On September 30, 2020, Silver Gate Water Users Association (Applicant) submitted Application to Change Water Right No. 43B 30150121 to change Groundwater Certificate 43B 16243-00 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 24, 2021. The Applicant responded with information dated March 24, 2021, and an additional $500.00 filing fee to change the place of use for 43B 16243-00. In addition, after request by the Department, the Applicant submitted a supplemental historical use document dated September 11, 2021, to help substantiate the historical use of Groundwater Certificate 43B 16243-00. The Application was determined to be correct and complete as of December 15, 2021. An Environmental Assessment for this Application was completed on April 4, 2022.

INFORMATION

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

Application as filed:

• Application to Change Water Right, Form 606-NIR
• Attachments
• Montana Well Log Report – GWIC ID 106030
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.

- 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, part 4, MCA).
PRELIMINARY MATTERS

The Applicant submitted Permit Application No. 43B 30107068 for beneficial use within the Yellowstone Controlled Groundwater Area on May 26, 2016. Permit Application No. 43B 30107068 was for municipal use from the same point of diversion that is now subject of this Preliminary Determination. The application was deemed correct and complete on November 22, 2016. The Department received an objection to the permit application from the National Park Service on December 22, 2016. As part of the settlement agreement with the National Park Service, Silver Gate Water Users Association agreed to file a change application, resulting in this change application 43B 30150121 as a replacement well for existing Groundwater Certificate 43B 16243-00. The Applicant proposes to withdraw pending Permit Application No. 43B 30107068 if this replacement well application 43B 30150121 is granted.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes to change the point of diversion (POD) of Groundwater Certificate 43B 16243-00 to a replacement well located approximately 484 feet northwest of the existing POD and change the place of use (POU). Groundwater Certificate 43B 16243-00 has a priority date of November 15, 1977, with a maximum flow rate of 38 gallons per minute (GPM) and diverted volume of 60 acre-feet (AF). The purpose is municipal to supply water users within the service area of the Silver Gate Water Users Association with a period of use from January 1 to December 31. The point of diversion and place of use are located in the SWNE Section 33, T09S R14E, Park County.

<table>
<thead>
<tr>
<th>WR Number</th>
<th>Flow Rate</th>
<th>Volume</th>
<th>Purpose</th>
<th>Period of Use</th>
<th>Place of Use</th>
<th>Point of Diversion</th>
<th>Priority Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>43B 16243-00</td>
<td>38 GPM</td>
<td>60 AF</td>
<td>Municipal</td>
<td>1/1-12/31</td>
<td>SWNE Sec 33, T09S R14E, Park County</td>
<td>SWNE Sec 33, T09S R14E, Park County</td>
<td>11/15/1977</td>
</tr>
</tbody>
</table>

2. The Town of Silver Gate is an unincorporated community located in Park County, Montana. A community water supply system has been in place since at least 1954 and has
operated under several different names, currently known as the Silver Gate Water Users Association (Applicant or SGWUA).

3. Groundwater Certificate 43B 16243-00 proposed for change is used in conjunction with Statement of Claim 43B 158-00 as part of a manifold system. The source listed on claim 43B 158-00 is a spring, tributary to Soda Butte Creek, with a maximum flow rate of 5 cubic feet per second, diverted volume of 3,620 acre-feet, and priority date of May 22, 1954. The Application Materials stated that the spring has experienced water quality issues and has not been suitable for a potable water supply. Groundwater Certificate 43B 16243-00 historically served as a redundant water supply serving the same place of use as 43B 158-00.

4. Groundwater Certificate 43B 16243-00 is located within the Yellowstone Controlled Groundwater Area (YCGA). The YCGA was established on January 31, 1994, under the Reserved Water Rights Compact between the U.S. National Park Service (NPS) and the State of Montana. Groundwater Certificate 43B 16243-00 was filed on November 15, 1977, prior to establishment of the YCGA. The National Park Service Compact also includes a reserved instream flow water right on Soda Butte Creek for the entire flow, less the consumptive use limits described in Table 11 of the compact, applicable to water rights with a priority date after January 1, 1993.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to change the point of diversion (POD) for Groundwater Certificate 43B 16243-00 to a replacement well located approximately 484 feet northwest of the existing POD and place of use (POU). The proposed POD is located in the NWSWNE Section 33, T09S R14E, Park County. The proposed place of use is the E2 Section 33, T09S R14E, Park County. The Applicant proposes to change the POU to match the POU for Statement of Claim 43B 158-00 as these water rights are used in conjunction as part of a manifold system. The proposed POU encompasses the existing POU and is intended to more accurately reflect the municipal water supply distribution system (Figure 1).

6. No change in purpose is proposed and the proposed change in place of use encompasses the existing place of use. Groundwater Certificate 43B 16243-00 was originally issued with a POU
that did not include the existing water storage tank and a portion of the municipal supply lines. Therefore, the proposed POU will more accurately reflect the water distribution system as constructed.

7. The following condition has been incorporated in the analysis of this preliminary determination:

**WATER MEASUREMENTS REQUIRED**

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.
FIGURE 1: Map of the proposed place of use and point of diversion.
8. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant’s burden to prove change criteria by a preponderance of evidence is “more probably than not.”); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

9. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).
HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

10. Groundwater Certificate 43B 16243-00 has historically been used for domestic supply and lawn and garden irrigation for single-family dwellings, commercial businesses, and hotels located in the community of Silver Gate. Seasonal residents and tourists account for a large proportion of the population during the spring, summer, and fall months.

11. No water measurement records exist for 43B 16243-00. As a result, the Applicant followed the methods used by the neighboring town of Cooke City to estimate historical water use. Information provided for Cooke City’s Change Application 43B 30013684 served as the basis for estimating historical use in Silver Gate due to similar demographics and economies for both communities, but with some modifications to account for flow rate constraints in Silver Gate’s municipal water system.

12. The town of Cooke City changed the point of diversion for their municipal water supply in Change Authorization 43B 30013684. Cooke City did not measure individual water use historically. In order to evaluate historical water use, Cooke City compared water use estimates from five towns in Montana with similar demographics: two towns with metered use and three towns without metered water use (Water Right File 43B 30013684, Engineering Report, 2002). The communities identified in the report are Ennis, Shelby, Virginia City, Townsend, and Clyde Park, MT. These communities have similar demographics and water use patterns as Cooke City and Silver Gate.

13. The Cooke City engineering report shows considerably higher water use in the communities without meters, averaging 444 gallons per capita per day (GPCD) compared to 195 GPCD in communities with meters. Water use during the summer months (June to August) is also considerably higher than the winter months in communities without meters, averaging 647 GPCD.

14. The Applicant submitted supplemental information dated September 11, 2021, to substantiate the historical population estimate and historical use that occurred at the time Groundwater Certificate 43B 16243-00 was perfected in 1977. The supplemental document summarized information gathered from SGWUA board members and other residents that had direct historical knowledge of the water supply system in 1977. Historical population estimates were based on several sources, including an estimate of the number of service hookups, partial
billing records, direct knowledge of infrastructure construction, and personal accounts of commercial business operations in 1977. The number of permanent residents, seasonal residents, and seasonal employees historically served by 43B 16243-00 in 1977 is shown below in Table 2.

<table>
<thead>
<tr>
<th>TYPE</th>
<th>NUMBER</th>
<th>NUMBER OF DAILY PER YEAR</th>
<th>GPCD</th>
<th>GPY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent resident</td>
<td>20</td>
<td>365</td>
<td>314</td>
<td>2,292,200</td>
</tr>
<tr>
<td>Seasonal resident</td>
<td>100</td>
<td>240</td>
<td>314</td>
<td>7,536,000</td>
</tr>
<tr>
<td>Seasonal employee</td>
<td>30</td>
<td>240</td>
<td>314</td>
<td>2,260,800</td>
</tr>
<tr>
<td><strong>Total GPY</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>12,089,000</strong></td>
</tr>
</tbody>
</table>

**Total** 37.1 AF

GPCD = gallons per capita per day  GPY = gallons per year  AF = acre-feet

15. The Applicant identified three categories of residents in Silver Gate for historical domestic water use: permanent resident, seasonal resident, and seasonal employee. A relatively small proportion of residents reside in Silver Gate year round, totaling 20 permanent residents in 1977. Many of the dwellings served by this municipal system are occupied seasonally during the spring, summer, and fall months. Seasonal employees for local businesses also account for a proportion of the domestic use served by this system (Table 2). Seasonal employees were often housed in dormitories attached to hotels or restaurants to supply the workforce for the seasonal, tourist-driven economy.

16. The Applicant originally estimated a per capita daily water use of 444 gallons following the Cooke City engineering report. However, as described further in the Department’s December 15, 2021, Technical Report, the 38 GPM flow rate for 43B 16243-00 is not capable of producing the originally estimated per capita volume during peak demand. Therefore, the Applicant reduced the per capita volume to 314 gallons per day for domestic use by distributing the maximum daily volume supplied by the well pump across the maximum number of residents and commercial use supplied by the system in a single day (email communication, July 16, 2021).

17. The Town of Silver Gate has several hotels, motels, cabins, and restaurants to serve seasonal tourist demand. Table 3 shows the number of rooms and businesses identified in the Application Materials. The Deficiency Letter Response adjusted the period of seasonal tourist
demand from 274 days to 210 days annually to reflect the historical use at the time 43B 16243-00 was perfected in 1977. Historically, peak tourist season typically occurred during the summer months. The seasonal period of 210 days represents the summer tourist season, plus shoulder seasons when restaurants and hotels remained open outside of peak tourist season.

18. The water use standards for motels, hotels, restaurants, and commercial businesses used in the engineering report for the Cooke City Change Application, and those used in the Silver Gate Application Materials, referenced DEQ Circular No. 4 water use requirements. These standards used by Silver Gate are similar to DNRC’s water use requirements listed in Form 615 Water Conversion Table. Commercial use at local restaurants, hotels, and businesses are shown in Table 3.

<table>
<thead>
<tr>
<th>TYPE</th>
<th>NUMBER</th>
<th>GPD PER UNIT</th>
<th>GPD TOTAL</th>
<th>GPY (210 DAYS PER YEAR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hotel Rooms*</td>
<td>13</td>
<td>50</td>
<td>650</td>
<td>409,500</td>
</tr>
<tr>
<td>Motel Rooms*</td>
<td>15</td>
<td>50</td>
<td>750</td>
<td>472,500</td>
</tr>
<tr>
<td>Motels with Laundry</td>
<td>2</td>
<td>1,160</td>
<td>2,320</td>
<td>487,200</td>
</tr>
<tr>
<td>Cabins*</td>
<td>12</td>
<td>50</td>
<td>600</td>
<td>378,000</td>
</tr>
<tr>
<td>Restaurants</td>
<td>2</td>
<td>900</td>
<td>1,800</td>
<td>378,000</td>
</tr>
<tr>
<td>Commercial Business</td>
<td>3</td>
<td>500</td>
<td>1,500</td>
<td>315,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>7,620</strong></td>
<td></td>
<td><strong>2,440,200</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Total</strong></th>
<th><strong>7.5 AF</strong></th>
</tr>
</thead>
</table>

GPD = gallons per day  
GPY = gallons per year  
AF = acre-feet

*Hotels, motels, and cabins water use multiplied by three to account for three people per room.

19. The calculations provided by the Applicant used the water use standards shown in Table 3 above as GPD per unit. For hotels, motels, and cabins, this number is the water use requirement per person. As a result, the total gallons per day for hotel rooms, motel rooms, and cabins were multiplied by three to reflect an occupancy of three people per room, following the methods used in the Cooke City Change Application.

20. The Applicant clarified during a May 5, 2021, phone call that lawn and garden irrigation was included in the domestic diverted volume estimates for permanent and seasonal residents (Table 2). Silver Gate is located at an elevation of approximately 7,600 feet and has a very short growing season. The majority of the lots are small with minimal space for outdoor irrigation. The
Applicant stated that they were not aware of any residents that regularly irrigated substantial turf grass areas. Any outdoor irrigation likely occurred in small garden areas or infrequent turf irrigation during dry periods. The Applicant elected to apply Cooke City’s method of calculation for lawn and garden irrigation as both municipalities have similar water use patterns.

21. Cooke City’s change application estimated consumptive use for lawn and garden irrigation by attributing 1 GPM per household to irrigation with a period of use from July 1 to September 1, described in Section III of the Hydrogeological Report prepared by Great West Engineering (Page 19 of the report, page 35 of Water Right file 43B 30013684). The Applicant estimated the number of households from historical records of service connections. A total of 34 service connections (households) were used for this analysis. This method results in a consumptive volume for lawn and garden irrigation equal to 6.51 AF, or 15% of the diverted volume, assuming 70% efficiency for sprinkler irrigation. This results in 9.3 AF of the total diverted volume of 44.6 AF used for lawn and garden irrigation.

22. Based on the number of residents and businesses served by 43B 16243-00, 44.6 AF was historically diverted. All homes’ and commercial businesses’ wastewater is treated by individual wastewater treatment systems. The Department’s standard consumed volume for individual wastewater treatment systems is 10% of the diverted volume for a total of 4.5 AF consumed. The table below shows a breakdown of the diverted and consumed volumes attributed to each component of the municipal system.

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Period of Use</th>
<th>Diverted Volume (AF)</th>
<th>Consumed Volume (AF)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic</td>
<td>1/1 - 12/31</td>
<td>27.8</td>
<td>2.8</td>
</tr>
<tr>
<td>Commercial</td>
<td>1/1 – 12/31</td>
<td>7.5</td>
<td>0.7</td>
</tr>
<tr>
<td>Commercial</td>
<td>(210 days per period)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lawn and Garden Irrigation</td>
<td>7/1 - 9/1</td>
<td>9.3</td>
<td>6.5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>44.6</strong></td>
<td><strong>10.0</strong></td>
</tr>
</tbody>
</table>

23. Groundwater Certificate 43B 16243-00 was issued with a flow rate of 38 GPM. The original Notice of Completion of Groundwater Development form filed on November 15, 1977, states that
a one horsepower submersible well pump with 1¼ inch outlet capable of pumping up to 38 GPM was installed in the well (water right file 43B 16243-00).

24. The Department finds the following historical use:

<table>
<thead>
<tr>
<th>WR No.</th>
<th>Priority Date</th>
<th>Flow Rate</th>
<th>Purpose</th>
<th>Diverted Volume</th>
<th>Consumptive Volume</th>
<th>Place of Use</th>
<th>Point of Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>43B 16243-00</td>
<td>11/15/1977</td>
<td>38 GPM</td>
<td>Municipal</td>
<td>44.6 AF</td>
<td>10.0 AF</td>
<td>SWNE Sec 33, T9S R14E, Park County</td>
<td>SWNE Sec 33, T9S R14E, Park County</td>
</tr>
</tbody>
</table>

**FINDINGS OF FACT – Adverse Effect**

25. No change in purpose will occur with the proposed change. The replacement well is located in the NWSWNE Section 33, T09S R14E, Park County, approximately 484 feet northwest of the existing well. The change in place of use is intended to more accurately reflect the water distribution system as it exists and to match the place of use of Statement of Claim 43B 158-00 used in combination with 43B 16243-00 in this manifold system.

26. No change in diverted or consumed volume or flow rate will occur from the proposed change. The proposed point of diversion is an existing well (GWIC 268631) constructed in the same gravel aquifer in the basin fill of Soda Butte Creek valley. The Groundwater Change Report dated September 2, 2021, found that monthly and total net depletion to Soda Butte Creek will be the same for the existing well and the proposed well.

27. The September 2, 2021, Groundwater Change Report evaluated drawdown in existing wells under the proposed change. After five years of an assumed monthly pumping schedule, modeling indicates that no additional water rights in the source aquifer will experience drawdown greater than one foot from pumping the proposed well compared to pumping the existing well under Groundwater Certificate 43B 16243-00.

28. The Applicant proposes to measure the flow rate and volume diverted from the proposed point of diversion using a meter currently installed (Change Application 43B 30150121, NIR.4.A).

29. The Department finds that the proposed change will not cause adverse effect under the terms and conditions set out in this Preliminary Determination.
30. The following condition has been incorporated into the analysis of this Preliminary Determination:

**WATER MEASUREMENTS REQUIRED**

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.

**BENEFICIAL USE**

**FINDINGS OF FACT**

31. The Applicant proposes to use water for municipal purpose to serve the community of Silver Gate (Change Application 43B 30150121, NIR.6.A)

32. The Applicant proposes to use 44.6 AF diverted volume and 38 GPM flow rate. This amount is supported by the Department’s historical water use findings and the MT DEQ’s water use standards for commercial use at hotels, motels, cabins, and restaurants. The domestic and lawn and garden irrigation use is supported by the engineering report prepared for Cooke City’s Change Application 43B 30013684 using water use records from similar communities in Montana.

33. The Department finds the proposed change to be a beneficial use of water.

**ADEQUATE DIVERSION**

**FINDINGS OF FACT**

34. The Applicant proposes to use a Franklin 35 SDQP 3.0 horsepower submersible well pump capable of operating at the requested 38 GPM flow rate at their new point of diversion located in the NWSWNE Section 33, T09S R14E, Park County. The distribution system also includes a 2,000 gallon storage tank to buffer the well pump capacity during peak demand.
35. A 7-hour drawdown test was performed on the proposed well per MT Department of Environmental Quality’s Public Water Supply permitting requirements. The total depth of the proposed well is 75 feet with a static water level of 51.1 feet below ground surface. A 48 GPM test rate resulted in 1.47 feet of drawdown after seven hours of pumping with a recovery time of 0.27 hours, leaving 22.4 feet of available water column above the well casing perforations.

36. A variance from aquifer testing requirements was granted on December 15, 2021. The Applicant submitted the results of a 7-hour test in lieu of the required 72-hour test. The Department determined that it had enough information from existing data and the testing data provided to determine aquifer characteristics (Letter dated December 15, 2021, granting a variance from aquifer testing requirements).

37. The Applicant’s well pump specifications and results of the 7-hour aquifer test are adequate for the proposed flow rate and diverted volume.

**POSSESSORY INTEREST**

**FINDINGS OF FACT**

38. This application is for a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802.

**CONCLUSIONS OF LAW**

**HISTORICAL USE AND ADVERSE EFFECT**

39. Montana’s change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator’s right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v.
Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co. LLC, DNRC Proposal For Decision and Final Order (2004). ¹

40. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of

41. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.\(^3\) A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, at ¶44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the

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\(^2\) See also *Holmstrom Land Co., Inc., v. Newlan Creek Water District*, 185 Mont. 409, 605 P.2d 1060 (1979); *Lokowich v. Helena*, 46 Mont. 575, 129 P. 1063(1913); *Thompson v. Harvey*, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

\(^3\) A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA
historical pattern of use, amount diverted or amount consumed through actual use); **Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum**, Pgs. 8-22 (Adopted by DNRC Final Order January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).\(^4\)

42. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991);

\(^4\) Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change … The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)
43. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

44. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the "amount historically consumed" and the water that re-enters the stream as return flow. . . .
An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable,

5 The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43 (citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).
however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use. We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

45. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

46. Based upon the Applicant’s evidence of historical use, the Applicant has proven by a preponderance of the evidence the historical use of Groundwater Certificate No. 43B 16243-00 of 44.6 AF diverted volume and 38 GPM flow rate with a consumptive use of 10.0 acre-feet. (FOF Nos. 10—24)

47. Based upon the Applicant’s comparative analysis of historical water use to water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 25—30)
BENEFICIAL USE

48. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (affirmed on other grounds, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

49. The Applicant proposes to use water for municipal use which is a recognized beneficial use. §85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence the municipal use is a beneficial use and that 44.6 acre-feet of diverted volume and 38 gallons per minute flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 31—33)

ADEQUATE MEANS OF DIVERSION

50. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation
works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. **Crowley v. 6th Judicial District Court**, 108 Mont. 89, 88 P.2d 23 (1939); **In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC** (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

51. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 34—37)

**POSSESSORY INTEREST**

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

53. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 38)
Preliminary Determination to Grant
Application to Change Water Right No. 43B 30150121

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 43B 30150121 should be GRANTED subject to the following.

The Applicant is authorized to change the point of diversion and place of use for Groundwater Certificate 43B 16243-00 to a replacement well located in the NWSWNE Section 33, T09S R14E, Park County. The authorized place of use is the E2 Section 33, T09 S R14E, Park County. The purpose will continue to be municipal use to serve the Silver Gate Water Users Association public water supply system with a diverted volume of 44.6 AF, consumed volume of 10.0 AF, and maximum flow rate of 38 GPM with a period of use and period of diversion from January 1 to December 31.

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

WATER MEASUREMENTS REQUIRED
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.
NOTICE

This Department will provide public notice of this Application and the Department’s Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 5th day of April 2022.

/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 5th day of April 2022, by first class United States mail.

SILVER GATE WATER USERS ASSOCIATION
%VICTOR TABER
2424 RANCHO RD
BILLINGS, MT 59102

__________________________
Jack Landers
Regional Office, (406) 556-4500