

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

APPLICATION TO CHANGE WATER RIGHT) NOS. 41P 30114262 and 41P 30116656 BY) THE CITY OF SHELBY)	PRELIMINARY DETERMINATION TO GRANT CHANGES
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On July 05, 2019, the City of Shelby (Applicant) submitted Applications to Change Water Right Nos. 41P 30114262 and 41P 30116656 to the Havre Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) to change points of diversion permanently and change the place of use temporarily. Application 41P 30116656 seeks changes to Water Right Statement of Claim (SOC) Nos. 41P 192878, 41P 192880, 41P 192881, and 41P 192882, and Beneficial Water Use Provisional Permit (Permits) Nos. 41P 4489, 41P 4490, and 41P 58129. Change Application 41P 30114262 seeks changes to Water Right SOC Nos. 41P 192877 and 41P 192879. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter per §85-2-302, Montana Code Annotated (MCA), dated December 27, 2019. The Applicant responded with information dated January 22, 2020. The Application was determined to be correct and complete as of August 3, 2020. An Environmental Assessment for this Application was completed on November 20, 2020. The Applicant submitted a waiver of the timelines in § 85-2-307, MCA on November 30, 2020.

I. SUMMARY OF THE APPLICATION

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

Application as filed:

- Applications to Change Water Right, Form 606
- Change in Purpose Addendums
- Temporary Change Addendums
- Well Logs
- Shelby Well Field Pump Test - KLJ Engineering

- Water System Modeling Report – KLJ Engineering
- Water Service Area Design and Record Drawings
- The 1961 Preliminary Engineers Report on Water Supply and Distribution System for Shelby, Toole County, Montana by Stanley J. Thill, Conrad, Montana (1961 PER)
- Application for Reservation of Water for the City of Shelby by Aquoneering, Roger Perkins, Laurel Montana, August 1988 (1988 Reservation Application)
- Preliminary Engineering Report Water System Improvements prepared for City of Shelby, Montana by Kadrmas, Lee & Jackson Engineers and Surveyors Planners (KLJ),2010 (2010 PER), and correspondence with KLJ, the Applicant’s engineer

Information Received after Application Filed

- Email Correspondence between Applicant and DNRC
- Deficiency Letter Responses
- Point of Diversion Amendment to Application received July 5, 2019
- Response to Department’s Letter from Applicant, received January 22, 2019
- Measurement Condition Letter from Applicant received August 19, 2020

Information within the Department’s Possession/Knowledge

- Change Application Files for 41P 30072725 and 41P 30072726
- Department’s Technical Report dated August 3, 2020
- Department Aquifer Test and Depletion Reports by DNRC Water Management Bureau (WMB) Groundwater Hydrologist, Attila Fohnagy dated July 21, 2020

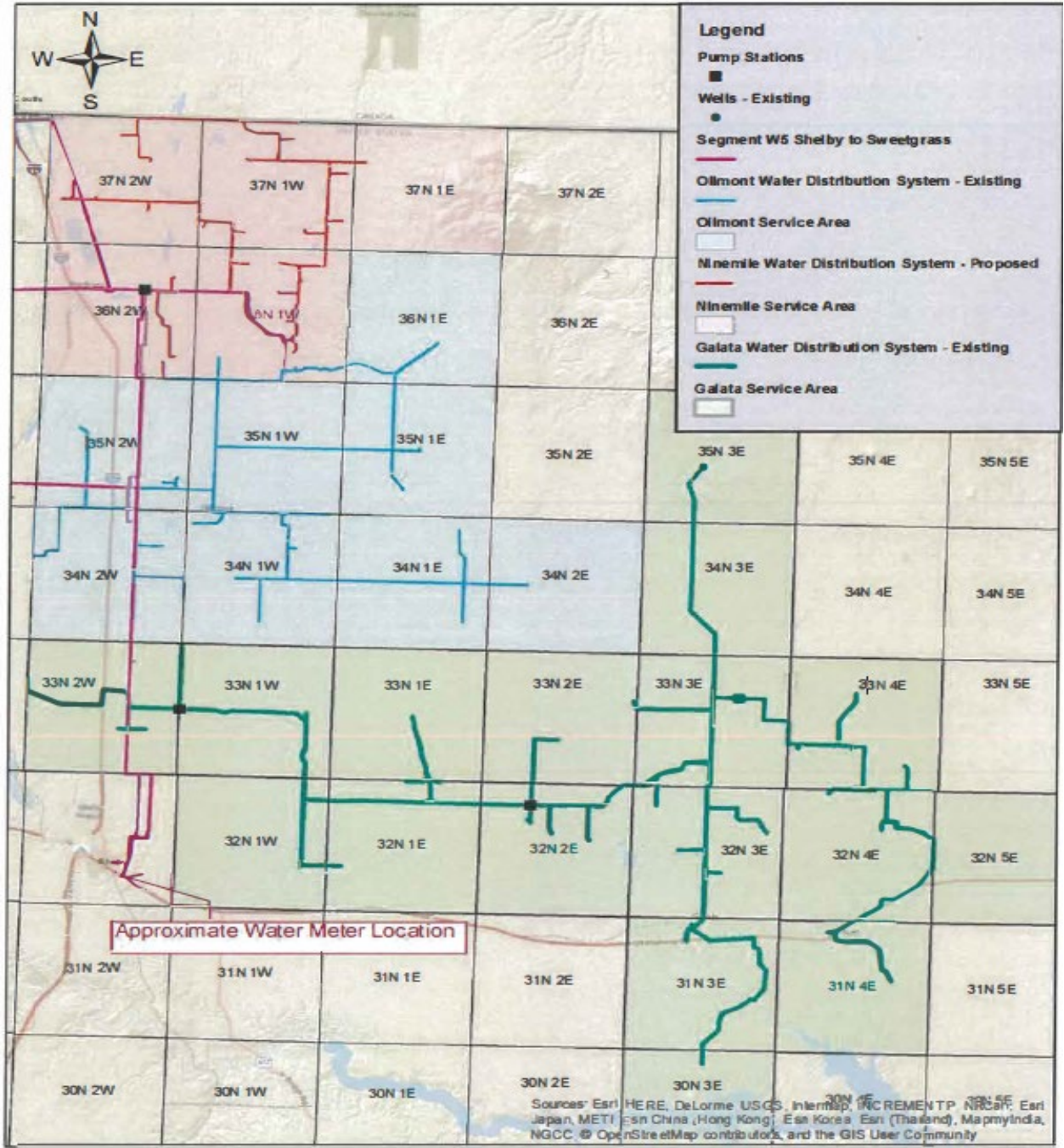
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4 MCA).

A. Change Proposals and Water Rights to be Changed

Findings of Fact

1. The amount of water the Applicant is seeking to change through both Applications is up to 2.690 gallons per minute (GPM) for a total volume up to 1124.90 acre-feet (AF) in these two change proposals. 205 GPM up to 331.6 AF is proposed to be added by the Applicant through Permit Application 41P 30117451 which is being processed concurrently by the Department. The change proposal includes permanent changes in points of diversion for three replacement wells that will serve in place of three failed wells that are to be abandoned (new well # 2,4, and 6). The other change proposal includes temporarily adding places of use to include Oilmont, Nine Mile and Galata rural water systems to the Applicant's service area for a period of ten years or until the North Central Montana Regional Water System is operational (*See Table 1, Pg. 8 of this document for a complete listing of all water rights proposed to be changed*).

Map 1: Applicant's Proposed Distribution System



B. Previous Change Authorizations

2. Change Authorizations 41P 30072725 and 41P 30072726 were previously issued by the Department on March 01, 2017. The Department authorized changing the point of diversion so that all 13 points of diversion located in a shallow well field near the Marias River generally located in the SW of Sec. 21, Twp. 31N, Rge. 2W, Toole County, would be included on each water right as the system is physically manifold. The change in point of diversion for these water rights was a permanent change. The Department also authorized a temporary change to the place of use so that water historically used within the City of Shelby could serve the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony and the City of Cut Bank until the North Central Montana Regional Water System is operational. The points of diversion were changed to include all 13 wells on the following municipal water rights: 41P 192878 00, 41P 192880 00, 41P 192881 00, 41P 192882 00, 41P 4489 00, 41P 4490 00, and 41P 58129 00 along with 41P 192877 and 41P 192879. The 2,895.00 gallons per minute (GPM) for a total volume up to 1124.90 acre-feet (AF) represent the total amount of water authorized by the Department on the 6 SOCs and 3 Permits. The previous change authorizations are unperfected.

Change Criteria

3. Department is authorized to approve a change if the applicant meets its burden to prove the applicable §§ 85-2-402, and -407, 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.

1. In addition to the §85-2-402(2), MCA, an application for a temporary change must comply with the requirements and conditions set forth in § 85-2-407, MCA.
2. 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).

II. FINDINGS OF FACT

Historical Use

3. All the Applicant's water supply is obtained from a well field located approximately 6 miles south of the City of Shelby and one mile east of Interstate 15 along the north side of the Marias River. The entire well field consists of 13 wells drilled to a total depth ranging from 31 to 50 feet below ground surface (bgs). Wells are completed in alluvial deposits of the old riverbed and are hydraulically connected to surface flows in the Marias River. The depth of the aquifer varies in each well. Water pumped from the individual wells is comingled and pumped in a

transmission line to the south side of Shelby where it enters the City’s distribution system. Water is distributed throughout the City to meet municipal demands.

4. The Department found in the previous change proceedings that the Applicant’s peak population occurred in 1960 at 4,017. At 250 gallons per capita per day (gpcd), the maximum historic diversions totaled 1,124.90 AF per year. This volume was applied to Statements of Claim 41P 192878 00, 41P 192880 00, 41P 192881 00, 41P 192882 00, 192877 and 41P 192879.

5. Provisional Permits 41P 4489 and 41P 4490 are provisional permits issued in 1974 and verified as perfected by the Department in 2003. These two permits added two wells to the City’s well field in manifold to the municipal system. Each of these permits lists a flow rate of no more than 300 GPM. Wells known as 7 and 8 respectively were both completed in 1975.

6. Provisional Permit 41P 58129 is unperfected, having a project completion date of 12/31/2025. The permit was issued in 1985 to the Applicant for an additional flow rate of 1850 GPM and an additional volume of up to 545 AF. This permit added five additional wells known as Wells 9 through 13 in manifold to the Applicant’s existing well field.

7. The Department found the following amounts totaling 2,895.00 GPM up to 1,124.90 AF annually to represent the Applicant’s historical municipal use as represented in the following Table 1:

Table 1: Historic Use Determination from Change Authorizations 41P 30072725 and 41P 30072726 (issued 3/1/2017)

Water Right No. (41P)	Well No.	Priority Date	Source	Historic Flow Rate (GPM)	Period of Use	Historic Volume (AF)
192878		2 10/1/1946	Groundwater	300.00	Year-Round	234.35
192880		4 10/12/1946	Groundwater	300.00	Year-Round	234.35
192881		5 12/26/1963	Groundwater	350.00	Year-Round	234.35
192882		6 12/26/1963	Groundwater	250.00	Year-Round	234.35
192877		1 6/6/1940	Groundwater	241.00	May 1 -Oct 31	93.74
192879		3 7/7/1939	Groundwater	158.00	May 1 -Oct 31	93.74
4489		7 12/26/1974	Groundwater	240.00	Year-Round	0.00
4490		8 12/26/1974	Groundwater	111.00	Year-Round	0.00
58129	9 through 13	6/10/1985	Groundwater	945.00	Year-Round	0.00
				2895.00		1124.90

8. The Department finds that 2,895.00 GPM and a volume of up to 1,124.90 AF. The 1,124.90 AF is the total combined volume to be the historic use pursuant to Change Authorizations 41P 30072725 and 41P 30072726.

Adverse Effect

9. Water will be diverted from each well and pumped into the clear well collection point where it comingles with water from other wells (all from the same groundwater source) and then pumped in a single transmission line through the water treatment system to the south side of Shelby. From there, water would be stored in tanks and distributed throughout the City or distributed in pipelines to the outlying communities within the proposed service area.

10. In total, the Applicant proposes to provide water to nine separate water service areas including the three new service areas as proposed. The areas are generally grouped by geography or organizational entity. Each of the separate areas to be served has a proposed volume allocation. The nine areas to be served include:

- Shelby Service Area (includes Prison and Humic facility)
- Shelby South
- Ethridge County Water District
- Big Rose Service Area

- Devon-Dunkirk
- Cut Bank Water Service Area
- Oilmont (*New*)
- Galata (*New*)
- Nine Mile (*New*)

11. The Applicant will operate all points of diversion associated with their municipal water rights as they have operated historically. Together the well field will divert no more than the historic volume, along with the additional 330.4 AF of volume the Applicant currently seeks from Permit Application 41P 30117451. Consistent with current operations, water will be diverted from each well and pumped into the clear well where it comingles with water from other wells (all from the same groundwater source) and then pumped in a single transmission line through the water treatment system to the south side of Shelby. From there, Shelby water would be stored in tanks and distributed throughout the City or distributed in pipelines to the outlying communities within the service area. The volume allocation is as follows in Table 2:

Table 2 Volume Allocation:

	Shelby	Prision	Humic	Ethridge	Big Rose	Devon-Dunkirk	Cut Bank	Shelby South	Oilmont/ Galata Nine Mile
Total Expressed in AF	443.60	62.80	67.20	12.80	4.30	62.10	448.10	24.00	330.40

12. Actual water use will vary year to year for each community and will be measured to ensure the amount of water authorized through this change is not exceeded.

13. The Applicant provided a plan explaining how water will be appropriated under the proposed change in water use. The plan includes monitoring existing and proposed water meters throughout the City's internal distribution network and includes plans to meter service pipelines for outlying water service areas. The Applicant provided a water meter map which provided a schematic of the water reservation place of use, the City of Shelby's water distribution network, and the City's existing and proposed water system meters.

14. City of Shelby water use, which includes the 161.0 AF allocated under the City's Water Reservation shall be calculated by subtracting the sum of the volume measured by the meters for

Prison, Humic, Ethridge, Big Rose, Devon-Dunkirk, Cut Bank, Shelby South and Oilmont/Galata/Nine Mile from the Master Meter.

15. Permit 41P 30117451 together with Change Authorizations 41P 30114262 and 41P 30116656 shall be subject to the following conditions, limitations or restrictions upon issuance:

1) WATER MUST NOT BE DIVERTED PURSUANT TO PERMIT 41P 30117451 AND CHANGE AUTHORIZATIONS 41P 30116656 AND 41P 30114262 TO ANY INDIVIDUAL PLACE OF USE AUTHORIZED IN SAID CHANGE AUTHORIZATIONS UNTIL A REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING AT THE SPECIFIED METER LOCATION CORRESPONDING TO THE PARTICULAR PLACE OF USE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPERLY FUNCTIONING CONDITION SO THAT THE VOLUMES ARE ACCURATELY MEASURED.

2) ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL RECORD MONTHLY VOLUME OF ALL WATER INDIVIDUALLY METERED AT EACH METER LOCATION. THE VOLUME OF WATER AT EACH OF THE METER LOCATIONS SHALL NOT EXCEED THE FOLLOWING AMOUNTS EXPRESSED IN ACRE FEET:

	Shelby Master Meter	Cut Bank Meter	Prison, Humic, Ethridge, Big Rose, Devon-Dunkirk, Shelby South and Oilmont/Galata Nine Mile Meter Locations
January 1 -April 30	411.70	124.48	164.00
May 1 -October 31	839.00	261.42	318.82
November 1 -December 31	205.80	62.24	81.98
Total	1456.50	448.10	564.80

3) RECORDS SHALL BE SUBMITTED MONTHLY AND A SUMMARY PROVIDED BY JANUARY 31 OF EACH YEAR TO THE DEPARTMENT’S WATER RESOURCES HAVRE REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THIS CHANGE AUTHORIZATION.

16. There is no change in the historic timing of diversion or source aquifer. The source aquifer for the for the three replacement wells is also not changing. Therefore, there will not be an adverse effect resulting from the proposed change in points of diversion or place of use. The Applicant will operate all points of diversion associated with their municipal water rights as they

have operated historically. The Department finds that the diverted volume for the historic municipal use is 100% consumed.

17. The seasonal and daily timing of diversions from the source aquifer would remain the same as historic diversion. Additional amounts of water necessary to sustain the additional places of use will be obtained from the issuance of Permit 41P 30117451. No adverse effect will be experienced by other water users because the historical diverted flow rate and volume of existing water rights under this proposed change will not be exceeded.

18. There is no adverse effect to existing water users from the continuation of using these municipal water rights and permits. The amount of water that is diverted by the City of Shelby will be measured and recorded as part of the agreement the City has with each community.

19. Currently, a master water meter that measures all water diverted from the well field is located near the storage tank on the south side of Shelby. Other water meters maintained by the Applicant measures or will measure water going to the service areas proposed in this application.

20. Based on the analysis comparing the Applicant's historical municipal use to the proposed new municipal use, the Department finds that proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons, other perfected or planned uses, developments for which a permit or certificate has been issued, or for which a state water reservation has been issued when a condition to measure and report the Applicant's water use to the Department is applied as described more fully in the Preliminary Determination section of this document.

Beneficial Use

21. The Applicant proposes to use water for municipal use. Municipal use is defined as a beneficial use of water pursuant to §85-2-102(5)(a), MCA.

22. There are three new permanent points of diversion for the three replacement wells (new well # 2,4, and 6). The temporary place of use is the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony, the City of Cut Bank, Oilmont, Nine Mile and Galata for a ten year period. This change temporarily expands the service area and modifies points of diversion to the City's municipal

water service area which includes nearby communities which need a reliable source of good quality water. The need exists to provide a critical and reliable water source to multiple communities until the North Central Montana Regional Water Authority (NCMRWA) is operational.

23. The Department determined through previous change authorizations (41P 30072725 and 41P 3007276) that the Applicant may temporarily change the place of use so that water historically used within the City of Shelby could serve the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony and the City of Cut Bank.

24. The additional demands for the Oilmont, Galata and Nine Mile systems were determined based from existing flow demands and estimated future demands. Estimated average daily use was determined by participating water systems to be purchased from the NCMRWA daily.

25. The calculations provided by the Applicant of water demands assumes that household and animal units will remain the same as proposed in previous water right change authorizations issued by the Department for the areas served by the Applicant. Household use was calculated based on 100 gallons per capita and 2.5 persons per homes.

Adequate Diversion

26. The proposed appropriation will utilize the following new wells: Well #2 (Groundwater Information Center (GWIC) # 87581, Well #4 (GWIC # 87576) and Well #6 (GWIC # 225363) which will be utilized in manifold with ten existing wells located in the wellfield. The wells were drilled by multiple licensed well drillers in accordance with MCA Title 37, Chapter 43 and ARM Title 36, Chapter 21.

27. The Applicant provided a copy of an engineering report from KLJ Engineering which summarized the existing water system in addition to descriptions of upgrades to the UV Treatment Plant that can treat from 1,750 GPM to 3,820 GPM.

28. Water will be measured at multiple points throughout the City's transmission and pipeline systems. Water use to each community served in the proposed service area will be metered. A master water meter that meters all diverted flow is located on the south end of Shelby.

29. The Applicant will record daily water use, peak flow rates, and totalized monthly and annual volumes for the total diverted flow. The total monthly volume will be metered and recorded to each community in the proposed service area and for residential use in the City of Shelby. Service area water is tracked for water use agreement purchases.

30. Water is to be pumped from all points of diversion according to their individual pumping schedules. From the clear well or manifold collection point, four booster pumps pump the water through the water treatment system where it is disinfected. From the treatment plant, water is pumped to the south side of Shelby and the volume is recorded at the location of the master water meter. From here, water is pumped through the aid of several booster pump to the south tank, airport tank, shop tank, and prison tank. Check valves are located along the lines at selected locations to prevent backflow. Water meters are located at selected locations and will record the amount of water distributed the Prison, Ethridge, Big Rose Colony, Cut Bank, Shelby South, Devon, Oilmont, Galata and Nine Mile.

31. The system serving the Prison includes three booster pumps that deliver water from the City's water tank on the south side of Shelby to the prison via a 12-inch PVC line. A 500,000 gallon water tank stores water at the prison. A water meter exists at the prison near the water tank. A 12-inch PVC line extends north from the prison to serve Ethridge and Cut Bank.

32. The Ethridge service area is served from a 4-inch main line that is connected to the 12-inch waterline extending north from the prison. Water distribution lines within the Ethridge service area also include 1, 2, and 3-inch lines. An existing water pipeline extends north of Shelby to Big Rose Colony. The pipeline was constructed in 2004 and water use is metered by the Applicant. The water meter is located where the system connects to the Applicant's pipeline on the north side of Shelby.

33. Segment WS, Shelby to Sweetgrass will be the pipeline used to convey water from Shelby to Nine Mile, Galata, and Oilmont. Segment WS will start in Shelby and will be installed north using 12-inch pipe. As the pipe heads north, it will connect to a proposed standpipe and continue north until reaching the proposed pump station near Sunburst. At the Sunburst pump station, the water supply will be split between an 8-inch water main heading to the west and an 8-inch water

main the East that will connect to the Nine Mile and Oilmont systems. This segment will include two booster stations and two storage tanks.

34. The proposed Nine Mile system will consist of approximately 63 miles of HDPE pipe that will feed the local area.

35. The Galata system design consists of four pressure zones and three booster stations. The distribution system consists of approximately 171 miles of pipe varying in size from 1-inch to 12-inch. Most of the system will consist of 1.25-inch pipe to 6-inch pipe. The segment W-5 will provide direct water into the distribution system.

36. The Oilmont system design is approximately 132 miles of pipe varying in sizes from 2 to 6 inches. The system will consist of three pressure zones with two pressure reducing valves. The current water supply comes from the White Spring and Daisy Spring supply water wells located on the north end of the system.

37. The system is designed by a professional engineer from KLJ Engineering and shall be approved by the Department of Environmental Quality as a public water supply system prior to operation.

A. Possessory Interest

38. These applications are for supply of water to the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony, City of Cut Bank, Oilmont, Galata and the Nine Mile system. The Applicant has established water service agreements through contracts and have provided copies to the Department. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802.

III. CONCLUSIONS OF LAW

A. Historic Use and Adverse Effect

39. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an

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

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

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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

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

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).

³A Statement of Claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The Statement of 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

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

42. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g.*, Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

43. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 42-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates

⁵ The Montana Supreme Court 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).

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).

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

46. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the

location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986.

47. Accordingly, the Applicant was required to prove the historic consumptive use by a preponderance of the evidence for each of the water rights being changed. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

48. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence for each of the water rights being changed that the historic municipal use totals 2,895.00 GPM up to 1,124.90 AF annually, as represented in the following table (FOF 3-8):

Water Right No. (41P)	Well No.	Priority Date	Source	Flow Rate (GPM)	Period of Use	Historic Per Capita pre-1973 (AF)
192878	2	10/1/1946	Groundwater	300.00	Year-Roun	234.35
192880	4	10/12/1946	Groundwater	300.00	Year-Roun	234.35
192881	5	12/26/1963	Groundwater	350.00	Year-Roun	234.35
192882	6	12/26/1963	Groundwater	250.00	Year-Roun	234.35
192877	1	6/6/1940	Groundwater	241.00	May 1 -Oct	93.74
192879	3	7/7/1939	Groundwater	158.00	May 1 -Oct	93.74
4489	7	12/26/1974	Groundwater	240.00	Year-Roun	0.00
4490	8	12/26/1974	Groundwater	111.00	Year-Roun	0.00
58129	9 through 13	6/10/1985	Groundwater	945.00	Year-Roun	0.00
				2895.00		1124.90

49. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(a), MCA. (FOF 9-20)

Beneficial Use

50. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

51. The Applicant proposes to use water for municipal use which is a recognized beneficial use. §85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence municipal is a beneficial use and that 2,690.00 GPM for a total volume up to 1124.9 AF is the amount needed to sustain the beneficial use (FOF 21-25).

Adequate Means of Diversion

52. 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).

53. 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 26-37)

Possessory Interest

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

55. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF 38)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Applications to Change Water Right No. 41P 30114262 and 41P 30116656 should be GRANTED.

The Department determines that the Applicant may divert groundwater a total of 2,690 GPM and up to 1124.9 AF. The points of diversion are thirteen wells that are between 32 feet and 49 feet deep in SW ¼ of Section 21, Township 31 North, Range 2 West for municipal use from January 1 through December 31 and shall include three new permanent points of diversion for the three replacement wells (new well # 2,4, and 6). The temporary place of use is the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony, the City of Cut Bank, Oilmont, Nine Mile and Galata for a ten year period (*See application file for more specific legal land descriptions*).

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

Permit 41P 30117451 together with Change Authorizations 41P 30114262 and 41P 30116656 shall be subject to the following conditions, limitations or restrictions upon issuance:

- 1) WATER MUST NOT BE DIVERTED PURSUANT TO PERMIT 41P 30117451 AND CHANGE AUTHORIZATIONS 41P 30116656 AND 41P 30114262 TO ANY INDIVIDUAL PLACE OF USE AUTHORIZED IN SAID CHANGE AUTHORIZATIONS UNTIL A REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING AT THE SPECIFIED METER LOCATION CORRESPONDING TO THE PARTICULAR PLACE OF USE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPERLY FUNCTIONING CONDITION SO THAT THE VOLUMES ARE ACCURATELY MEASURED.

- 2) ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL RECORD MONTHLY VOLUME OF ALL WATER INDIVIDUALLY METERED AT EACH METER LOCATION. THE VOLUME OF WATER AT EACH OF THE METER LOCATIONS SHALL NOT EXCEED THE FOLLOWING AMOUNTS EXPRESSED IN ACRE FEET:

	Shelby Master Meter	Cut Bank Meter	Prison, Humic, Ethridge, Big Rose, Devon-Dunkirk, Shelby South and Oilmont/Galata Nine Mile Meter Locations
January 1 -April 30	411.70	124.48	164.00
May 1 -October 31	839.00	261.42	318.82
November 1 -December 31	205.80	62.24	81.98
Total	1456.50	448.10	564.80

3) RECORDS SHALL BE SUBMITTED MONTHLY AND A SUMMARY PROVIDED BY JANUARY 31 OF EACH YEAR TO THE DEPARTMENT’S WATER RESOURCES HAVRE REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THIS CHANGE AUTHORIZATION.

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 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, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 21st day of December 2020.

Matt Miles, Regional Manager
Havre Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 21st day of December 2020, by electronic mail.

ABIGAIL ST. LAWRENCE
ATTORNEY AT LAW
(406) 797-7220
PO BOX 2019
HELENA, MT 59624
ABIGAIL@STLAWRENCELAWFIRM.COM

Havre Regional Office, (406) 265-5516