by 41H 15887-00. A total of 43 acres will be retired from irrigation.

95. The Applicant proposes to continue diverting water from Hyalite Creek under Statement of Claim 41H 15887-00 at the Hoy Ditch headgate located on Hyalite Creek in the SENWNW Section 14, T03S R05E, Gallatin County. Water will continue to be conveyed in the existing Hoy Ditch to an infiltration gallery located within the footprint of the historically irrigated area.

96. The Applicant originally proposed to change the full volume historically diverted under 41H 15887-00 to mitigation. Model results summarized in the August 16, 2021, Depletion and Aquifer Recharge Report indicates that 49 AF delivered to the infiltration gallery during June, July, and August is sufficient to offset year round depletions from Groundwater Permit...
Application 41H 30148637. The August 27, 2021, Technical Report showed that 43 acres must be retired from irrigation to achieve the required 49 AF of water for mitigation. In addition, the fully applied volume on 43 acres, equal to 70 AF, must be delivered to the infiltration gallery to replace the loss of return flows on 43 acres, in addition to offsetting new depletions from the proposed groundwater permit.

97. The following conditions were proposed by the Department and agreed to by the Applicant on November 17, 2021, by email:

**IMPORTANT INFORMATION**

NOTIFICATION REQUIREMENT: THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS CHANGE AUTHORIZATION; AND 2) THE PORTION OF THIS WATER RIGHT CHANGED TO MITIGATION PURPOSE CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS, FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

**IMPORTANT INFORMATION**

IN ORDER TO PREVENT ADVERSE EFFECTS TO OTHER APPROPRIATORS DUE TO LOSS OF HISTORICAL RETURN FLOWS, THE APPROPRIATOR SHALL DIVERT, OR CAUSE TO BE DIVERTED, 21 AC-FT PER YEAR OF WATER AND SHALL APPLY THIS WATER TO THE INFILTRATION GALLERY DESCRIBED IN THIS DOCUMENT BETWEEN JUNE 1 AND AUGUST 31 OF EACH YEAR.

**WATER MEASUREMENT INFORMATION – AQUIFER RECHARGE**

THE APPROPRIATOR SHALL INSTALL A MEASURING DEVICE CAPABLE OF RECORDING THE RATE AND VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY UNDER CHANGE 41H 30148636. THE APPROPRIATOR MUST RECORD THE VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY. SUCH RECORDS SHALL BE SUBMITTED TO THE BOZEMAN DNRC WATER RESOURCES OFFICE BY NOVEMBER 30 OF EACH YEAR. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING PROPERLY. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
FIGURE 3: Overview of the Hoy Ditch, historical place of use, and proposed infiltration gallery location.

Preliminary Determination to Grant
Combined Application Nos. 41H 30148636 and 41H 30148637.
§ 85-2-402, MCA, CHANGE CRITERIA

GENERAL CONCLUSIONS OF LAW

98. An applicant in a change proceeding must affirmatively prove all of the criteria in § 85-2-402, MCA. 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), and (16) 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) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436 or a temporary change in appropriation right authorization pursuant to § 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana’s change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Rovston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT...
203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg. 8, aff’d on other grounds, Town of Manhattan v. DNRC, 2012 MT 81.

The burden of proof in a change proceeding is by a preponderance of evidence, which is “more probably than not.” Hohenlohe ¶¶ 33, 35.

99. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also 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). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Water Use Act in § 85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) … 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.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(italics added).

100. Montana’s change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as “diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use.” “Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant.” An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

¹ Although Montana has not codified the law in the detail, Wyoming has, and the two states’ requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

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.

Colorado follows a similar analysis under its requirement that a “change of water right, … shall be approved if such change, … will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[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.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use…. A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

101. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, (DNRC Final Order 1991); In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, (DNRC Final Order 1992); In The Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H, Proposal for Decision and Memorandum at Pgs. 8-22 (Adopted by Final Order January 9,1985);
see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) 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, citing McDonald).

# The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. 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. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 (1908)….

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 v. DNRC, 2010 MT 203, ¶¶ 43, 45; see also Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg. 9.

102. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Hohenlohe ¶ 43; Quigley; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); City of Bozeman (DNRC), supra (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no
right to waste water or to otherwise expand his appropriation to the detriment of juniors”). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” § 85-2-234, MCA. *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

103. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. *Hohenlohe ¶¶ 30-31.*


In a change proceeding, the *consumptive* use of the historical right has to be determined:
In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates. With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

Expected consumptive use after a reallocation [change] may not exceed historic consumptive use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, 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.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

105. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg. 8; In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).
106. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

**Historical Use:**

FINDINGS OF FACT

107. The Applicant proposes to change the purpose and place of use of a portion of Statement of Claim 41H 15887-00. The source of water for 41H 15887-00 is Hyalite Creek with a point of diversion in the SENWNW Section 14, T03S R05E, Gallatin County. The Hoy Ditch was historically used to convey water to the historical place of use for irrigation of 83 acres in the N2NE and S2NE Section 2, T03S R05E, Gallatin County between approximately June 1 and September 15. Statement of Claim 41H 15887-00 has a claimed flow rate of 282.74 gallons per minute (GPM) and a calculated diverted volume of 147.0 AF with a priority date of May 31, 1882, decreed in the March 11, 1897, Middle Creek Decree.

108. Approximately two acres of the historically irrigated area has been subdivided and is no longer owned by the Applicant. Parcel 2 of Certificate of Survey 2888 in the southeast corner of the historical place of use is 1.9284 acres in size, according to Montana Cadastral records. Accordingly, the Applicant has retained ownership interest in 97.67% of the water right proposed for change, equal to 81.07 acres. The Applicant is only changing a portion of their irrigated acreage within their ownership interest in 41H 15887-00, therefore historical use of this water right was analyzed as a whole.

**Point of diversion and means of conveyance**

109. The Hoy Ditch, operated by the Hoy Ditch Company, was formally established in 1951, as described in the 1953 Gallatin County Water Resources Survey. Prior to filing articles of incorporation, the ditch users operated as an unincorporated mutual association. The ditch company historically did not directly own water rights, rather water users could purchase shares in the ditch company for the right to transport water in the ditch and cover maintenance and operation costs. The 1953 Water Resources Survey states that all water rights conveyed in this ditch were decreed in the March 11, 1897, Middle Creek Decree. The 1953 Water Resources
Survey also notes that 725 AF of stored water from the Middle Creek Storage Project was conveyed in the ditch.

110. In the January 20, 2021, Deficiency Letter Response, the Applicant stated that the Hoy Ditch is approximately six feet wide and two to three feet deep near the Applicant’s property. The segment from the point of diversion on Hyalite Creek to the point where the ditch flows under South 19th Avenue is larger, as this segment carries the entire flow rate for all water rights associated with this structure. Just prior to flowing under South 19th Avenue, a secondary point of diversion bifurcates the ditch to deliver water to fields southwest of the Applicant’s property. The Applicant stated in the January 20, 2021, Deficiency Letter Response that an on-farm ditch splits into two laterals, each approximately three feet wide and one foot deep. The total length of the Hoy Ditch from the point of diversion on Hyalite Creek to the southwest corner of the Applicant’s property is 11,913 feet measured using aerial imagery and GIS software.

111. The Hoy Ditch was subject of a recent Change Application 41H 30143744 by Home 40 LLC. As part of that change application review, the Department calculated the capacity of the Hoy Ditch based on culvert dimensions at several locations along the ditch. Culvert capacity was used as a proxy for the ditch capacity and was determined using HY 8 Culvert Hydraulic Analysis Program by DNRC staff. The maximum capacity of the Hoy Ditch is 54.0 CFS and is sufficient to carry the water right proposed for change.

**Period of diversion and place of use**

112. The Applicant stated in the January 20, 2021, Deficiency Letter Response that flood irrigation was historically used to irrigate alfalfa with periodic barley or wheat rotation, with a period of diversion typically beginning in early June through the middle of September for a total of approximately 107 days. The Hoy Ditch reaches the field at a point in the southwest corner of the field, at which point on-farm ditches deliver water across the historical place of use. On-farm ditches were dammed and allowed to flood on a four to five day cycle beginning on the north end of the parcel and working towards the southern boundary.

113. The 1953 Gallatin County Water Resources Survey map and aerial photo dated 5/6/1947 shows the entire historical place of use irrigated. An aerial photo dated 9/5/1976 shows most of...
the historical place of use irrigated, with approximately two acres developed in the southeast corner of the place of use. The maximum historical acres for this water right is 83 acres. Parcel 2 of Certificate of Survey 2888 in the southeast corner of the historical place of use is 1.9284 acres in size, according to Montana Cadastral records. Accordingly, the Applicant has retained ownership interest in 97.67% of the water right proposed for change, equal to 81.07 acres.

**Historical consumptive use**

114. Historical consumptive use was determined using the Departments standards for irrigation water rights found in ARM 36.12.1902 (14-17). The Applicant is not changing their entire portion of 41H 15887-00, therefore historical use was analyzed for the water right as a whole. The net Irrigation Water Requirements (IWR) computer program output for alfalfa for the Bozeman MT State University weather station is 18.42 inches. The original IWR estimates have been reduced from 18.4 inches to 17.28 inches based on the number of days historically irrigated (107 days, June 1 through September 15). A pre-1973 management factor of 73.5% for historical flood irrigation (from ARM 36.12.1902) results in a historical crop consumptive use on 83 acres of 87.8 AF. An estimated field efficiency of 65% for graded border flood irrigation results in a total field applied volume of 135.1 AF. Irrecoverable losses were assumed to be 5%, or 6.8 AF of the total 135.1 AF applied volume. The total historical consumptive use for flood irrigation of 83 acres is 94.6 AF (87.8 AF crop consumptive use plus 6.8 AF irrecoverable losses equals 94.6 AF historical consumptive use).

**Historical Diverted Volume**

115. The Applicant is not changing their entire portion of 41H 15887-00, therefore historical use was analyzed for the water right as a whole. The historical diverted volume for 41H 15887-00 is the sum of the volume applied to the field and conveyance losses. The volume applied to the field was 135.1 AF. Conveyance losses include evaporation, seepage, and loss to non-target vegetation along the ditch. The means of conveyance is not changing; water will continue to be conveyed through the Hoy Ditch to an infiltration gallery located within the footprint of the historically irrigated area. The Applicant elected to calculate historical diverted volume using the
Department’s standard methodology outlined in ARM 36.12.1902(10). Historical diverted volume was calculated using the Applicant’s explanation of irrigation operations and the best readily available information regarding the Hoy Ditch. Historical diverted volume calculations are explained in detail in the August 27, 2021, Technical Report; a summary is given below.

116. The Hoy Ditch was subject of a recent Change Application 41H 30143744 by Home 40 LLC. As part of that change application review, the Department calculated the capacity of the Hoy Ditch based on culvert dimensions at several locations along the ditch. Culvert capacity was determined using HY 8 Culvert Hydraulic Analysis Program by DNRC staff. The Hoy Ditch was split into three segments due to several secondary points of diversion that distribute water to other water users on this system. Ditch geometry and flow rates for Segment 1 and Segment 2 were taken from 41H 30143744. Segment 3 was not included in Change Application 41H 30143744; therefore, ditch capacity was estimated from the sum of the flow rates for water rights conveyed in this section of the ditch and the Manning N equation. The portion of conveyance losses attributed to the Applicant’s water right 41H 15887-00 are summarized below:

Evaporation = 0.1 AF
Seepage loss = 9.9 AF
Vegetation loss = 1.9 AF
Total conveyance loss = 11.9 AF

The total historical diverted volume is the field-applied volume of 135.1 AF, plus conveyance losses of 11.9 AF, for a total diverted volume of 147.0 AF attributed to 41H 15887-00.

117. The Department finds the following historical use shown in Table 9 below:

<table>
<thead>
<tr>
<th>WR Claim #</th>
<th>Source</th>
<th>Priority Date</th>
<th>Diverted Volume (AF)</th>
<th>Flow Rate (GPM)</th>
<th>Purpose (Total Acres)</th>
<th>Consump. Use (AF)</th>
<th>Place of Use</th>
<th>Point of Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>41H 15887-00</td>
<td>Hyalite Creek</td>
<td>5/31/1882</td>
<td>147.0</td>
<td>282.74</td>
<td>Irrigation (83 acres)</td>
<td>94.6</td>
<td>N2NE, S2NE SEC 2, T3S R5E, GALLATIN COUNTY</td>
<td>SENWNW SEC 14, T3S R5E, GALLATIN COUNTY</td>
</tr>
</tbody>
</table>

AF = acre-feet  GPM = gallons per minute
CONCLUSIONS OF LAW

118. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. § 85-2-402(1), MCA; Rovston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120; 85-2-102(12)("Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973). An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Quigley, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg. 9 (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, citing Featherman v. Hennessy, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495; see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse … properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

119. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result
The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pg.13 (upholding ARM 36.12.1902, as reflecting basic water law principles).

The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. Id. at Pg. 14; In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008)(applicant must provide evidence on actual historic use of water right regardless of decree; statement that “we will not be using any more water than was used before” is not sufficient).

120. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

121. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902.
If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902, the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”).

122. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (citing Application for Water Rights in Rio Grande County, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001).

123. Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston, COL No. 8 (DNRC Final Order 1989), affirmed (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC., DNRC Proposal for Decision (November 19,
2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), supra; In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra.

124. The Department has the authority to consider waste in determining a volume for change in a water right.

The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.

Hohenlohe ¶ 71.

125. Applicant may proceed under ARM 36.12.1902, the Department’s historic consumptive use rule, for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF 114)

126. The Applicant has proven by a preponderance of the evidence that the historical use of their 97.67% ownership interest in Water Right Claim No. 41H 15887-00 is 143.6 AF diverted volume and 276.17 GPM flow rate with a consumptive use of 92.4 AF. (FOF 107-117)

Adverse Effect:

FINDINGS OF FACT

127. The Applicant proposes to change the purpose and the place of use of a portion of Statement of Claim 41H 15887-00. No changes are proposed to the point of diversion, and this water right does not involve a place of storage.

128. No change in the point of diversion is proposed and water will continue to be conveyed in the Hoy Ditch as it occurred historically to the new place of use at an infiltration gallery and continued irrigation of 38.07 acres within the historical place of use. The additional owner on this water right, owner of Parcel 2, and other water users on the Hoy Ditch will not be adversely affected because water will continue to be conveyed in the same manner and amount as occurred historically. The new proposed consumptive use for Permit Application 41H 30148637 is 34.6
AF. The Applicant will divert 70 AF into the infiltration gallery equal to the historically applied volume on 43 acres. The historically consumed volume on 43 acres is more than the volume required in the associated permit application. However, the volume required to be delivered to the infiltration gallery during the historical period of diversion is the volume required to offset year round depletions associated with the proposed groundwater permit. This results in over-mitigation in some months, but models show that this mitigation plan fully offsets depletions in every month.

129. The historical consumptive use from crop consumption and field application on 43 acres is 49.0 AF. The Applicant proposes to retire 43 acres from irrigation in order to achieve the required consumptive volume for mitigation in a new infiltration gallery. The new consumptive use is the same as the historical consumptive use. The consumptive use is not expanding, so no other appropriators will be adversely affected by an increase in consumptive use under the water right proposed for change.

130. The August 16, 2021, Return Flow Report identified Hyalite Creek downstream of the southern boundary of Section 11, Township 3 South, Range 5 East and Bozeman Creek downstream of the southern boundary of Section 6, Township 3 South, Range 6 East to the confluence with the East Gallatin River as the receiving stream reaches for historical return flows. The Applicant proposes to divert the full field applied volume of 70 AF on 43 acres to an infiltration gallery in order to offset the proposed consumptive use for Permit Application 41H 30148637 and the loss of return flows on 43 acres retired from irrigation. The infiltration gallery is located within the footprint of the historically irrigated area. The proposed mitigation plan will not result in a change in pattern or timing of return flows (August 27, 2021, Irrigation Change Application Technical Report).

131. The total volume required to be delivered to the infiltration gallery in order to offset depletions from the proposed use (49.0 AF), plus the loss of return flows (21.0 AF) is 70 AF.

132. Hyalite Creek is an active Distribution Project with a court-appointed Water Commissioner. The Hoy Ditch headgate and conveyance system is also operated by the Hoy Ditch Company. These factors will help ensure the Applicant’s water right will continue to operate as it has historically with no increase in the diverted volume or flow rate.
133. The Applicant has proposed to measure the volume and flow rate delivered to the infiltration gallery from the Hoy Ditch. Flow meters will also be installed on the wells proposed under Permit Application 41H 30148637. The measuring devices will help ensure that a sufficient volume of water is delivered to the infiltration gallery for mitigation of the proposed groundwater permit and loss of return flows (January 20, 2021, Deficiency Letter Response).

CONCLUSIONS OF LAW
134. The Applicant bears the affirmative burden of proving that 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. § 85-2-402(2)(a), MCA. Royston, supra. It is the applicant’s burden to produce the required evidence. In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005).

135. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980), 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (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 (1909), 38 Mont. 302, 100 P. 222 (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); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the
gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review (2011) Pg.13; City of Bozeman (DNRC), supra; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. 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. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 (1908)…. 

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…

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 ¶¶ 43-45.
The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo.1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder’s decreed water right operating in priority.” (citations omitted) …

… it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) …

… diversions are implicitly limited in quantity by historic use at the original decreed point of diversion…

…we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).
Final Order 2005); In the Matter of Application to Change a Water Right No. 41H 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision adopted by Final Order (2003).
Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC., DNRC Proposal for Decision (2003) (application subsequently withdrawn); In the Matter of Application to Change A Water Right No. 43B 30002710 by USA (Dept. of Agriculture – Forest Service) (DNRC Final Order 2005); In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation (DNRC Final Order 2008).
137. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, Montana Water Law Handbook (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, Montana Water Law (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of the water right of the appropriator changing their water right and an appropriator changing their water right is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. See also, Doney, p. 21.
The Montana Supreme Court also 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; see discussion in Hohenlohe, supra.

138. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., In the Matter of Application to Change Appropriation Water Right No. 41F-31227 by T-L Irrigation Company (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra; In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008) (applicant must show that significant changes in timing and location of historic return flow will not be adverse effect.) The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

139. The Applicant has proven by a preponderance of the evidence 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 127-133)
**Adequate Diversion**

**FINDINGS OF FACT**

140. The Applicant proposes to continue diverting water under 41H 15887-00 at the historical point of diversion at the Hoy Ditch headgate on Hyalite Creek. The Hoy Ditch is a major irrigation structure for numerous water users with water rights from Hyalite Creek. The August 27, 2021, Technical Report estimated the maximum capacity of the Hoy Ditch of 54 CFS. The Applicant proposes to continue diversion practices as they occurred historically to convey water to the historical place of use and proposed infiltration gallery. The Hoy Ditch has been and will continue to be adequate for conveying the requested volume and flow rate.

141. The Applicant proposes to deliver water to an infiltration gallery in order to offset depletions from Groundwater Permit Application 41H 30148637. The proposed design consists of a buried pipe conveying water from the Hoy Ditch to an infiltration gallery located within the footprint of the historically irrigated area. Perforated pipes buried three feet below the ground surface will allow water to infiltrate to the underlying sand and gravel aquifer (January 20, 2021, Deficiency Letter Response). Well logs provided in the Application Materials indicate that the water table is approximately 30 feet below ground surface in the vicinity of the proposed infiltration gallery. This will provide adequate separation between the infiltration gallery and the underlying aquifer to allow water to infiltrate below the root zone and satisfy the required aquifer recharge volume.

**CONCLUSIONS OF LAW**

142. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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. The adequate means of diversion statutory test merely codifies and encapsulates the
common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt (DNRC Final Order 1981); § 85-2-312(1)(a), MCA; see also, In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger (DNRC Final Order 1989) (whether party presently has easement not relevant to determination of adequate means of diversion); In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); In the Matter for Application to Change a Water Right No. 101960-41S by Royston (DNRC Final Order 1989) (irrigation system is designed for flow rates of 750 GPM, and maximum usage allowed during non-high water periods, is 144-247 GPM, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), affirmed, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; 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); In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

143. Pursuant to § 85-2-402(2)(b), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves (iii) a change in appropriation right pursuant to § 85-2-420, MCA, for mitigation or marketing for mitigation. (FOF 140-141)
**Beneficial Use**

**FINDINGS OF FACT**

144. The Applicant proposes to use water for mitigation to offset adverse effects resulting from net depletion of surface water and changes in return flows. Aquifer recharge is a beneficial use of water in the State of Montana.

145. The Applicant proposes to use 143.6 AF diverted volume and 276.17 GPM flow rate, reflecting the historical use of their 97.67% ownership interest in 41H 15887-00. Of the total 143.6 AF diverted volume, 70 AF will be diverted to the infiltration gallery for mitigation purpose, 62.0 AF will remain for irrigation purpose on 38.07 acres, and 11.6 AF will be needed for carriage water from the historical point of diversion. The point of diversion and means of conveyance are not changing. The total volume applied to the infiltration gallery includes 49.0 AF of the historically consumed volume to offset the proposed new consumptive use in Permit Application 41H 30148637 and 21.0 AF to mitigate the loss of return flows from irrigation of 43 acres.

146. Over-mitigation is not a beneficial use of water, but the full field-applied volume of 70.0 AF for historical irrigation of 43 acres must be diverted to the infiltration gallery in order to offset depletions in every month. Through numerous modeling iterations, DNRC Water Management Bureau hydrologists determined that 70.0 AF of the historically diverted volume delivered to the infiltration gallery is required to offset depletions and changes to return flows fully in every month.

147. Water will need to be delivered to the infiltration gallery at a constant rate of 0.38 CFS, or 170.54 GPM, during June, July, and August (92 days) to achieve the required volume of 70 AF. The claimed flow rate 41H 15887-00 is 282.74 GPM and the portion owned by the Applicant is 276.17 GPM. The Applicant proposes to continue to irrigate 38.07 acres. This flow rate is sufficient to meet the mitigation requirements and continued irrigation.

148. Hyalite Creek is an active Water Distribution Project with a court-appointed water commissioner. The current water commissioner, George Alberda, stated in a December 1, 2021, phone call that water rights with an 1882 priority date or older on Hyalite Creek are typically not curtailed and will remain in priority until at least early August in all but the driest years. Hyalite
Creek and Hoy Ditch also convey water stored in Hyalite Reservoir and information available to the Department indicates that in most years, sufficient water will be available for the proposed beneficial use.

CONCLUSIONS OF LAW

149. Under the change statute, § 85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and 311(1)(d), MCA.

150. 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. The amount of water under a water right 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 (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Quigley; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 3 (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); In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick, (DNRC Final Order 1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); In the Matter of Application No. 40A-108497 by Alex Matheson, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling, (DNRC Final Order 2003), aff’d on other grounds, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); In the Matter of Application for Beneficial
Preliminary Determination to Grant

Combined Application Nos. 41H 30148636 and 41H 30148637.

Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company (June 11, 2008) (change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly, DNRC Final Order (2007), aff’d on other grounds, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, Nunc Pro Tunc Order on Petition for Judicial Review (2008) (permit denied in part because of failure to support quantity of water needed for pond); In The Matter Of Change Application No. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008) (when adding new water rights to land already irrigated by other water rights, applicant must show that all of the proposed rights together are needed to irrigate those lands).

151. The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. Waste is defined to include the “application of water to anything but a beneficial use.” § 85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

152. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005).

153. Applicant proposes to use water for mitigation and irrigation purposes, which are recognized beneficial uses. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that mitigation and irrigation are beneficial uses and that 70 acre-feet of diverted volume for mitigation, 73.6 acre-feet for irrigation, and 276.17 GPM flow rate of water requested is the amount needed to sustain the beneficial use. § 85-2-402(2)(c), MCA. (FOF 144-148)
**Possessory Interest**

**FINDINGS OF FACT**

154. 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. (Department file)

155. The Applicant submitted an affidavit signed by Debra Amunrud on April 23, 2021, affirming written consent of the person with possessory interest of Parcel 1A, owned by Mark L Amunrud and Debra A Amunrud.

156. Parcel 4A, currently owned by William and Julia Hatch, is located within the historical place of use. The Applicant submitted a deed dated December 23rd, 1998, with the January 20, 2021, Deficiency Letter documenting the sever of appurtenant water rights from the sale of this property.

**CONCLUSIONS OF LAW**

157. Pursuant to § 85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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 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.

158. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and
(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

159. 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 for irrigation use. § 85-2-402(2)(d), MCA. (FOF 154-156)

160. Pursuant to § 85-2-402(2)(d), MCA, the Applicant is not required to prove that they have a possessory interest in the property where the water is to be put to beneficial use because this application involves (iii) a change in appropriation right pursuant to § 85-2-420, MCA, for mitigation or marketing for mitigation. (FOF 94)

Salvage Water
161. This Application does not involve salvage water.

Discharge Permit
FINDINGS OF FACT
162. A discharge permit from the Department of Environmental Quality is not required. On December 6, 2021, the Applicant submitted email communication with the Montana Department of Environmental Quality stating that a Montana Ground Water Pollution Control Systems discharge permit is not required for operation of the infiltration gallery.
CONCLUSIONS OF LAW

163. Sections 85-2-362(3) and 85-2-364, MCA require that an Applicant receive the appropriate water quality permits for a mitigation or an aquifer recharge plan pursuant to Title 75, chapter 5 MCA, as required by §§75-5-410 and 85-2-364, MCA, prior to the grant of beneficial water use permit application as part of a combined application under § 85-2-363, MCA. The Department of Environmental Quality has confirmed that a Montana Ground Water Pollution Control Systems discharge permit is not required. (FOF 162)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Order, the Department preliminarily determines that this Combined Application for Beneficial Water Use Permit No. 41H 30148637 and Change 41H 30148636 should be GRANTED.

BENEFICIAL WATER USE PERMIT

The Department determines the Applicant may for the purposes of Beneficial Water Use Permit No. 41H 30148637 divert water from groundwater, by means of 37 wells, from January 1 to December 31 at individual flow rates of 10 GPM and a cumulative flow rate of 370 GPM up to 93.6 AF, from points in the NWNE, S2NENE, N2SENE, and N2SWNE Section 2, T03S R05E, Gallatin County, for multiple domestic (47.4 AF) use from January 1 to December 31 and lawn and garden irrigation (46.3 AF) from April 1 to October 31. A maximum of two dwelling units per lot on 37 lots is authorized under the multiple domestic purpose. The Applicant may irrigate up to 18.5 acres of lawn and garden on 37 lots, up to 0.5 acres per lot. The place of use is located on 37 lots in the NWNE, S2NENE, N2SENE, and N2SWNE Section 2, T03S R05E, Gallatin County. The consumptive volume for multiple domestic purpose is 4.7 AF and for lawn and garden irrigation is 29.9 AF. Net depletion from the proposed groundwater pumping will accrue to Bozeman Creek and Hyalite Creek (Depletion and Aquifer Recharge Report).

Change No. 41H 30148636 will mitigate net depletion in the affected surface waters. The water to mitigate the affected reach will be diverted from Hyalite Creek into the Hoy Ditch and conveyed to an infiltration gallery located within the footprint of the historical place of use in the...
SENWNE of Section 2, T03S R05E, Gallatin County, as described in the Change Authorization below.

The permit application will be subject to the following conditions, limitations or restrictions:

**IMPORTANT INFORMATION**

**NOTIFICATION REQUIREMENT:** THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS PERMIT; 2) A COPY OF THE WELL LOG MUST BE SUBMITTED TO THE APPROPRIATOR; AND 3) A WATER RIGHT CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS, FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

**IMPORTANT INFORMATION**

INDIVIDUAL WELLS AUTHORIZED BY THIS PERMIT SHALL BE LIMITED TO A MAXIMUM FLOW RATE OF 10 GPM AND VOLUME OF 2.53 AF.

**IMPORTANT INFORMATION**

AQUIFER RECHARGE REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 49.0 AC-FT OF AQUIFER RECHARGE VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO BOZEMAN CREEK AND HYALITE CREEK. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE AQUIFER RECHARGE PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 41H 30148636 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT, EXCEPT FOR EMERGENCY USE, MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES.

**WATER MEASUREMENTS REQUIRED – PROVISIONAL PERMIT**

FOR EACH WELL, THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A
PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

IMPORTANT INFORMATION
WELL LOGS: THE APPROPRIATOR SHALL REQUIRE THE LANDOWNER PROVIDE A COPY OF THE WELL LOG TO THE APPROPRIATOR WITHIN 90 DAYS OF COMPLETION OF THE WELL. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE WELL LOG TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

AUTHORIZATION OF CHANGE IN APPROPRIATION RIGHT
Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41H 30148636 should be GRANTED.

The Applicant is authorized to divert water from Hyalite Creek at a point in the SENWNW Section 14, T03S R05E, Gallatin County, which is the location of the Hoy Ditch headgate, at a rate of 276.17 GPM. Between June 1 and August 31 of each year, water at a rate of 170.54 GPM and a volume of 70 AF of water shall be applied to the infiltration gallery located in the SENWNE of Section 2, T03 S, R05 E, Gallatin County. The continued irrigation of 38.07 acres of the historical place of use is authorized with the remaining 105.63 GPM flow rate and 62.0 AF.

The application will be subject to the following conditions, limitations, or restrictions:

IMPORTANT INFORMATION
NOTIFICATION REQUIREMENT: THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS CHANGE AUTHORIZATION; AND 2) A WATER RIGHT CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS, FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.
IMPORTANT INFORMATION
IN ORDER TO PREVENT ADVERSE EFFECTS TO OTHER APPROPRIATORS DUE TO LOSS OF HISTORICAL RETURN FLOWS, THE APPROPRIATOR SHALL DIVERT, OR CAUSE TO BE DIVERTED, 21 AC-FT PER YEAR OF WATER AND SHALL APPLY THIS WATER TO THE INFILTRATION GALLERY DESCRIBED IN THIS DOCUMENT BETWEEN JUNE 1 AND AUGUST 31 OF EACH YEAR.

WATER MEASUREMENT INFORMATION – AQUIFER RECHARGE
THE APPROPRIATOR SHALL INSTALL A MEASURING DEVICE CAPABLE OF RECORDING THE RATE AND VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY UNDER CHANGE 41H 30148636. THE APPROPRIATOR MUST RECORD THE VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY. SUCH RECORDS SHALL BE SUBMITTED TO THE BOZEMAN DNRC WATER RESOURCES OFFICE BY NOVEMBER 30 OF EACH YEAR. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING PROPERLY. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
NOTICE

This Department will provide public notice of this Combined 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 Combined Application pursuant to §§ 85-2-307, and -308, MCA. If this Combined Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Combined Application as herein approved. If this Combined Application receives a valid objection, the Combined Application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to a combined application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the combined application, the department will grant the combined application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 21st day of December 2021.

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

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 21st day of December 2021, by first class United States mail.

LAZY TJ ENTERPRISES
%BRENT AMUNRUD
6280 JOHNSON RD
BOZEMAN, MT 59718-8902

TOM MICHALEK   (VIA EMAIL ONLY)
SENIOR HYDROGEOLOGIST, RESPEC
3810 VALLEY COMMONS DRIVE, SUITE 4
BOZEMAN, MT 59718
TOM.MICHALEK@RESPEC.COM

______________________________________________________________
JACK LANDERS
BOZEMAN REGIONAL OFFICE, (406) 556-4500