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**IN THE WATER COURT OF THE STATE OF MONTANA**

<p>McCAULEY FAMILY RANCH, LLC,</p> <p>Petitioner,</p> <p>MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,</p> <p>Respondent,</p> <p>UNITED STATES OF AMERICA THROUGH THE FOREST SERVICE AND BUREAU OF LAND MANAGEMENT</p> <p>Applicant.</p>	<p><b>Case No.:</b> _____</p> <p><b>PETITION FOR JUDICIAL REVIEW</b></p>
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McCauley Family Ranch, LLC (“McCauley”) submits the following Petition for Judicial Review of Montana Department of Natural Resources and Conservation’s (“DNRC”) June 13, 2023, Final Order in which DNRC granted the United States’ application to change water right claim 41E 54725-00. A copy of the Final Order is attached as Exhibit A.

## **PARTIES**

1. Petitioner McCauley owns senior water rights that will be affected by the change application. It also grazes cattle in the area where water right claim 41E 54725-00 is used.
2. DNRC is the administrative agency that issued the Final Order.
3. The United States of America, through its political subdivisions the Forest Service and Bureau of Land Management, filed the change application that is the subject of this Petition.

## **JURISDICTION AND VENUE**

4. Pursuant to Mont. Code Ann. § 2-4-702, a party aggrieved by a final decision on an application for a permit or change in appropriation may petition the Water Court for judicial review of the decision. Mont. Code Ann. § 2-4-702(2)(e)(i).
5. Montana Code Annotated § 2-4-704(2)(a), entitles McCauley to relief from the Final Order if the Court finds the decision was:
  - (i) in violation of constitutional or statutory provisions;
  - (ii) in excess of the statutory authority of the agency;
  - (iii) made upon unlawful procedure;
  - (iv) affected by other error of law;
  - (iv) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
  - (v) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. In addition, the Court may set aside and vacate the Final Order if “findings of fact, upon issues essential to the decision, were not made although requested.” Mont. Code Ann. § 2-4-704(2)(b).
7. McCauley is aggrieved by the Final Order granting the Applications because the Order is erroneous and entered in violation of one or more standards in Mont. Code Ann. § 2-4-704, thus prejudicing McCauley’s substantial rights. DNRC’s Final Order must be set aside and vacated for the reasons raised in McCauley’s briefing before the DNRC, the issues raised at the hearing, and for the reasons stated in McCauley’s Proposed Findings of Fact and Conclusions of Law which are incorporated herein (Exhibit B). This includes, but is not limited to:
  - a. DNRC’s decision to deny McCauley’s March 16, 2022 Motion to Certify to Water Court certain factual and legal issues involving claim 41E 54725-00 pursuant to Mont. Code Ann. § 85-2-309(2).
  - b. DNRC’s decision to adjudicate factual and legal issues involving claim 41E 54725-00 in the Final Order, including the proper place of use for the water right, the volume, and the flow rate.
  - c. DNRC’s decision to extend the 90-day deadline for the hearing set forth in Mont. Code Ann. § 85-2-309(1) without the necessary good cause and over McCauley’s objection.
  - d. DNRC failed to follow its prior precedent regarding how it handles change applications for stock water rights without acknowledging that it was departing from its own prior practices and providing a reasoned explanation for doing so.

- e. DNRC failed to make factual findings concerning certain factual issues raised in McCauley's Proposed Findings of Fact and Conclusions of Law and it improperly rejected the legal conclusion in the Proposed Findings of Fact and Conclusions of Law.
  - f. DNRC's decision to grant the United States' application to change water right claim 41E 54725-00.
8. McCauley's substantial rights were prejudiced by the Final Order as it was made in violation of Montana law and will allow the United States to use water that McCauley would otherwise be entitled to under its senior water rights.
9. McCauley reserves the right to amend or supplement this Petition as necessary.

**DEMAND FOR RELIEF**

The Court should vacate the Final Order and remand the case to the DNRC with instructions to deny the United States' change application. McCauley requests such other and further relief as this Court deems just and proper, including an award of attorney fees and costs as permitted by law or equity.

DATED this 13th day of July, 2023.

DONEY CROWLEY P.C.

/s/ Jack G. Connors

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Jack G. Connors  
*Attorneys for McCauley Family Ranch, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Petition for Judicial Review* was served via email and U.S. Mail, on this 13th day of July, 2023, upon the following:

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

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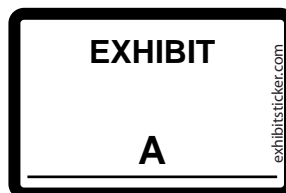
**IN THE MATTER OF CHANGE )  
APPLICATION NO. 41E-30148132 BY USA )  
(DEPT. OF AGRICULTURE FOREST ) **FINAL ORDER**  
SERVICE) AND USA (DEPT OF INTERIOR )  
BUREAU OF LAND MANAGEMENT) )**

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On January 31, 2023, I conducted a hearing related to the above-captioned application. For the reasons set forth below, I hereby overrule the valid objection filed by McCauley Family Ranch LLC (Objector) and GRANT the USA Dept. of Agriculture Forest Service and USA Dept. of Interior Bureau of Land Management (Applicants) application on the terms and conditions set forth herein.

**BACKGROUND AND PROCEDURAL HISTORY**

On September 13, 2021, the Department of Natural Resources and Conservation (DNRC) issued a Preliminary Determination to Grant (2021 PDG) regarding the above-captioned change application (2020 Change Application). The 2020 Change Application seeks to change the point of diversion and place of use for Water Right Statement of Claim number 41E 54725-00 in order to split the claim between its decreed direct-from-source point of diversion and a pump and stock tank system. 2021 PDG at 3. Specifically, the 2020 Change Application seeks to divert water at a flow rate of 1.8 gallons per minute (GPM) over a 45-day period to a storage tank located within the claim’s historical place of use for distribution to four troughs. *Id.* The 2020 Change Application asserts that the historical volumetric use of the claimed water right is 4.68 acre-feet of water (AF) per year. *Id.* The 2021 PDG was publicly noticed pursuant to § 85-2-307, MCA, and Objector timely filed a valid objection to the



application on the ground of adverse effect. See DNRC Validity Determination of November 24, 2021, at 1.

On December 8, 2021, DNRC assigned me to be the hearing examiner presiding over this contested case. On March 17, 2022, Objector moved to certify this matter to the Water Court on the ground that DNRC's 2021 PDG had conducted an improper quantification of Applicants' water right. Applicants filed a response in opposition to Objector's motion on April 7, 2022, and I heard oral argument on the motion the following day. I denied the motion in an Order issued April 12, 2022, on the ground that the Water Court had validly quantified the right using a narrative rather than a numeric standard and that DNRC's determination of historical diverted and consumptive use volumes in the 2021 PDG reflected an appropriate exercise of its authority to process change applications rather than an improper incursion on the exclusive jurisdiction of the Water Court. Order of April 12, 2022, at 2. In that same April 12<sup>th</sup> Order, I set a hearing date, which was subsequently continued. The matter eventually came on for hearing on January 31, 2023, and pursuant to my post-hearing order of February 2, 2023, the parties both filed proposed findings of fact and conclusions of law on March 17, 2023.

### **LEGAL STANDARD**

Under Montana law, an applicant for a change in use authorization always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-402(2), MCA, are satisfied before DNRC may issue the applicant a change authorization. *In re Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991).<sup>1</sup> Consequently, in this case, Applicants must show that:

- 1) 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;
- 2) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 3) the proposed use of water is a beneficial use; and

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1. A change applicant need only demonstrate that the criteria of § 85-2-402(2)(f)-(g), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-402(3), MCA. No such valid objections were filed in connection with the instant Change Application.

- 4) the Applicants have 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.

Section 85-2-402(2)(a)-(d), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's 2021 PDG reflects DNRC's preliminary determination that Applicants have proven those criteria by the requisite standard in connection with the 2020 Change Application.

The issuance of DNRC's 2021 PDG does not relieve Applicants of their obligation to prove that the applicable criteria are satisfied. It does, however, have the effect of shifting the burden of production to Objector to demonstrate that Applicants failed to satisfy their burden on the criterion at issue in the valid objection. Because Applicants retains the burden of proof as to the criteria, Applicants may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing. See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005). In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.*, ¶ 2 (see § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."))).

### **UNCONTESTED CRITERIA**

Because no valid objections were filed as to the adequacy of the means of diversion, possessory interest, water quality, or the beneficial nature of the proposed use of water for the 2020 Change Application, and because there is no evidence in the record that would cause me to revisit DNRC's 2021 PDG as to those four criteria, I find that Applicants have met their burden in regard to those four criteria for the reasons set forth in the 2021 PDG,



which I incorporate herein by reference. 2021 PDG, ¶¶ 17-24, 34-39.

### **APPEARANCES AND WITNESSES**

At the hearing on January 31, 2023, Applicants were represented by counsel Jennifer Newbold and John Chaffin. Objector was represented by counsel Jack Connors. Applicants called as witnesses Thor Burbach, Forest Service Program Manager; Don Despain, retired employee of the Bureau of Land Management; and Lucas Phillips, Forest Service Rangeland Specialist. Objector called as witnesses Edward McCauley, for McCauley Family Ranch LLC; and Jennifer Daly, DNRC Helena Regional Manager. Both parties cross-examined the others' witnesses.

### **EXHIBITS**

In addition to the administrative records maintained by DNRC for the 2020 Change Application, and the video and audio recordings of the hearing, the record in this case includes the following exhibits offered by the Applicants and Objector that I admitted at the hearing:

#### **Applicants' Exhibits:**

- 1) **Exhibit A-1:** 1982 Statement of Claim
- 2) **Exhibit A-2:** Map – Pipeline System
- 3) **Exhibit A-3:** Change Application #1 filed November 7, 2014 (excerpted portion)
- 4) **Exhibit A-4:** Change Application #2 filed January 21, 2020 (excerpted portion)
- 5) **Exhibit A-5:** Pump Flow Chart & Specification/Calculations
- 6) **Exhibit A-6:** Map – Allotment Boundaries (*same as Exhibit O-5*)
- 7) **Exhibit A-7:** 1967 – Letter re: fencing and coordinated management planning
- 8) **Exhibit A-8:** 1967 – Field meeting notes re: intensive management
- 9) **Exhibit A-9:** 1968 – Typed notes re: cooperative management of Little Boulder
- 10) **Exhibit A-10:** 1968 – Cooperative Range Management Agreement
- 11) **Exhibit A-11:** 1969 Little Boulder Allotment Management Plan
- 12) **Exhibit A-12:** 1976 – Letter re: establishment of 2 allotments (Little Boulder No. 214 and Galena No. 225)
- 13) **Exhibit A-13:** 1983 – MOU re: coordinated management plan
- 14) **Exhibit A-14:** 1989 – Coordinated Resource Management Plan

- 15) **Exhibit A-15:** Map – Fence Installation
- 16) **Exhibit A-16:** 1921-1975 Actual Use Summary Sheet
- 17) **Exhibit A-17:** 1921-1933 Actual Use Record
- 18) **Exhibit A-18:** 1934-1946 Actual Use Record
- 19) **Exhibit A-19:** 1947-1958 Actual Use Record
- 20) **Exhibit A-20:** 1969-1974 LB Grazing Rotation Notes

**Objector's Exhibits:**

- 1) **Exhibit O-1:** Copy of change application 41E 30071675 (application #1)
- 2) **Exhibit O-2:** General Abstract 41E 77028-00 Ground Water Certificate; Map
- 3) **Exhibit O-3:** 1984 Environmental Assessment - BLM (EA Number: MT-075-94-15)
- 4) **Exhibit O-4:** USDI – BLM Headwaters Resource Area Actual Grazing Use Report, dated 10/20/1995.
- 5) **Exhibit O-5:** Map of Galena and Little Boulder Allotments
- 6) **Exhibit O-6:** General Abstract 41E 54723-00 Statement of Claim; Map
- 7) **Exhibit O-7:** Photo of Boulder River, dated 09/25/2013.
- 8) **Exhibit O-8:** Hand-written notes from Edward McCauley
- 9) **Exhibit O-9:** 2016 USDA Forest Service Term Grazing Permit – Parts 1 and 2 (Fitzgerald Ranch Inc.)
- 10) **Exhibit O-10:** 2020 USDA Forest Service Term Grazing Permit – Parts 1 and 2 (McCauley Ranches LLP)
- 11) **Exhibit O-11:** Grazing Permit for Fitzgerald Ranch Inc., Effective 03/01/2021 to 02/28/2031

**ADVERSE EFFECT**

The sole criterion at issue in this case is adverse effect. The determination of whether Applicants have met their burden of proving by a preponderance of the evidence that the proposed change will not adversely affect the water right of another water user is closely related to the threshold question of the volume of water historically used pursuant to the water right sought to be changed. See *Town of Manhattan v. DNRC*, 2012 MT 81, ¶10, 364 Mont. 450, 276 P.3d 920 (2012); *In re Royston*, 249 Mont. at 431-32 (without adequate evidence of

historical volume of use, a record cannot support a finding of no adverse effect).

### **FINDINGS OF FACT<sup>2</sup>**

1. On April 27, 1982, Applicants filed Statement of Claim 41E 54725-00, asserting a right to use up to 10.6 GPM<sup>3</sup> with a total volume of 1.62 acre-feet (AF) for direct-from-source stockwater use to water up to 294 cattle from the North Fork of the Little Boulder River on a Forest Service grazing allotment know as Allotment 225. Exhibit A-1 at 2. Allotment 225 is also commonly known as the “Galena Allotment.” Hearing video at 9:09:20-30 (testimony of Applicants’ witness Thor Burbach).
2. Claim 41E 54725-00 appeared in the Basin 41E Temporary Preliminary Decree and Preliminary Decree without a defined flow rate and with a narrative volume quantification remark stating that “this water right includes the amount of water consumptively used for stockwatering purposes at the rate of 30 gallons per day [(GPD)] per animal unit.” Exhibit O-1 at 63. The volume remark further explained that “animal units shall be based on reasonable carrying capacity and historical use of the area served by this water source.” *Id.*
3. On November 7, 2014, Applicants filed with DNRC change application 41E 30071675 (2014 Change Application), seeking to change Water Right number 41E 54725-00. In that application, Applicants sought “to split the use of this water right claim between stock watering direct from source and a pump and stock tank system.” Exhibit O-1 at Bates 0006, ¶ 3.

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2. Section 2-4-623(4), MCA, provides that when parties submit proposed findings of fact and conclusions of law, as that parties in this case have done at my request, my “decision must include a ruling upon each proposed finding.” The Montana Supreme Court has held that this provision “does not require a separate, express ruling on each required finding as long as the agency’s decision and order in such proposed findings are clear[.]” *State ex rel. Montana Wilderness Association v. Board of Natural Resources and Conservation*, 200 Mont. 11, 40, 638 P.2d 734, 749 (1982) (citing *Montana Consumer Counsel v. Public Service Commission and Montana Power Co.*, 168 Mont. 180, 541 P.2d 770 (1975)). Thus, while I utilize the gravamen of certain of Applicants’ and Objector’s specific proposed findings in this Order, there are others that I implicitly reject as being inconsistent with the findings I lay out and the conclusions I draw therefrom.

3. The original Statement of Claim asserted a flow rate of 10.6 cubic feet per second (cfs) rather than 10.6 GPM. Exhibit A-1 at 2. Applicants’ witness Thor Burbach testified at the hearing that this claimed flow rate was likely an error and that a flow rate of 10.6 gallons per minute was intended. Hearing video at 9:08:21-9:09:12. Objector’s witness Jennifer Daly corroborated Mr. Burbach’s testimony. Hearing video 14:26:10-25. I find this testimony credible, as 10.6 cfs would be an extraordinarily high flow rate for the claimed stockwater use.

Specifically, the 2014 Change Application contemplated diverting up to 1.12 AF/year into a stock tank system at a flow rate of 2.037 GPM. *Id.*, ¶ 5.

4. In assessing the historical use of Water Right number 41E 54725-00 in connection with the 2014 Change Application, DNRC found that “[b]ased on historic[al] grazing records maintained by the Butte District of the Beaverhead/Deer Lodge National Forest, the pre-1973 carrying capacity of [Allotment 225] was 240 [animal units<sup>4</sup>],” with a “historic[al] diverted and consumed volume [of] 1.12 AF[.]” *Id.* at Bates 0014-15, ¶ 17. DNRC arrived at the total volume of 1.12 AF by multiplying 240 animal units by “the New Appropriation standard of 15 gallons per animal unit per day,” dividing that figure by 365 to obtain a per day volume and multiplying that figure by 100 to reflect the historical annual grazing period of 100 days. *Id.* at Bates 0015, ¶ 17. DNRC calculated the “maximum historic[al] flow rate” for this right to be 2.54 GPM. *Id.*

5. On August 31, 2016, DNRC issued a preliminary determination to grant the 2014 Change (2016 PDG), and the application was publicly noticed. See *id.* at Bates 0030-31. Edward K. McCauley filed a valid objection to the application. *Id.* at Bates 0158. In pre-hearing motions practice, Objector moved for the dismissal of the 2014 Change Application on the ground that Applicants had failed to timely make it correct and complete. *Id.* at Bates 0246. The Hearing Examiner assigned to the contested case dismissed the 2014 Change Application on that ground. *Id.*

6. On January 21, 2020, Applicants filed the 2020 Change Application with DNRC. The 2020 Change Application seeks to change the same water right at issue in the 2014 Change Application, Water Right number 41E 54725-00. PDG at 1. This time, however, Applicants asserted that the historical use of the grazing allotment was 509 animal units with a historical flow rate of 10.6 GPM. Applicants Exhibit 2 at 3.<sup>5</sup> Based on this information and applying the adjudication standard of 30 GPD per animal unit, DNRC calculated the historical diverted and consumed volume to be 4.68 AF. PDG at 6, ¶ 7. In the 2020 Change Application, Applicants

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4. In this context, an “animal unit” is a cow-calf pair. See *Steffen v. Dept. of State Lands*, 223 Mont. 176, 178, 724 P.2d 713, 715 (1986).

5. It is not clear to me how Applicants arrived at the 10.6 GPM flow rate for the 1982 Statement of Claim based on 294 animal units and the identical flow rate in the 2020 Change Application based on 509 animal units. Because of the conclusions I set forth below, however, I see no need to resolve that question in the course of ruling on the ultimate issues in this matter.

sought authorization to divert 1.8 GPM into its stock tank system, with “the remaining flow rate [being] left instream....” *Id.*

7. The two change applications thus differ markedly in terms of the historical volumes and flow rates identified; differences that predominantly stem from the number of animal units asserted in each application to have historically used the claimed source. This is information that seemingly should not vary, as nothing occurring between 2014 and 2020 could change the historical use of the water right. Yet the 2021 PDG makes no mention of the 2014 Change Application and contains no analysis of these discrepancies. Nor is there anything in either of the claim files for the two change applications that explains the differences asserted by Applicants in the respective change applications in the number of animal units that historically used Water Right number 41E 54275-00.

8. At the hearing, Objector’s witness Jennifer Daly explained why DNRC calculated the volume and flow rate differently in the two applications. Specifically, she testified that DNRC’s preliminary review of a change application involving a stockwater right can be significantly shaped by the information presented by the applicant. If the applicant does not specifically request to apply the adjudication standard of 30 GPD per animal unit, DNRC will evaluate the historical flow rate under the New Appropriation standard of 15 GPD per animal unit, which DNRC believes to be a more precise and scientifically reasonable estimate of stock consumption than the adjudication standard, which is intended as a maximum. But where an applicant requests the use of the adjudication standard, DNRC defers to that request to avoid invading the province of the Water Court. Hearing video at 14:28:12-14:29:22; 14:58:54-14:59:06.

9. The differences in volume and flow rate identified by DNRC in connection with the two change applications, therefore, can be partially explained by the differences in the way Applicants framed the applications, with DNRC then utilizing the 15 GPD per animal unit standard in connection with the 2014 Change Application and the 30 GPD per animal unit standard in connection with the 2020 Change Application.

10. There remain, however, the discrepancies between the applications in the number of animal units that Applicants assert have historically used the claimed water. Ms. Daly testified that DNRC relies on the information provided by an applicant in connection with the requested

change to assess the number of animal units that historically utilized a claimed right since the Water Court does not decree a specific number as part of its adjudication of an underlying claim. Hearing video 14:22:28-14:23:45. Ms. Daly also testified that it was her understanding that Applicants had identified additional historical information between the filing of the two change applications capable of supporting the assertion of a greater number of animal units historically utilizing the claimed source. Hearing video at 14:59:05-23. The 2021 PDG, however, does not identify that as the basis for difference in the number of animal units identified in the two applications. Thus, due to the different figures asserted by applicants in the different change applications, and the lack of any discussion or explanation in the 2021 PDG regarding the divergence from the information relied on in the 2016 PDG, I find that neither PDG is an independent source of information upon which I can rely to ascertain the number of animal units that historically used Water Right number 41E 54275-00.

11. One key question identified by the parties that is directly relevant to the historical animal unit inquiry is whether the appropriate geographic scope of consideration is the Galena allotment – the Forest Service grazing unit (number 225) specifically identified in the Statement of Claim for Water Right 41E 54275-00 – or a broader swath of the Boulder National Forest that today is comprised of multiple allotments but that historically were less- or entirely un-fenced, allowing more cattle freer access to a multiplicity of water sources including the portions of the Little Boulder River that are the sources for Water Right 41E 54275-00. See Exhibits A6-A15.

12. Applicants' witness Thor Burbach testified that limitations with the database in place during the claim filing period in 1982 meant that the Forest Service needed to file multiple water rights to encompass water used by cattle along stream segments and to allocate animal unit numbers to discrete fields – even when in reality they would have had access to multiple portions of a source – because they could only make one entry in the database per element (e.g. place of use, point of diversion) even when the reality on the ground was more complex. Hearing video at 9:17:15-9:18:51; 9:23:13-36.

13. Mr. Burbach also testified that he was unaware of the basis for the 294 animal units asserted in the 1982 Statement of Claim for Water Right number 41E 54275-00 but that, based on his research into Forest Service records, 509 animal units appeared to be a

reasonable assessment of the number of cattle that historically had access to the place of use for that water right. Hearing video at 9:21:02-18. Mr. Burbach further testified that, based on his calculations, historical use by 509 animal units would comport with the flow rate of 10.6 GPM asserted in the 1982 Statement of Claim. Hearing video at 9:28:05-57; 10:27:48-10:29:10.

14. Applicants' witness Don Despain testified at the hearing that prior to the creation and fencing off of the Galena allotment in 1976, cattle permitted to graze on the Little Boulder Allotment and the Chinese Diggings Allotment (which would also have access to the stock tank system for which Applicants are seeking this change authorization) both also had access to the stream reach associated with Water Right 41E 54275-00. Hearing video at 10:53:25-56; 11:14:13-11:16:20; *see also* Exhibit A-15.

15. Applicants' witness Lucas Phillips testified at the hearing about the Forest Service's actual use records for the portion of the Boulder National Forest that contains the place of use for Water Right 41E 54275-00 and how that information was deployed in developing the 2020 Change Application. Hearing video at 13:11:45-13:16:44. Specifically, Mr. Phillips testified that he calculated from those records that the average number of animal units that had access to the historical Little Boulder allotment (from which the Galena allotment was carved out in 1976) from 1921 to 1975 was 499. Hearing video at 13:16:13-13:16:44.

16. Exhibits A-17, A-18, and A-19 are Forest Service actual use records depicting the number of animal units utilizing the historical Little Boulder allotment from 1921-1933, 1934-1946, and 1947-1958 respectively. They are generally consistent with Mr. Phillips' testimony, showing a high of 955 animal units on the allotment in 1923 and a low of 342 animal units in 1937. Exhibit A-16 illustrates that average use was closer to 400 animal units during the period from 1938 to 1967 before jumping back a bit above 500 animal units from 1968 to 1975, the year before the Galena allotment was fenced off.

17. Objector's witness Edward McCauley testified at the hearing that he believed that Applicants have overstated the carrying capacity of the Galena allotment in a manner that renders the 509 animal units identified in the 2020 Change Application an overstatement of actual historical use. Hearing video at 16:01:55-16:04:41. *See also* Exhibit O-8. Mr. McCauley also testified that the period for which he has personal knowledge of conditions and grazing

use on the Little Boulder allotment begins in the late 1960s or early 1970s. Hearing video at 15:15:41-52.

18. I find that the witness testimony and exhibits adduced by Applicants discussed above are more persuasive regarding the full scope of actual historical use than Mr. McCauley's testimony and Objector's exhibit.

19. The fact that roughly 500 animal units had access to the place of use associated with Water Right 41E 54275-00, however, does not fully resolve the question of how much water was historically used under that right. This is so for two reasons. First, while I find it more likely than not that those animals had access to the source, the testimony of Mr. Burbach, Mr. Despain, and Mr. Phillips identified above also supports the conclusion that those cattle similarly had access to other water sources contained within the historical Little Boulder allotment that are subject to other water rights claimed by the Forest Service. See *also* Exhibits O-2 and O-6. Therefore, the full water consumption of the 509 animal units is not appropriately attributable exclusively to Water Right number 41E 54275-00. Second, the record reflects that the adjudication standard of 30 GPD per animal unit is a *maximum* volume of use—not necessarily a historically accurate one. See Finding of Fact ¶ 8, *supra*.

20. Applicants address these issues in the 2020 Change Application by seeking to change the place of use (from direct-from-source to a stock tank system) for only a portion of the animal units that utilize the water associated with Water Right 41E 54725-00, and to remove from the source only a portion of the water that was historically consumed direct-from-source. Specifically, the 2021 PDG recites that “[t]he pump system is intended to move approximately 168 [animal units] off stream to less vulnerable parts of the allotment to reduce riparian impacts of stock grazing at the source.” 2021 PDG at 6. The 2020 Change Application contemplates an additional 72 animal units continuing to drink direct-from-source for a total of 240 animal units, a number smaller than the historical maximum of 509 animal units (and one that matches the number of animal units identified in the 2014 Change Application).<sup>6</sup>

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6. Unlike the 2014 Change Application, the 2020 Change Application identifies an additional 202 animal units who will also continue to drink direct-from-source on top of the other 72. Exhibit A-4 at 2. Although the 2021 PDG fails to address this difference, the 2020 Change Application reflects that Water Right 41E 54275-00 historically served three grazing allotments, but that only cattle from two of the allotments will be able to access the tank system the changed water right



21. Moreover, “[a] flow rate of 1.8 GPM will be diverted to the stock tanks, the remaining flow rate will be left instream for the remaining stock.” *Id.* The flow rate of 1.8 GPM is less than the cumulative flow rate DNRC calculated as the maximum historical use of Water Right 41E 54275-00 in the 2016 PDG when it used the new appropriation standard of 15 GPD per animal unit to determine historical use and prior to Applicants presenting their evidence regarding the larger number of animal units that historically had access to that water right’s source. Exhibit O-1 at 15. It is also lower than the flow rate asserted in the original Statement of Claim for this water right. Exhibit A-1 at 2. Furthermore, the pump system is to be used for only 45 days a year, despite the historical period of use of Water Right number 41E 54275-00 being 153 days. See 2021 PDG at 5-6. Mr. Burbach testified that the annual volume of water Applicants intend to pump into the stock tank system is approximately 0.7 AF. Hearing video at 10:40:25-10:41:46. Thus while it may not be possible to quantify with precision the actual historical consumption of water pursuant to this water right, see Hearing video at 14:55:36-14:56:44 (testimony of Ms. Daly), the volume associated with the change purported to be authorized by the 2021 PDG is assuredly less than the volume quantified by the Water Court in decreeing Water Right number 41E 54275-00. As there are now fewer cattle grazing the place of use of this water right than the maximum number that historically did so and the proposed change is not intended to increase the number of animal units currently utilizing the source, I find that there will be no expansion of the historical use of this water right if the 2020 Change Application is granted and Applicants use water consistent with the approved change.

22. In the absence of an expansion of the historical use of the water right, I find that there will be no adverse effect to Objector from the grant of the 2020 Change Application. At least as much water will remain instream after satisfaction of Water Right number 41E 54275-00 after the change as did historically.

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is intended to serve. Exhibit A-4 at 5. The 202 cattle separately identified on the 2020 Change Application are the number with access to the third allotment but not the two the tank system will serve. *Id.* Mr. Burbach also testified specifically to this point at the hearing, Hearing video at 10:38:15-10:39:08, and I find his explanation credible.

## CONCLUSIONS OF LAW

23. The majority of the 2021 PDG's conclusions of law regarding adverse effect accurately recite the applicable principles of Montana law. Consequently, I adopt the relevant paragraphs from the 2021 PDG and incorporate them herein by reference. 2021 PDG at 9-14 (¶¶ 25-31).

24. I part company from the 2021 PDG, however, with its conclusion that Applicants have proven by a preponderance of the evidence the specific volume historically used pursuant to Water Right number 41E 54275-00, and consequently reject ¶¶ 32-33 of the 2021 PDG. For the reasons set forth above at Findings of Fact ¶¶ 21-23, however, I nonetheless conclude that Applicants have proven by a preponderance of the evidence that the proposed change will not cause adverse effects to "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)(a), MCA, **so long as** the changed water right is used consistent with the description of the stock tank system as described in the 2020 Change Application and in the testimony of Mr. Burbach, including the maximum flow rate of 1.8 GPM and a maximum annual volume pumped to the tank system of 0.7 AF.

25. As adverse effect was the sole change criterion at issue in this case, I conclude that Applicants have satisfied their burden under § 85-2-402(2), MCA, and are entitled to have the 2020 Change Application granted. However, because it is not possible to ascertain the volume of water used by cattle drinking from the tank system in the absence of a measurement or monitoring plan, Hearing video at 14:56:30-14:57:34, nor to accurately determine the volume that will be consumed direct from source, I find two conditions must be imposed before I can issue a Final Order granting the 2020 Change Application.

26. These conditions are the following: 1) Applicants must install a water meter in the pipeline nearest the pump and provide monthly and annual records of the amount of water pumped from the source into the tank system to the DNRC; and 2) a remark shall be added to Water Right 41E 54275-00 that this change authorization does not increase the decreed volume for that water right.

## **CONCLUSION**

Objector has failed to bear its burden of production for the valid objection it filed in connection with the 2020 Change Application. Applicants have met their burden of proof to show by a preponderance of the evidence that they have satisfied all of the applicable criteria necessary to warrant a grant of the 2020 Change Application with the addition of the two conditions identified above.

## **FINAL ORDER**

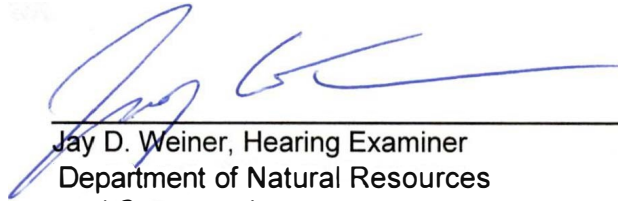
Change Application No. 41E 30148132 is hereby GRANTED for the reasons set forth in this Final Order as to the criterion of adverse effect and for the reasons set forth in the 2021 PDG as to the other applicable criteria of § 85-2-402, MCA, subject to the following terms and conditions:

1. Additional places of use (stock tanks) are authorized to be in the (1) SESESW Sec 36. T6N, R5W (2) SESESE Sec 36. T6N, R5W (3) E $\frac{1}{2}$ E $\frac{1}{2}$ NESE Sec 1, T5N, R5W, Jefferson County.
2. The periods of diversion and use are from June 1 through October 31.
3. The maximum flow rate Applicants may divert into the stock tank system is 1.8 GPM.
4. The maximum annual volume Applicants may divert into the stock tank system is 0.7 AF.
5. Applicants must install a water meter in the pipeline nearest the pump and provide monthly and annual records of the amount of water pumped from the source into the tank system to the DNRC.
6. The following remark shall be added to Water Right number 41E 54725-00: IN NO EVENT SHALL THIS CHANGE AUTHORIZATION INCREASE THE VOLUME DECREED FOR WATER RIGHT 41E 54275-00.

## **NOTICE**

This Final Order is the Department's final decision in this matter. A final order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 13<sup>th</sup> day of June 2023.



Jay D. Weiner, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Office of Administrative Hearings  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-1510

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 13<sup>th</sup> day of June 2023 by first class United States mail and/or by electronic mail.

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**DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION**

IN THE MATTER OF CHANGE  
 APPLICATION NO. 41E-30148132 BY USA  
 (DEPT. OF AGRICULTURE FOREST  
 SERVICE) AND USA (DEPT. OF INTERIOR  
 BUREAU OF LAND MANAGEMENT)

**OBJECTOR MCCAULEY FAMILY  
 RANCH, LLC'S PROPOSED FINDINGS  
 OF FACT AND CONCLUSIONS OF LAW**

vs.

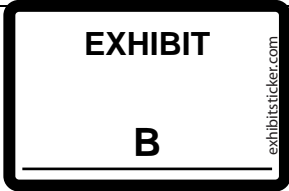
Objector McCauley Family Ranch, LLC submits the following Proposed Findings of Fact and Conclusions of Law regarding U.S. Department of Agriculture Forest Service (“Forest Service”) and U.S. Department of Interior Bureau of Land Management’s (“BLM”) (collectively, “Applicants”) application to change Water Right 41E 54725-00.

**FINDINGS OF FACT**

**I. The Forest Service’s Water Rights**

1. In April 1982, the Forest Service filed a series of Statement of Claims for livestock water rights in the Little Boulder River drainage (Exhibit A-1; O-6; and judicial notice of the claim files):

Water Right.	Source	POD	POU	No. Livestock	Allotment No.	Flowrate	Volume
41E 54723-00	North Fork of the Little Boulder River (“NFLBR”)	SWSESE, § 4, 5N, 5W	SEWNNE, § 7, 5N, 5W	294 Cattle	225	9 CFS	1.62 AF



41E 54724-00	Spring on an unnamed tributary of NFLBR	SESESE, § 1, 5N, 5W	SESESE, § 1, 5N, 5W	309 Cattle	214	0.01 CFS	2.06 AF
41E 54725-00	NFLBR	SESESW, § 2, 5N, 5W	NESWSE, § 3, 5N, 5W	294 Cattle	225	10.6 CFS	1.62 AF
41E 54726-00	NFLBR	NESESE, § 7, 5N, 4W	SWSENW, § 7, 5N, 4W	294 Cattle	225	13 CFS	1.62 AF
41E 54729-00	NFLBR	NENENW, § 26, 5N, 6W	NENENW, § 26, 5N, 6W	294 Cattle	225	3.4 CFS	1.62 AF
41E 54731-00	Little Boulder River ("LBR")	SESESW, § 1, 4N, 6W	NWNESE, § 35, 5N, 6W	309 Cattle	214	1.8 CFS	2.06 AF
41E 54735-00	LBR	SESESE, § 7, 5N, 5W	SWSWNE, § 23, 5N, 5W	309 Cattle	214	39 CFS	2.06 AF

2. These water rights appeared in the Temporary Preliminary Decree and Preliminary Decree for Basin 41E Preliminary Decree with the following elements:

Water Right.	Source	POD/POU	Flowrate	Volume
41E 54723-00	NFLBR	SENESE, § 7, 5N, 5W S2NENE, § 7, 5N, 5W NWNW, § 8, 5N, 5W S2S2, § 5, 5N, 5W S2S2, § 4, 5N, 5W	Standard remark	Standard remark
41E 54724-00	Spring on an unnamed tributary of NFLBR	SESESE, § 1, 5N, 5W	4.49 GPM	Standard remark
41E 54725-00	NFLBR	NESWSE, § 3, 5N, 5W SESE, § 3, 5N, 5W S2S2, § 2, 5N, 5W	Standard remark	Standard remark
41E 54726-00	NFLBR	S2SENE, § 7, 5N, 4W E2, § 7, 5N, 4W	Standard remark	Standard remark
41E 54729-00	NFLBR	NENENW, § 26, 5N, 6W S2, § 23, 5N, 6W W2, § 14, 5N, 6W § 13, 5N, 6W NW, § 18, 5N, 6W SE, § 7, 5N, 6W SWSENE, § 7, 5N, 6W	Standard remark	Standard remark
41E 54731-00	LBR	SE, § 35, 4N, 6W § 2, 4N, 6W NENE, § 11, 4N, 6W N2NW, § 12, 4N, 6W NWNWNE, § 12, 4N, 6W SESESW, § 1, 4N, 6W	Standard remark	Standard remark

41E 54735-00	LBR	NE, § 23, 5N, 5W SESESE, § 14, 5N, 5W S2, § 13, 5N, 5W N2, § 18, 5N, 4W S2S2S2, § 7, 5N, 4W	Standard remark	Standard remark
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**II. The Relevant Allotments**

3. The Forest Service manages a large section of federal property located in the Little Boulder River drainage. The Forest Service issues permits to private individuals allowing them to graze livestock on the federal land in defined areas known as allotments. (Hearing testimony in general). Historically, the Forest Service land within the Little Boulder River drainage was managed as a single allotment known as the Little Boulder Allotment, but in 1976, the Forest Service divided the allotment into two allotments. The southern portion retained the name Little Boulder Allotment and was assigned identification number 214. The north portion was named the Galena Allotment and assigned identification number 225. (Exhibit A-12)
4. The main sources of water for livestock within the two Allotments are the Little Boulder River (“LBR”) and the North Fork of the Little Boulder River (“NFLBR”). The relevant portion of the LBR is located within the Little Boulder Allotment. A majority of the NFLBR is located in the Galena Allotment, but a portion of the NFLBR extends into the Little Boulder Allotment, upstream of the confluence of the two sources. (Exhibit A-16)
5. As noted above, when the Forest Service filed the Statement of Claims in 1982, it differentiated the claims by allotment number: claims 41E 54723-00, 41E 54725-00, 41E 54726-00, and 41E 54729-00 listed the NFLBR as the source and were claimed for allotment 225 (the Galena Allotment), while claims 41E 54731-00 and 41E 54735-00 listed the LBR as the source and were claimed for allotment 214 (the Little Boulder Allotment).<sup>1</sup> Claim 41E 54724-00, lists a spring that is tributary to NFLBR, but it is

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<sup>1</sup> This is further confirmed by the fact the Forest Service listing 294 cattle for the water rights associated with allotment 225, and 309 cattle for the water rights associated with allotment 214.

located within the Little Boulder Allotment, and thus, the Forest Service claimed it for allotment 214.<sup>2</sup>

6. Objector McCauley Family Ranch currently holds the grazing permit for the Galena Allotment which allows it to graze 190 animal units (“AUs”)<sup>3</sup> on the land managed by the Forest Service. (Exhibit O-10) Fitzgerald Ranch, Inc., holds the grazing permit for the Little Boulder Allotment which allows it to graze 194 AUs on the land managed by the Forest Service. (Exhibit O-9) Fitzgerald Ranch also holds a grazing permit issued by BLM for a parcel known as the Chinese Diggings, which allows it to graze an additional 29 AUs the land managed by BLM. (Exhibit O-11)
7. BLM holds a number of water rights that provide water to livestock on the Chinese Diggings (Exhibit O-2):

<b>Water Right</b>	<b>Source</b>	<b>POD/POU</b>	<b>Flowrate</b>	<b>Volume</b>	<b>No. Livestock</b>	<b>Name</b>
41E 77028- 00	Developed Spring	SWNESW, § 31, 6N, 4W	1 GPM	0.8 AF	114 Cattle	Poor Gulch Spring
41E 77045-00	Developed Spring	NESWNE, § 6, 5N, 4W	1 GPM	1.61 AF	114 Cattle	Little Boulder Spring
41E 78313-00	Developed Spring	SWSW, § 32, 6N, 4W	2.02 GPM	0.62 AF	38 AUMs	

8. Access to water on the Chinese Diggings parcel has been an issue for decades. In 1967, the permittee on the Chinese Diggings reported he was only able to use one third of the potential of the pasture due to a lack of water, and he proposed a rotation with Forest Service land to improve access to water. (Exhibit A-7 at 2) As a result, BLM and the Forest Service agreed that the Little Boulder Allotment and the Chinese Diggings would be operated as a combined allotment, with various pastures being used on a rotational basis. (Exhibit A-8 to A-14) This agreement was formalized in the 1989 Coordinated Resources Management Plan. (Exhibit A-14 at 7)

<sup>2</sup> See Exhibit O-9 at 3, listing the Upper Watson Spring in § 1, 5N, 5W as part of the Little Boulder Allotment.

<sup>3</sup> The term “animal unit” has more than one definition. DNRC’s Admin. R. Mont. 36.12.010(2) defines it as one “beef cow,” or an equivalent number of other species of animals. However, Claims Examination Rule 2(5) defines it as “one cow and calf pair is one,” which is the same definition used in DNRC’s Form 615. The Forest Service permit allows for 190 cattle with the “Class” “mature cow w/nursing calf.” (Exhibit O-10)



9. The 1995 Actual Use Report for the Chinese Diggings reported, “The water sources on Poor Gulch & the Little Boulder River get hit too hard. Hopefully we can develop a suitable water system soon.” (Exhibit O-4) To address the situation, the permittee and Applicants decided to install a pump in the NFLBR and pipeline system that would provide water to new stock tanks located on both Forest Service and BLM managed lands. In 1997, Applicants prepared an Environmental Assessment for the pump and pipeline project. (Exhibit O-3 at 1) As part of the project, the “Poore Gulch spring site would be excluded or armored to protect the riparian area . . . from livestock impact.” (*Id.*) BLM also noted that “filing for a change in point of use would be needed.” (*Id.*) In 1998, the Forest Service installed the 3 horse power pump in the NFLBR, pipeline, and tanks, and started using the new system to provide water to livestock on the North Fork pasture and the Chinese Diggings, but it did not file a change application before doing so. (DNRC file for Change App 41E 30148132 (“File”) at 27). From 1998 to 2013 the Forest Service used the pump, pipeline, and tanks without authorization from DNRC and in violation of Montana law. (*Id.* “From 1998 to 2013 the water usage was occurring from the existing point of use as described in the water right no. 41E 54725 00 and from the water system that was installed in 1998 which this application is being made for.”)

### **III. The 2014 Change Application**

10. In response to a complaint about the pump diverting water from the NFLBR in violation of Montana law, on November 7, 2014, the Forest Service<sup>4</sup> filed a change application for claim No. 41E 54725-00 (Change Application No. 41E 30071675). In the application, the Forest Service stated that “the water right is on the Little Boulder Allotment that has a historical carrying capacity of 240 AUs. Current use is 223 AUs (FS-194 AU; BLM - 29 AU).” (Exhibit O-1 at 46) In 2015, DNRC asked for clarification regarding “how many

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<sup>4</sup> BLM was added as a co-owner of the water right in 2016. (Exhibit O-1 at 95) Since then it has been listed as co-applicant.

animal units were historically watered in total,” to which the Forest Service responded, “230-240 AMUs [sic, AUs].”<sup>5</sup> (Exhibit O-1 at 71, 83)

11. Based on the evidence provided by the Forest Service and a claimed volume of 15 gallons per animal unit per day (“GPAPD”), in 2015 DNRC issued a Preliminary Determination to Grant Change Application No. 41E 30071675 with a historic volume of 1.12 AF and a flow rate of 2.54 GPM. (Exhibit O-1 at 14)
12. In November 2016, Ed McCauley filed an objection to Change Application No. 41E 30071675. In September 2017, DNRC’s Hearing Examiner dismissed the application because the Forest Service had missed the deadline to make its application correct and complete. (Exhibit O-1 at 246) The Forest Service did not petition for judicial review to challenge the dismissal.

#### **IV. The 2020 Change Application**

13. The Forest Service and BLM waited until January 14, 2020, to file a second change application for claim 41E 54725-00 (Change Application No. 41E-30148132). In their 2020 application, Applicants provided information that conflicted with the prior application.
14. First, they stated, “Historic maximum use for this water right is based on 580 cow/calf pairs” and later in the application they stated, “The highest historic use that has occurred on this water right has been 509 cow/calf pair . . .” (File at 25, 26) Applicants did not explain how the “historical” use had increased from the 240 AUs stated in the 2014 Change Application.
15. In 2021, DNRC issued a Preliminary Determination to Grant Change Application No. 41E-30148132 (“PDG”). The PDG found, “Based on historic grazing records maintained by the Butte District of the Beaverhead/Deer Lodge National Forest, the pre-1973

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<sup>5</sup> An animal unit month or “AUM” is generally defined as “the amount of forage one animal unit (a cow and calf pair) will consume in a month.” *Steffen v. Dept. of State Lands*, 724 P.2d 713, 715, 1636 Mont. 1638 (1986) (also Exhibit O-11 at 10). Given the context, it is clear the Applicants intended to refer to the number of animals.

carrying capacity of the North Fork Little Boulder River Allotment was 509 animal units (AUs).” PDG at 5, ¶ 7. The PDG, however, did not explain how DNRC had relied on the same “historic grazing records maintained by the Butte District of the Beaverhead/Deer Lodge National Forest” in 2015 to find the historical use was 240 AUs. (Exhibit O-1 at 14)

16. The PDG found the historic diverted and consumed volume was 4.68 AF and the flow rate was 10.6 GPM. The PDG did not address why the volume was four times higher than the historic volume it determined for the same water right in 2015.
17. Objector McCauley Family Ranch, LLC, filed a timely and valid objection based on the adverse effect.

#### **CONCLUSIONS OF LAW**

18. Pursuant to Mont. Code Ann. § 85-2-311(1)(b), the applicant bears the affirmative burden of proving that other water users will not be adversely affected by the proposed change application. To ensure that other water users are not adversely affected:

The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use.

Admin. R. Mont. 36.12.1902(3).

19. Objector has downstream water rights on the Boulder River which is overallocated and in certain years, the river goes dry. (Hearing at 15:14;<sup>6</sup> Exhibit O-7) Given the demand for water from the Boulder River and its tributaries, each gallon of water in is important. (*Id.*) The Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC, CDV-2009-823, First Jud.* District Court, Memorandum and Order, 8 (2011). Therefore, if the Applicants use *any extra water* as a result of the pump and pipeline system, it will adversely affect Objector. Further, water

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<sup>6</sup> References to the Hearing are based on the time shown in the recording.

right claim 41E 54725-00 provides water to Objector's cattle on the Galena Allotment and Objector will be harmed if the amount of water available to cattle on the Galena Allotment is reduced.

**I. Applicants have not proven by the preponderance of the evidence that 4.68 AF was historically consumed by the livestock.**

20. First, if the application is granted, Applicants will be allowed to pump a larger volume of water from the NFLBR than was historically consumed by the livestock. This is because the Applicants presented no evidence on the *actual* amount of water historically consumed by the livestock and instead relied on the 30 GPAPD standard, which the DNRC Regional Manager who authored the PDG testified overstates the actual historic usage, yet the PDG allow Applicants to pump 30 GPAPD to the new tanks.
21. The applicant for a change application must establish the historic volume consumptively used, and if “the applicant fail[s] to provide the Department with evidence of the historic diverted volume,” “the record [cannot] not sustain a conclusion of no adverse effect.” PDG at 11 (citing *Matter of Royston*, 249 Mont. 431-32, 429, 816 P.2d 1054, 1059-60 (1991)). “Thus, the Department, as the fact finder in a change proceeding, must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right, or adversely effect water users.” *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, 13 (2011).
22. Here, Applicants did not provide *any* evidence on the historical volume consumptively used (either in total or per animal), and they are unaware of any such records. (Hearing at 10:30) Rather they relied on the 30 GPAPD standard used by the Water Court and listed on the abstract for claim 41E 54725-00. “Always to be borne in mind is that no matter how the water right is expressed in the decrees of the water court, either in flow rate or in acre feet or a combination thereof, such expression of amount is not the final determining

factor.” *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986). Therefore, “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.” PDG at 11 (citing Matter of Application for Beneficial Water Use Permit by City of Bozeman, *Memorandum*, Pgs. 8-22)

23. The 30 GPAPD standard used by the Water Court is the *maximum* amount the Forest Service could claim, but it is not proof of the *actual* historic volume consumed by livestock drinking from the segment of the NFLBR covered by Claim 41E 54725-00. To the contrary, the evidence presented at the Hearing and DNRC’s rule for “new uses of water” establishes that 30 GPAPD is not accrual and overstates historic use.
24. For “new uses of water,” DNRC has adopted a standard of “15 gallons per day or .017 acre-foot per year per animal unit.” Admin. R. Mont. 36.12.115(1)(c).<sup>7</sup> In its 2014 Application, the Forest Service used the 15 GPAPD or 0.017 AF standard to claim a “historic” volume of 1.12 AF. (Exhibit O-1 at 47) DNRC accept and used the 15 GPAPD standard to find “the historic diverted and consumed volume” was 1.12 AF. (Exhibit O-1 at 15)
25. Yet, in their 2020 application, Applicants used the 30 GPAPD standard to claim a “historic” volume of 4.86 AF. In the PDG, DNRC accepted the 30 GPAPD standard and a volume of 4.86 AF without addressing the significant conflict between the newly claimed volume of 4.86 AF, and the volume of 1.12 AF found the 2015 PDG, and the volume of 1.62 AF listed in the 1982 Statement of Claim.
26. There is no evidence in the File that establishes 30 GPAPD is the actual historic use for claim 41E 54725-00, and at the hearing no one testified that the figure was based on the historic use of the water right. Instead, the DNRC Regional Manager testified that the “15

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<sup>7</sup> While the five new stock tanks contemplated in the Change Application are located on new parcels of land it appears DNRC does not apply Admin. R. Mont. 36.12.115(1)(c) to “new uses of water” proposed in a change application.

gallons per minute per day [sic]” standard is “based on science and study more accurate” than the adjudication standard of 30 GPAPD. The Regional Manager added, “Because the adjudication standard of 30 gallons per day per animal unit is a maximum, it is, as DNRC’s new appropriation standard is half of that, it is more likely than not, those cows are probably not utilizing the maximum.” (Recording 14:56)

27. Since “it is more likely than not” the livestock drinking from the NFLBR did not consume the full 30 GPAPD, Applicants did not meet their burden of providing by the preponderance of the evidence that the historical volume consumed by each animal was 30 GPAPD. Just as an irrigator may not rely on the volume listed on the abstract for his water right to support the historical volume calculation for a change application, the Applicants here may not rely exclusively on the 30 GPAPD standard to establish the historic volume.
28. The difference between the 30 GPAPD standard and the lesser amount actually consumed by each animal is important because Applicants are proposing to pump the entire 30 GPAPD to the stock tanks. As the DNRC Regional Manager testified, it is “more likely than not” the cattle were not consuming the full 30 GPAPD historically and the unused water would remain in the NFLBR and flow down the river to be used by the Objector. (Recording 14:56). Therefore, using 30 GPAPD to determine the amount of water Applicants can pump to the tanks, and not the actual amount historically consumed per animal, will result in more water being diverted from the NFLBR than historically consumed.
29. Since the Applicants have not proven the actual historical volume of water consumed by each AU, “the record [cannot] not sustain a conclusion of no adverse effect,” PDG at 11, and the Application must be denied.

**II. The decision to calculate the number of historical AUs, rather than rely on the grazing records is flawed.**

30. The second major flaw is Applicants and DNRC's decision to *calculate* the historical number of livestock based on the flow rate claimed by the Forest Service in the 1982 Statement of Claim rather of relying on actual use records.
31. Applicants provided historical grazing records that tend to establish the number of cattle present on the allotments where the segments of the NFLBR and LBR claimed in the Forest Service's livestock rights are located. But the presence of cattle on the allotments does not establish that prior 1973, 509 AUs consumed 4.68 AF of water at a flow rate of 10.6 GPM from the segment of the NFLBR covered by Claim 41E 54725-00. In fact, no evidence supports the 509 AUs in the records provided by the Applicants.
32. Rather than rely on the actual use records, Applicants and DNRC calculated the number of livestock historically present by taking flow rate of 10.6 GPM claimed in the 1982 Statement of Claim (Exhibit A-1), and then multiplied by 1,440 minutes in a day and divided by 30 GPAPD, to come up with 509 AUs as the "historical" usage.<sup>8</sup> (Hearing at 10:29 (Forest Service witness); 14:27 (DNRC's Regional Manager)) The Applicants' witness confirmed that the figure of 509 AUs was not based on actual historical records, but calculated based on the 10.6 GPM flow rate. (Hearing at 9:21; 10:29) The DNRC Regional Manager confirmed that DNRC calculated the number and did not rely on any records establishing 509 AUs reflected the historic use. (Recording 14:25)
33. But as the witness testified, and common sense confirms, it is impossible to directly measure the flowrate at which livestock are drinking water. This is why the Water Court does not decree direct from source livestock water rights with a flow. At best, the 10.6 GPM flow rate used by Applicants and DNRC was an estimate — but the figure is contradicted by the Applicants' own calculation of the flow rate and DNRC determination in 2015 that "[t]he maximum flow rate for the Applicants' water right

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<sup>8</sup> 10.6 GPM x 1,440 minutes in day / 30 gallons per animal per day = 508.8 animals

claim is 2.54 GPM.” (File at 48; Exhibit O-1 at 30) Given that there is no evidence that livestock ever consumed water from the segment of the NFLBR covered by claim 41E 54725-00 at the rate of 10.6 GPM, it was a mistake for Applicants and DNRC to calculate the number of livestock served by the water right based the faulty and overstated the flow rate. Since Applicants did not prove the historical use by the preponderance of the evidence, the application must be denied.

**III. Objector will be adversely affected because the PDG did not consider the Forest Service’s other livestock rights.**

34. Applicants did not provide any records listing the actual number of cattle that drank from the segment covered by 41E 54725-00. Instead, they offered records from 1938 to 1961 with their application that listed the number of livestock present on the combined Galena and Little Boulder Allotments. (File at 35-36; 59-60) The highest number of cattle listed in the document contained in DNRC’s file supporting the PDG lists 459 cattle in 1945, which were located on both allotments.<sup>9</sup> (File at 35) As noted above, the Forest Service holds seven livestock water rights that cover different segments of the NFLBR and the LBR, and when the livestock were present on the allotments, they had access to multiple water rights.
35. When multiple livestock rights serve the same herd of livestock, DNRC’s practice has been to calculate a volume based on the number of animals, and then apportion the consumptive use between each livestock water right. This noted in the equation and chart from the Preliminary Determination to Grant Change Water Right No. 41H 30070678, pages 16-17:

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<sup>9</sup> This number roughly corresponds with the information the Forest Service provide in 2014, when it stated 240 AUs were historically on the Little Boulder Allotment (Exhibit O-1 at 45); the current permits which allow for 384 AUs on the two Forest Service allotments (Exhibits O-10, O-11); and the combined 439 cattle claimed for allotments 225 and 214 in the Forest Services’ 1982 Statement of Claims.



**Stock Water Rights**

33. As explained in FOF No. 29, the four stock rights served the same 357.5 animal units year-round. 41H 132201-00 and 41H 132202-00 served the stock between April 15 and October 1, and 41H 30069129 and 41H 30069130 served the stock between October 2 and April 14. The total consumptive use for 357.5 animal units is calculated as:

$$357.5 \text{ AU} \times \frac{30 \text{ gal}}{\text{AU} - \text{day}} \times \frac{365 \text{ days}}{1 \text{ yr}} \times \frac{1 \text{ AF}}{325,851 \text{ gal}} = 12.02 \text{ AF per year}$$

The consumptive use attributable to each water right is calculated as a proportion of the period of use, as shown in Table 2, which also summarizes the flow rate and period of use of these rights.

**Table 2:** Stock water right flow rate, volume, and period of use

Water Right	Consumed Flow Rate	Historical cons. use	Animal units	Period of Use	Days
(41H)	(GPM)	(AF)	(#)	(-)	(#)
132201	1.86	2.80	357.5	4/15 - 10/1	170
132202	1.86	2.80	357.5	4/15 - 10/1	170
30069129	1.86	3.21	357.5	10/2 - 4/14	195
30069130	1.86	3.21	357.5	10/2 - 4/14	195
Total =	7.44	12.02	357.5	year round	365

Note: The 7.44 GPM flow rate is a constant, year-round flow rate provided by all four water rights.

36. DNRC did not consider the Forest Service’s other livestock water rights and it attributed all 509 AUs to the segment of the NFLBR covered by 41E 54725-00 — even though the animals were drinking from other segments of the LBR and NFLBR covered by other water rights. Since Applicants and DNRC attribute all 509 AUs to water right claim 41E 54725-00 when the animals had access to multiple sources covered by multiple water rights, Applicants failed to establish the actual historical use of the water right.
37. In reality, the Applicant’s decision to change a water right historically used on the Galena Allotment to provide water to new tanks on the Little Boulder Allotment and the Chinese Diggings will expand the total amount of water consumed by the livestock on the two allotments because the Applicants are attempting to take water historically used on the Galena Allotment and using it on other allotments. This will result in a double dipping or

overcounting of historic use because not all of the relevant water rights are being considered. For example, in the future the Forest Service could use the same 509 AUs to support a change application for each of its other livestock rights in the LBR drainage, and the same 509 AUs would be counted seven times. Therefore, the application must be denied since it disregards the historical pattern grazing the public lands within the LBR drainage and the various water rights involved—not just the segment of the NFLBR covered by 41E 54725-00.

**IV. Objector will be adversely affected because claim 41E 54725-00 was never historically used to provide water to livestock on the Little Boulder Allotment or the Chinese Diggings.**

38. Based on the 1982 Statement of Claim and the information provided by the Forest Service in 2015, claim 41E 54725-00 was historically used to provide water to livestock on the Galena Allotment. Yet the Applicants propose to install a new pump on the Little Boulder Allotment and pump 70% of the water attributable to the water right to stock tanks in pastures that livestock on the Galena Allotment cannot access. This would adversely affect Objector because it has a right to use claim 41E 54725-00 for its stock, and allowing the water historically used on the Galena Allotment to be pumped to the new livestock tanks would increase the amount consumed and not leave enough water for Objector's stock.
39. When the Forest Service filed its Statement of Claims in 1982, it was careful to differentiate the claims for allotment 225, the Galena Allotment, and the claims for allotment 214, the Little Boulder Allotment. When it filed the Statement of Claim for 41E 54725-00, the Forest Service listed allotment 225 and it claimed a point of division in SESESW, § 2, 5N, 5W and a place of use in NESWSE, § 3, 5N, 5W. (Exhibit A-1) The legal description for the place of use and point of diversion in the Statement of Claim are located on the Galena Allotment. (Exhibit O-1 at 58) In 2015, the Forest Service provided DNRC with a map labeled "Historical Use" that stated the three places of use and points

of diversion for claim 41E 54725-00 were all located on the Galena Allotment, upstream from the fence line that separates the two allotments. (Exhibit O-1 at 59) Thus, according to the Forest Service, claim 41E 54725-00 was historically used on the Galena Allotment to provide water to livestock owned by the permittee. This was confirmed by Mr. McCauley's testimony at the hearing. Since Objector currently holds the permit for the Galena Allotment, it has a right to use the entire flow rate and volume attributed to claim 41E 54725-00 for its stock.

40. Yet the pump was installed on the Little Boulder Allotment, not the Galena Allotment, and it will provide water to stock tanks on pastures Objector's livestock cannot access. Applicants attempt to ignore their own evidence regarding the "Historical Use" for the point of diversion for claim 41E 54725-00, and they assert "This water right serves three grazing allotments." (File 47) Presumably, the third allotment is the Chinese Diggings. The application clarifies "[t]wo of these grazing allotments [the Little Boulder Allotment and the Chinese Diggings] will be serviced under the additional places of use . . . for approximately 240 cow calf pair." (File at 47) "The remaining allotment [Galena] serves 202 cow/calf pairs and will continue to only use water direct from the source." (File at 47)
41. The problem is that if the application is granted, Applicants will pump 70% of the flow rate and volume permitted by claim 41E 54725-00 to the stock tanks, and only "leave enough water in the stream to satisfy 30% of the stock use." (File at 48) That would not leave enough water for the livestock on the Galena Allotment since, based the number listed in the application, 45% of the livestock are located on the Galena Allotment and those animals cannot access the water in the new tanks. Therefore, Objector would be adversely affected by pumping 70% of a water right to be used in a new location when historically 100% of the water right was used on the allotment where Objector's livestock are located.

**V. The pump and pipeline statement will increase the amount of water consumed from the NFLBR.**

42. The clear intent of the new pipeline and tank system is to allow for more cattle to be present on the Little Boulder Allotment and/or to allow the same number of cattle to graze for additional days in a year. Since Applicants have not established how they will limit the amount of water consumed from the NFLBR to the historical volume, the increased consumption will adversely affect Objector.
43. Under the Forest Service's rotational grazing system on the Little Boulder Allotment, livestock are allowed to graze a pasture for up to 45 days, and then they are moved to the next pasture. (Hearing at 13:43) However, if the "utilization standards" for the pasture are satisfied before the end of the 45 days, the cattle are required to be moved to the next pasture. (Hearing at 13:41, 13:42) Once the standards are met for all of the pastures, the livestock have to be removed from the federal lands. (Hearing at 13:43)
44. For example, the 2005 Annual Operating Instructions for the Little Boulder Allotment stated:

It is planned that permitted livestock will enter the allotment around August 1st and will be moved through the scheduled pastures for grazing in 2005 before allowable use standards (bank disturbance and/or riparian utilization or stubble height, as well as upland utilization) are exceeded for that pasture or key area. When use standards have been reached in all scheduled pastures or on 10/1 permitted livestock will be removed from the allotment.

In order to simplify monitoring, instead of measuring all of the riparian use parameters . . . we plan to measure just one or two riparian parameters for each riparian transect.

(Exhibit O-1 at 181)

45. For the North Fork pasture, the key parameter was "bank disturbance" measured at 200 yards below the sump for the pipeline mentioned in the Change Application. (Exhibit O-1 at 182)

46. Thus, if the permittee on the Little Boulder Allotment is able to keep livestock away from the stream banks, they are able to use the North Fork pasture for the full 45 days, but once the bank disturbance standard has been exceeded, the permittee had to pull the livestock off the North Fork pasture. “The pump system is intended to move a portion of the stock . . . off stream to reduce riparian impacts of stock grazing at the source.” PDG 3. This will “allow livestock to better utilize the uploads and not congregate in the riparian areas.” (Hearing at 13:43)
47. While protecting riparian areas is a laudable goal, using the new livestock tanks to do so will allow the permittee to use each pasture for longer in a given season and/or to graze more cattle on the pasture in a given year. This increased usage or “increased utilization” will result in the livestock consuming more water from the NFLBR, either at the tanks or from the source directly. Since the Applicants have not explained how they will limit the amount of water consumed while increasing the use of the range, they have not met their burden of establishing Objector will not be adversely affected.
48. There is also the issue of Applicants’ plan to provide water from the NFLBR to the Chinese Diggings pasture on BLM property and how doing so will not increase the amount of water diverted from the NFLBR. Historically, the Chinese Diggings pasture was fenced separately from the Forest Service land. (Hearing at 15:18) BLM has water rights for three springs on the Chinese Diggings, which historically provided 3.03 AF of water and a combined flow rate of 3.02 GPM to 29 AUs. (Exhibit O-2) However, access to some of the water sources on the Chinese Diggings was “cut off or severely restricted” by development and subdivisions and the flow rate of two of the three springs decreased to 1/8 GPM. (Exhibit O-3) In 1967, the permittee on the Chinese Diggings reported he was only able to utilize one third of forage in the pasture due to lack of water. (Exhibit A-7 at 2) Thus water has been the limiting factor on the Chinese Diggings and providing more water from a new source would allow the permittee to “better” utilize the pasture by

allowing more cattle to graze the pasture or to allow the pasture to be grazed longer in a given year.

49. In the 1989 Coordinated Resources Management Plan, the Forest Service, BLM, and the permittee formalized the plan to include the Chinese Diggings as part of the Little Boulder Allotment. (Exhibit A-14 at 7) But even after the Coordinated Resources Management Plan was adopted, the pastures were still fenced separately to limit livestock to the designated pastures as part of the rotational grazing practice. That means the permittee's herd of cattle would be present on the Chinese Diggings pasture for a portion of the year and use the springs on the BLM land, the livestock would then be on the North Fork pasture for a portion of the year and consume water from the NFLBR. For example, in 1972, the Chinese Diggings pasture was rested and not used and in 1974, the North Fork pasture was rested. (Exhibit A-20)
50. The pump and pipeline system, however, will increase the usage of water from the NFLBR because when livestock are present on the Chinese Diggings pasture, they will be consuming water from the NFLBR for the first time. Given that Applicants will be providing water from the NFLBR to a new pasture, Applicants are essentially doubling the opportunity for livestock to consume water from the NFLBR. Before the change, when livestock were present on the Chinese Diggings pasture, they were consuming water from other sources, but under the change, they will be consuming water from the NFLBR. This increased usage is not accounted for or addressed in the PDG and therefore the application must be denied.

**VI. If the Application is granted, the amount of water that may be pumped to the tanks should be clearly stated and the Applicants must install a water meter to ensure the usage is not increased.**

51. In the alternative, if the Application is granted, the amount of water Applicants may pump to the tanks should be clearly stated and the Applicants should have to install a water meter to ensure the usage is not increased.

52. In the PDG, DNRC did not state the flow rate of volume of water that could be pumped to the new stock tanks. In the application, however, Applicants stated “1.778gpm, will be pumped into the pipeline/tank system.” (File at 78) The PDG determined, “The pump performance curve indicates the pump has the capability to pump 1.78 GPM of water . . .” (PDG ¶ 20) At the hearing, Applicants’ witness testified the volume pumped to the tanks would be 0.7 AF. (Hearing at 10:41)
53. Therefore, if the application is granted, it should be limited to 1.78 GPM and 0.7 AF of water. To ensure that Applicants do not exceed these amounts, and thereby use more water, they should be required to install a water meter in the pipeline near the pump and provide monthly and yearend records of volume used and the number of livestock served to the DNRC regional water rights office and Objector.

DATED this 17th day of March, 2023.

DONEY CROWLEY P.C.

/s/ Jack G. Connors

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Jack G. Connors  
*Attorneys for Objector McCauley Family Ranch,  
LLC*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Objector McCauley Family Ranch, LLC's Proposed Findings of Fact and Conclusions of Law* was served via email on this 17th day of March, 2023, upon the following:

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