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

APPLICATION TO CHANGE WATER RIGHT NO. 43O 30152542 BY SUNLIGHT RANCH CO.
PRELIMINARY DETERMINATION TO GRANT CHANGE

On November 3, 2021, Sunlight Ranch Co. (Applicant) submitted Application to Change Water Right No. 43O 30152542 to change Water Right Claim No. 43O 30146954 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 22, 2022.

The Department met with the Applicant’s attorney, Amber Stenson, and Consultant, Mike Meredith on June 16, 2021, for a pre-application meeting. Mark Elison and Christine Schweigert were present for the Department. Applicant requested a variance from aquifer testing requirements on November 24, 2021. The variance was granted on December 13, 2021. An Environmental Assessment for this Application was completed on February 25, 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
- Attachments
- Maps: USGS aerial photograph AR1VBYT00010013, dated 10/4/1968, at approximately 39,000:1 showing historical point of diversion and place of use.
  USDA NAIP aerial photograph, dated 2017, showing proposed point of diversion and place of use.
- Notarized affidavit of Craig Hossfeld dated March 28, 2018, attesting to a review of tax records to determine a maximum historical livestock herd of 7,567 cattle.
- Notarized affidavit of Bret Barney dated March 23, 2018, attesting to locating and decoding tax records related to livestock on the property currently owned by Sunlight Ranch Co.
• Flash drive containing copy of application and exhibits.
• Groundwater modeling results.
• Pump curves for the Headquarters Spring pumps.

Information Received after Application Filed
• Request for variance from aquifer testing requirements dated November 24, 2021, from Attorney Amber Stenson.
• E-mail and letter from Amber Stenson, attorney, to Mark Elison, Regional Manager, dated March 15, 2022, and March 17, 2022, respectively, agreeing to proposed condition.

Information within the Department’s Possession/Knowledge
• Crow Tribal Water Right.
• Department of Natural Resources and Conservation Water Rights database.
• Variance approval letter, from Mark Elison, Regional Manager, dated December 13, 2021.
• Water right file for Statement of Claim 43O 30146954.

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). NOTE: Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; GPD means gallons per day; AF means acre-feet; AF/YR means acre-feet per year; AU means animal units and POD means point of diversion.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT
1. The Applicant proposes to change Statement of Claim 43O 30146954 with a priority date of March 5, 1917. Statement of Claim 43O 30146954 is an implied claim for livestock direct from
source from the Antler Land Company Ditch (Antler Ditch) based on information in claim number 43O 208965-00. There is no defined flow rate for stock drinking direct from the source and the historical volume is 30 GPD/AU. The source is the Little Bighorn River, tributary to the Bighorn River and the point of diversion is the headgate for the Antler Ditch in SWSWSW Section 17, T9S, R34E, Big Horn County. The place of use is along the Antler Ditch in Sections 3, 8, 9, 10, and 17, T9S, R34E, Big Horn County. The period of diversion and period of use are January 1 through December 31. The place of use is approximately 10 miles southwest of Wyola, Montana. The water right proposed for change is a State-based water right on the Crow Tribal Reservation.

Table 1: Water right 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>Priority date</th>
</tr>
</thead>
<tbody>
<tr>
<td>43O 30146954</td>
<td>Stock</td>
<td>N/A</td>
<td>Consumptive use at 30 GPD/AU</td>
<td>1/1 – 12/31</td>
<td>SWSWSW Section 17, T9S, R34E</td>
<td>Sections 3, 8, 9, 10 and 17 T9S, R34E</td>
<td>3/5/1917</td>
</tr>
</tbody>
</table>

2. The Applicant has water rights for livestock direct from source on the Little Bighorn River that flows through some of the same areas as the Antler Ditch. The Antler Ditch extends past the Applicants place of use and serves down ditch water rights. No previous change authorizations have been issued for the Statement of Claim proposed for change in this application.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to add a point of diversion that is a developed spring (Headquarters Spring) in the NWNW Section 15, T9S, R34E and change the place of use by adding an approximately 106 AC feedlot in SW Section 3, T9S, R34E, a portion of the Antler Ditch in NWSW Section 2, T9S, R34E, and seven stock tanks in Sections 3, 9, 10, and 11, T9S, R34E, Big Horn County. The source for the proposed new POD is groundwater from a developed spring. The Department Change Manual, updated 1/21/2022, page 49, states that a source change from surface water to groundwater is not allowed unless the two sources are directly connected. The Applicant must show that the water to be appropriated is coming from the original surface water
source and that there are no changes to surface water depletion. A Groundwater Change Report dated December 17, 2021, by Department Hydrogeologist Attila Fölény, concludes that the spring is directly connected to the surface water source (Little Bighorn River) and that there will be no change in the rate or timing of surface water depletion. The proposed new places of use are shown in Figure 1 below. The Applicant proposes to use two pumps, capable of diverting 400 GPM in combination, at the new point of diversion at Headquarters Spring to fill an approximately 143,000-gallon storage tank above the feedlot. The storage tank will gravity feed the feedlot and stock tanks. The Applicant proposes to continue use of the Antler Ditch. The flow rate in the Antler Ditch would be reduced by the 400 GPM that the Headquarters Spring pumps can attain.

4. The new places of use overlap with the historical place of use in that some proposed stock tanks will serve pastures accessible to the Antler Ditch.
Figure 1. Location map of proposed change showing historical and proposed use.
CHANGE CRITERIA

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

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
(c) The proposed use of water is a beneficial use.
(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

6. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).
7. The State of Montana may authorize a change in use of a water right recognized under State law within the reservation, providing that the change does not adversely affect a use of the Tribal Water Right (TWR) existing at the time. See generally § 85-20-901 (IV)(D)(2), MCA. The Montana Department of Natural Resource and Conservation is required to determine if an adverse effect to the TWR would result from authorizing the change (§ 85-20-901 (IV)(D)(2)(2), MCA).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

8. The historical consumed volume for Statement of Claim 43O 30146954 is the amount of water consumptively used for stock watering purposes at the rate of 30 GPD per AU. An affidavit by Bret Barney, Range Detective for Sunlight Ranch Co, dated March 23, 2018, details a search for pre-1973 property tax records and a key to decipher what numbers referred to cattle. A second affidavit by Craig Hossfeld, Engineer and Project Manager for Sunlight Ranch Co, dated March 28, 2018, explains the analysis of the tax records. Adding the personal property taxes assessed on cattle from various owners, Mr. Hossfeld provided the conclusion that a maximum of 7,567 AU watered from the Antler Ditch prior to 1973. The historical consumptive volume for Statement of Claim 43O 30146954 is 254.3 AF (7,567 AU x 30 GPD/AU x 365 Days/325,851 gallons per AF = 254.3 AF).

9. Statement of Claim 43O 30146954 is an implied right for livestock drinking directly from the Antler Ditch which is primarily used for irrigation. The Big Horn County Water Resources Survey, dated May 1947, states that the Antler Ditch is about six miles long and in 1946 was used to convey irrigation water to 2,234.71 AC. Given Applicant-provided Antler Ditch dimensions reflecting a width of 10 feet, depth of two feet, a gradient of 0.002 to 0.004 ft/ft, and a Manning’s n roughness coefficient of 0.025, the Department finds the maximum capacity of the Antler Ditch to be between 95 CFS.

10. The Antler Ditch historically ran in the winter months between November 1 and March 30 (151 days) for stock use. The flow rate was less than the capacity of the ditch but sufficient for stock use, carriage water and to prevent freezing. Total flow rate in winter months is estimated by the Applicant as the seepage losses for the ditch plus 5% to ensure a minimum level of standing water in the ditch. Winter dimensions for the ditch were calculated by the Applicant for low flows and include a ditch width of 9 feet, a water depth of 0.5 feet, a ditch length of 26,981 feet and a
loss rate of 0.7 ft³/day for silty clay loam. Using the methodology provided in the Department’s historical diverted volume memo dated September 13, 2012, the historical seepage losses from the ditch are calculated at 4.34 AF/Day (10 x 26,981 x 0.7/43560 = 4.34 AF) which equates to a flow rate of 2.2 CFS. Five percent of 2.2 CFS is 0.11 CFS (2.2 x 0.05 = 0.11 CFS) and the estimated carriage water required is 2.31 CFS during November through March. The consumption by 7,567 AU over this time amounts to 0.7 AF/day (105.7 AF over 151 days) and a flow rate of 0.35 CFS. The Department finds that the total historical flow rate for Statement of Claim 43O 30146954 during the months of November through March is 2.66 CFS (2.31 CFS winter carriage water + 0.35 CFS stock water consumption = 2.66 CFS). During the remainder of the year, no carriage water is required because the Antler Ditch is in use for irrigation and carriage losses are assigned to that purpose. From April 1 through October 31 (214 days), the flow rate diverted for stock use for Statement of Claim 43O 30146954 is 0.35 CFS. The maximum historical flow rate for this water right is 2.66 CFS.

11. From November 1 through March 30, 2.66 CFS is required to provide carriage water and consumption for stock. A flow rate of 2.66 CFS over 151 days produces 795.3 AF. During the irrigation season from April 1 through October 31, no carriage water is required. A flow rate of 0.35 CFS over 214 days produces 148.3 AF. The total historical diverted volume for 43O 30146954 is 943.6 AF (795.3 + 148.3 = 943.6).

12. The Department finds the historical use of Statement of Claim 43O 30146954 to be livestock direct from source from the Antler Ditch with a point of diversion in SWSWSW Section 17, T9S, R34E, a period of use from January 1 through December 31 and a priority date of March 5, 1917. The historical flow rate is 2.66 CFS, the historical diverted volume is 943.6 AF, and the historical consumptive use is 254.3 AF.

**FINDINGS OF FACT – Adverse Effect**

13. The December 17, 2022, groundwater Change Report used forward modeling to predict that no wells in the source aquifer would experience drawdown of greater than one foot due to pumping of the Headquarters Spring.

14. The new POD is a developed spring approximately 300 feet from the Little Bighorn River a little over two miles downstream from the current POD. Addition of a groundwater source to a surface water right is allowed only if the two sources are immediately and directly connected
The Groundwater Change Report, by Department Hydrogeologist Attila Felnagy, dated December 17, 2022, concludes that the Headquarters Spring is directly connected to the Little Bighorn River and that there will be no change in the rate or timing of surface water depletion resulting from this change authorization.

15. There is one water right on the Little Bighorn River between the existing POD and the proposed additional POD. Reserved Claim 43O 185325-00 is for livestock direct from source with a priority date of 5/7/1868 and is owned by the Applicant. Because water will be left instream between the original POD and the reach that provides water to the Headquarters Spring, the intervening water right will not be adversely affected.

16. The proposed change is to a State-based water right that lies within the boundaries of the Crow Tribal reservation. The Department has considered the Tribal Water Right consisting of substantial downstream irrigation and stock use. Some of the Tribal Water Right uses the Antler Ditch as conveyance. Because the Antler Ditch will continue to carry water to the Applicant and beyond and because there will be no change to depletions to the Little Bighorn River, the Tribal Water Right will not be adversely affected.

17. The groundwater Change Report used forward modeling to predict that no wells in the source aquifer would experience drawdown of greater than one foot due to pumping of the Headquarters Spring.

18. The Applicant proposes to measure the flow rate of water pumped from the Headquarters Spring and reduce the flow in the Antler Ditch to ensure the historical flow rate does not increase. The Applicant proposes to measure the volume of water from the proposed additional POD and the number of AU drinking from the Antler Ditch. The Applicant will monitor Headquarters Spring usage and AU at 30 GPD/AU to insure the historical consumptive use does not increase.

19. The addition of the NWSW Section 2, T9S, R34E, adds a stretch of the Antler Ditch across the Applicant’s property that will be used by the same stock that are using other portions of the ditch. The addition of stock tanks allows separation of the stock and preserves the ditch banks without increasing the number of AU. The addition of the approximately 106 AC feedlot in the SW Section 3, T9S, R34E, has the potential to increase the consumptive use of this water right. The addition of a POD pumping to a storage tank and multiple stock tanks while the existing POD remains in place also creates the possibility of an increase in flow rate as well as diverted and
consumed volume. The Department will add the following condition agreed to by the Applicant on March 15, 2022:

WATER MEASUREMENT REQUIREMENT:


BENEFICIAL USE

FINDINGS OF FACT

20. Applicant proposes to use water for stock. Stock watering is a recognized beneficial use under the Montana Water Use Act. § 85-2-102, MCA

21. Applicant proposes to divert water at a flow rate up to 2.66 CFS flow rate and a volume up to 943.6 AF. This amount is supported by the historical use. The 2.66 CFS is the minimum amount of water required to use the Antler Ditch for stock watering purposes during the winter months (FOF 10). The 943.6 AF diverted volume is necessary if all 7,567 AU use the Antler Ditch for water. The Applicant proposes 254.3 AF of consumptive use consistent with historical use.

ADEQUATE DIVERSION

FINDINGS OF FACT
22. The Applicant proposes to retain the Antler Ditch headgate as a point of diversion. No changes are proposed to that headgate or to the ditch itself. The Antler Ditch has capacity to carry the Applicant’s irrigation water rights and is therefore adequate for the stock use.

23. The added POD at the Headquarters Spring consists of a pump house with two pumps capable of producing 200 GPM each for a total of 400 GPM. From the pump house water is pumped through 4-inch buried pipe to an approximately 148,000-gallon storage tank. From the storage tank water is gravity fed to the feedlot and stock tanks through 2-inch buried pipelines.

**POSSESORY INTEREST**

**FINDINGS OF FACT**

24. K. M. Holding, President of Sunlight Ranch Co. 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.

**CONCLUSIONS OF LAW**

**HISTORIC USE AND ADVERSE EFFECT**

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

26. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11,103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, at ¶¶43-45. 2

27. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other 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

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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).
beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect. A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum, Pgs. 8-22 (Adopted by DNRC Final Order January 9,1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).4

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

4 Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 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
28. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶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. Hollaron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76r By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co. LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users). 5

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

amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

5 The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).
place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . . An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use. We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

31. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. 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.

32. 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 with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.


33. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 43O 30146954 of 943.6 AF diverted volume and 2.66 CFS flow rate with a consumptive use of 254.3 AF. (FOF 8 - 11)

34. Based upon the comparative analysis of historic 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 12 - 18)

**BENEFICIAL USE**

35. 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).

36. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 943.6 AF of diverted volume and 2.66 CFS flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 19 - 20)

ADEQUATE MEANS OF DIVERSION

37. 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).

38. 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 21 - 23)

**POSSESSORY INTEREST**

39. 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

40. The Applicant has proven by a preponderance of the evidence that it has a possessory interest in the property where the water is to be put to beneficial use. (FOF 24)

**PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right 43O 30152542 should be granted subject to the following.

The Applicant may add a point of diversion that is a developed spring (Headquarters Spring) in the NWNW NW Section 15, T9S, R34E and change the place of use by adding the approximately 106 AC area of a feedlot in SW Section 3, T9S, R34E, a section of the Antler Ditch in NWSW Section 2, T9S, R34E, and seven stock tanks. The new place of use for the stock tanks is SENESW Section 9, SWSWSW, NWSWNW and NENENE (Govt Lot 1) Section 10, SESENE Section 3 (2 tanks), and SWSWNW Section 11, all in T9S, R34E, Big Horn County.

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

**WATER MEASUREMENT REQUIREMENT:**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASURING DEVICE AT A POINT ON THE STORAGE TANK SYSTEM, THE HEADQUARTERS SPRING, AND ANTLER DITCH APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS
OPERATE PROPERLY AND MEASURE FLOW RATE ACCURATELY. THE APPLICANT SHALL MAINTAIN INVENTORY RECORDS OF ANIMAL UNITS WATERING FROM THE ANTLER DITCH INCLUDING THE PERIOD OF USE. THE APPROPRIATOR SHALL REDUCE FLOW RATE AT THE ANTLER DITCH HEADGATE BY THE MEASURED FLOW RATE FROM THE HEADQUARTERS SPRING. THE APPROPRIATOR SHALL KEEP RECORDS OF TOTAL FLOW RATE DIVERTED AND VOLUME CONSUMED FROM THE HEADQUARTERS SPRING AND THE ANTLER DITCH AND SUBMIT SAID RECORDS TO THE DEPARTMENT UPON REQUEST. THE COMBINED FLOW RATE IS LIMITED TO 2.66 CFS AND THE TOTAL CONSUMPTIVE VOLUME IS LIMITED TO 254.3 AF AS DETERMINED BY MEASURING THE USE FROM THE STORAGE TANK PLUS STOCK FROM THE ANTLER DITCH AT 30 GPD/AU.

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 11th day of July 2022.

/Original signed by Mark Elison/
Mark Elison, Manager
Billings Regional Office
Department of Natural Resources and Conservation
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this ____ day of _______ 20__, by first class United States mail.

Amber Stenson
PO Box 1645
Great Falls, MT  59403
astenson@chjw.com

________________________________________
Regional Office, (406) 247-4415