

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

**APPLICATION TO CHANGE WATER RIGHT)
NO. 41B 30123390 by ROBERT AND)
DOROTHY MEINE REVOCABLE TRUST)** **PRELIMINARY DETERMINATION TO
GRANT CHANGE**

On April 5, 2019, the Robert and Dorothy Meine Revocable Trust (Applicant) submitted Application to Change Water Right No. 41B 30123390 to change Statement of Claim (Claim) 41B 88648-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated October 2, 2019. The Applicant responded with information dated December 30, 2019. A preapplication meeting was held between the Department and the Applicant on April 5, 2019. The Application was determined to be correct and complete as of September 28, 2022. The Applicant submitted a waiver of the timelines per §85-2-307, MCA on November 7, 2022. The Applicant submitted an amendment to the application on February 7, 2023, to add Claim 41B 88661-00 to the change, which reset timelines. The Department sent the Applicant a second deficiency letter under §85-2-302, (MCA), dated April 25, 2023. The Applicant responded with information dated August 23, 2023. The amended application was deemed correct and complete as of December 19, 2023. An Environmental Assessment for this application was completed on April 5, 2024.

INFORMATION

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

Application as filed:

- IRRIGATION Application for Change of Appropriation Water Right, Form 606-IR
- Addenda:
 - Change in Purpose Addendum, Form 606-PA
 - Change in Place of Storage Addendum, Form 600-PSA
- Attachments:
 - Meine Trust Agreement dated October 25th, 2007.

- Memorandum of Agreement between Peter Gaasch and Robert Meine dated September 9th, 1981.
- Series of undated maps and aerial photos depicting historical and proposed uses
- Photos of reservoir for proposed use
- Flow measurements taken between May and August of 2018, including site photos.
- Montana Sage Grouse Habitat Conservation Program letter dated October 6, 2016.

Information Received after Application Filed

- Deficiency Response received December 30, 2019
- Amendment to Application, received February 7, 2023, including additional Statement of Claim 41B 88661-00
- Deficiency Response to Amended Application, received August 23, 2023
- Letter from Matt Jaeger, MT DFWP Hydropower, Native Species & Beaverhead-Ruby Program Manager, dated January 3, 2024

Information within the Department's Possession/Knowledge

- Aerial photo CXM-6FF-171, dated August 18, 1965
- Aerial photo 779-246, dated September 17, 1979
- Surface Water Change Report by Jack Landers, DNRC Groundwater Hydrologist, dated July 21, 2023
- Department Technical Report by Russ Gates, DNRC Hydrologist/Water Resource Specialist, dated December 19, 2023
- USGS Streamstats Streamflow Estimation reports, dated March 4, 2024
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.
 - DNRC Return Flow Memo dated April 1, 2016
 - DNRC Consumptive Use Methodology Memo dated March 17, 2010

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

For the purposes of this document, Department of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the point of diversion, place of use, purpose, and add storage to Statement of Claim (Claim) Nos. 41B 88648-00 and 41B 88661-00 in this Application.

Claim 41B 88648-00 is filed for 1.33 CFS flow rate from Sheep Creek via a dike and culvert for the purpose of flood irrigation of 35 acres. The period of use and period of diversion are March 20 to October 10. The point of diversion is located in the SESWSE of Section (S) 24, Township (T) 8 South, Range (R) 9 West, Beaverhead County, and water is applied directly to the place of use at the point of diversion.

Claim 41B 88661-00 is filed for livestock drinking directly from Sheep Creek with no decreed flow rate or volume and a total of 1100 animal units. The period of use and period of diversion are January 1 to December 31. The point of diversion and place of use are located in the SWSENE of S14, T10S, R9W, Beaverhead County.

Table 1: Water Rights Proposed for Change

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion	Priority Date
41B 88648-00	1.33 CFS	N/A	Irrigation	3/20 – 10/10	S2S2 S24 T8S R9W	SESWSE S24 T8S R9W	7/31/1881
41B 88661-00	N/A	N/A	Stock	1/1 – 12/31	SWSENE S14 T10S R9W	SWSENE S14 T10S R9W	4/1/1900

CHANGE PROPOSAL

FINDINGS OF FACT

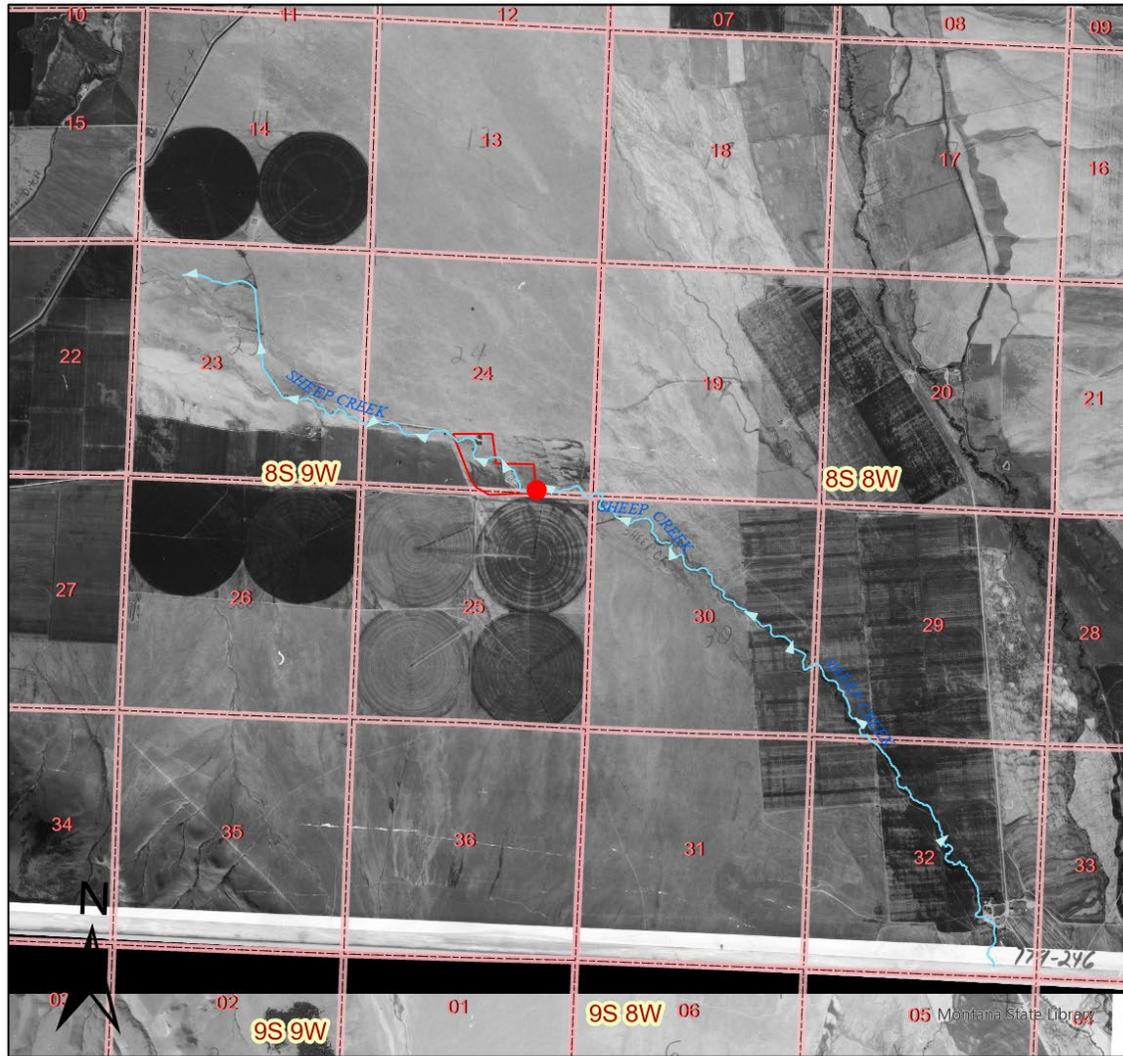
2. The Applicant proposes to change the point of diversion, place of use, purpose, and to add storage to Claim 41B 88648-00. Under the proposed change, 35 acres of land in the S2S2 S24, T8S, R9W, Beaverhead County, will no longer be irrigated from Sheep Creek. The Applicant also proposes to change the point of diversion, place of use, purpose, and to add storage to Claim

41B 88661-00. Under the proposed change, 1100 head of livestock will no longer drink from a spring in the SWSENE S14, T10S, R9W, Beaverhead County. The proposed use is to divert water from Sheep Creek with a dam to fill a reservoir for the purpose of Fishery approximately 12 miles upstream from Claim 41B 88648-00 and roughly at the location of claim 41B 88661-00 in the W2SENE S14, T10S, R9W, Beaverhead County. The spring from Claim 41B 88661-00 will be located under the proposed reservoir once it is filled. After this change, the Applicant will appropriate 36.9 AF under Claim 41B 88648-00 and 5.7 AF under Claim 41B 88661-00. The proposed period of use is January 1 through December 31. Maps 1, 2, and 3 show elements of the proposed change.

Map 1: Historical Use for Claim 41B 88648-00

Department of Natural Resources and Conservation

41B 88648 Historic Use



0 0.3 0.5 1 Miles

-  HistoricPOD
-  Sheep_Creek
-  Historic POU
-  Section
-  Township & Range

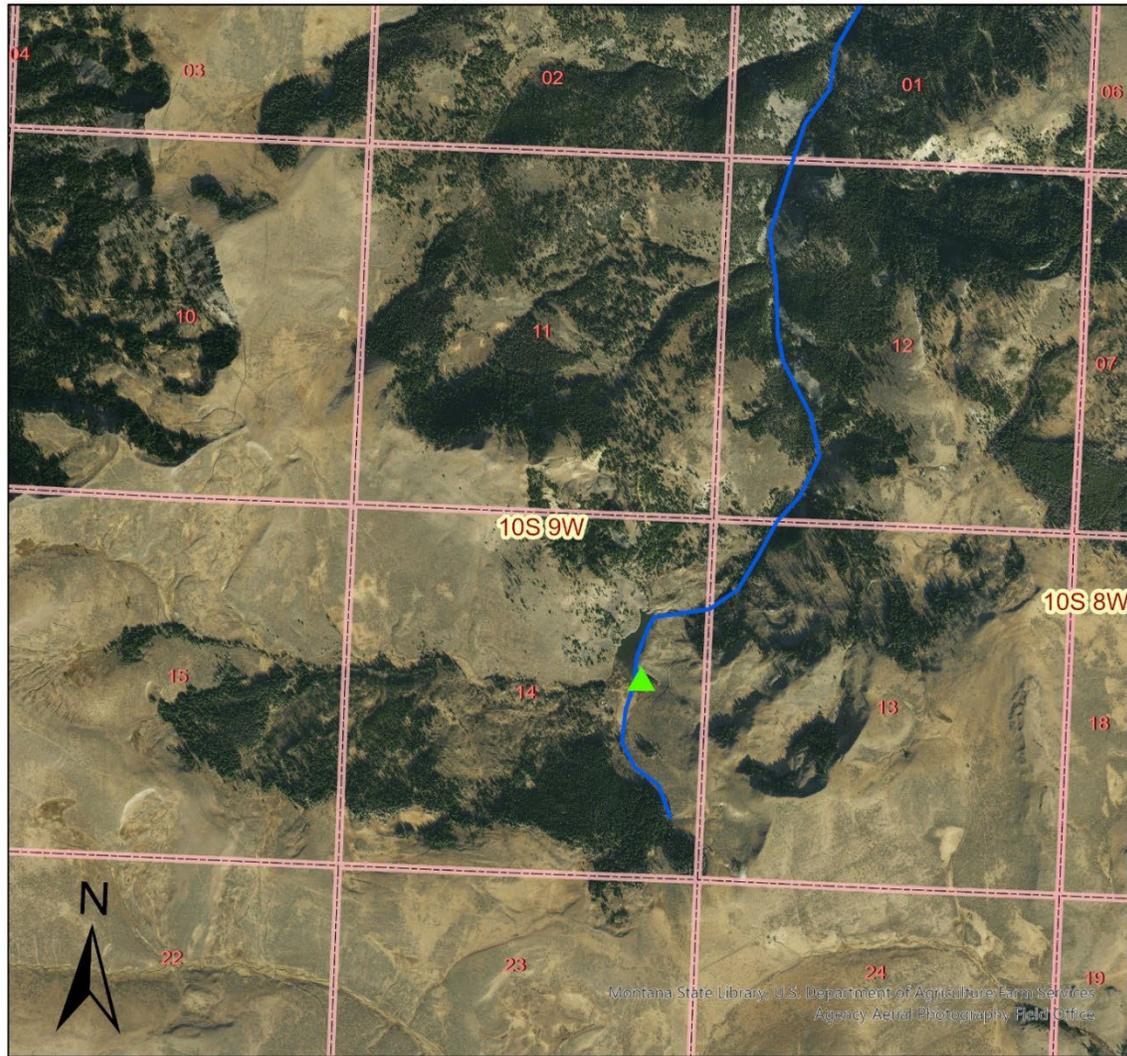
Image
Value
High : 255
Low : 0



Map 2: Historical Use for Claim 41B 88661-00

Department of Natural Resources and Conservation

41B 88661 Historic Use



0 0.1 0.3 0.6 Miles

-  Historic POD
-  SheepCreek
-  Section
-  Township & Range



Map 3: Proposed Use for Both Claims

Department of Natural Resources and Conservation

41B 88648 and 41B 88661 Proposed Use



0 0.1 0.3 0.6 Miles

-  Proposed POD
-  Sheep Creek
-  Proposed POU
-  Section
-  Township & Range



CHANGE CRITERIA

3. The Department is authorized to approve a change if the Applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. *Matter of Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an Applicant's burden to prove change criteria by a preponderance of evidence is "more probable 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.

4. 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*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

Claim 41B 88648-00

5. Irrigation Claim 41B 88648-00 has a priority date of July 31, 1881. The decreed historical place of use for Claim 41B 88648-00 is 35 acres in the S2S2 S24, T8S, R9W, Beaverhead County. The Applicant submitted an affidavit dated July 8, 2023, describing how he and his family irrigated the historical place of use. The affidavit describes the 35-acre place of use proposed for change in this application as pasture that was primarily irrigated in the spring and early summer unless water was also available later in the year. Because of this early irrigation and the fact that this land was not hayed, distinct field boundaries are not typically visible later in the year when most historical photos for this area were taken. The Beaverhead County WRS Survey was not completed or published, and WRS aerial photos for this area were taken late in the year when irrigation was likely to be limited. Aerial photo CXM-6FF-171, dated August 18, 1965, shows the historical place of use with slightly darker shading than the surrounding fields. Aerial photo 779-246, dated September 17, 1979, shows water being spread across the historical place of use in a series of ditches. The Department finds that the Applicant's explanation of the lack of distinct field boundaries or evidence of harvesting in conjunction with the nature of pasture irrigation and the late season aerial imagery, along with clear evidence of water in ditches in the 1979 aerial photo, sufficiently corroborates the claimed 35 acres of historical irrigation.

6. The Applicant submitted flow measurements for Sheep Creek taken at the mouth of the Canyon, approximately 5 miles upstream from the historical POD, found in Table 1 below. Measurements were taken by Richard Nordquist, retired agricultural engineer with the Natural Resources Conservation Service (NRCS). These estimates support the historical availability of the decreed 1.33 CFS diverted flow rate for Claim 41B 88648-00.

Table 2: Flow Measurements for Sheep Creek at the Mouth of the Canyon

5/22/2018	41.08 CFS
6/5/2018	9.81 CFS
6/20/2018	17.00 CFS
7/3/2018	7.70 CFS
7/23/2018	5.85 CFS
8/10/2018	4.65 CFS

7. The Applicant elected to use the methodology set forth in ARM 36.12.1902 for the Historic Use analysis for irrigation claim 41B 88648-00. The historical place of use is located in Beaverhead County approximately 6 miles south of Dillon. Per the IWR values listed under ARM 36.12.1902, the seasonal evapotranspiration (ET) for this area based on the Dillon weather station is 18.34 inches for flood, wheel line, and hand line irrigation. The management factor for Beaverhead County for pre-July 1, 1973, uses is 63.7%. The Applicant described contour ditch irrigation, and evidence of a series of ditches in historical aerial photos supports this claim. The Department utilized the efficiency value of 60% corresponding to contour ditches with a design slope of 0.75% from the list of on-farm efficiency values in the DNRC Historic Diverted Volume Memo dated September 13, 2012.

Table 3: Historically Consumed Volume (HCV) and Field Application Volume for the Historical Place of Use for Claim 41B 88648-00

Beaverhead County Flood Irrigation ET (inches)	Historical Management Factor %, Beaverhead County	Historically Irrigated Acres	HCV (Excluding IL) (AF)	On- Farm Efficiency %	Field Application Volume (AF)	Historical Irrecoverable Losses (IL): Flood, 5%	HCV (Including IL) (AF)
18.34	63.7	35.0	38.8	60	56.8	2.8	36.9

8. The historical point of diversion was decreed in the SESWSE S24, T8S, R9W, Beaverhead County. Water was diverted from Sheep Creek with a dike into contour ditches within the place of use adjacent to the stream, therefore no conveyance losses are associated with the historical use of this claim. The decreed flow rate is 1.33 CFS. The Applicant describes the use of a 2 ft. diameter culvert in addition to a dike. A 2 ft. diameter culvert can pass roughly 3 CFS per

1 foot per second of flow velocity, and the Applicant listed the capacity as 5 CFS. The Department finds that the claimed historical diversion was capable of diverting the decreed flow rate.

9. The decreed period of diversion is March 20 to November 14, and the decreed period of use is March 20 to November 10. This appears to be a DNRC coding error as the period of diversion and period of use were both amended during the adjudication process to March 20 to November 14. The Applicant describes irrigating from Sheep Creek as early as mid-March as soon as frost was off the ground and as late as early November, and that the historical place of use could be flooded 4 or 5 times throughout the season when water was available.

10. The historically diverted volume for Claim 41B 88648-00 is the same as the field application since there are no conveyance losses associated with this use.

Table 4: Historically Diverted Volume of Claim 41B 88648-00

Water Right Number	Field Application Volume	Conveyance Loss Volume	Historically Diverted Volume
41B 88648-00	56.8 AF	n/a	56.8 AF

11. The Department finds the following historical use for Claim 41B 88648-00, as shown in Table 5 below.

Table 5. Summary of Historical Use Findings for Claim 41B 88648-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
41B 88648-00	July 31, 1881	56.8 AF	1.33 CFS	35.0	36.9 AF	S2S2 S24 T8S R9W	SESWSE S24 T8S R9W

Claim 41B 88661-00

12. The decreed period of use and period of diversion for Claim 41B 88661-00 is January 1 to December 31. The decreed point of diversion and place of use are in the SWSENE S14, 10S, R9W, Beaverhead County. WRS aerial photo CXM-6FF-160, dated August 18, 1965, shows evidence of a spring in the claimed location. The Applicant states that up to 1100 head of cattle were pastured in this area and utilized the spring dependent on the seasonal conditions.

13. No flow rate was decreed for Claim 41B 88661-00 since the means of diversion was Livestock Direct from Source. The historical flow rate would be based on the maximum number

of animal units or 1100 x 30 gallons per day per animal unit, divided by 1440 minutes per day to get 22.9 gallons per minute.

14. The historical consumptive volume would be 1100 animal units x 0.017 AF/animal unit, or 18.7 AF per year. The historical diverted volume would also be 18.7 AF per year since the means of diversion was Livestock Direct from Source.

15. The Department finds the following historical use for Claim 41B 88661-00, as shown in Table 6 below.

Table 6: Summary of Historical Use Findings for Claim 41B 88661-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Use	Place of Use	Point of Diversion
41B 88661-00	April 1, 1900	18.7 AF	22.9 GPM	Stock, 1100 animal units	18.7 AF	SWSENE S14 T10S R9W	SWSENE S14 T10S R9W

16. The Department finds the following historical use for both claims involved in this change, as shown in Table 7 below.

Table 7: Summary of Historical Use Findings for Claims 41B 88648-00 and 41B 88661-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Use	Place of Use	Point of Diversion
41B 88648-00	July 31, 1881	56.8 AF	1.33 CFS	Irrigation, 35.0 acres	36.9 AF	S2S2 S24 T8S R9W	SESWSE S24 T8S R9W
41B 88661-00	April 1, 1900	18.7 AF	22.9 GPM	Stock, 1100 animal units	18.7 AF	SWSENE S14 T10S R9W	SWSENE S14 T10S R9W

ADVERSE EFFECT

FINDINGS OF FACT

17. The proposed use under this change is an on-stream fishery reservoir with a dam on Sheep Creek in the NWSENE S14, T10S, R9W, Beaverhead County. The reservoir will have a surface area of 8.19 acres and a maximum depth of 10 ft. The proposed reservoir volume is calculated using the Department methodology for estimating reservoir capacity, or 8.19 acres surface area x 10 ft. depth x 0.4 for a total fill volume of 32.8 AF. The proposed volume for the reservoir will also include evaporation, based on the Department methodology utilizing the Gridded Monthly NetEvap values for the location of the proposed reservoir as seen in Table 8 below.

Table 8: Gridded Monthly NetEvap

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual (inches)	Annual (feet)
Net Evaporation	0.0	0.0	0.08	0.15	0.00	0.47	1.41	4.42	4.06	2.75	0.84	0.26	14.44	1.2

The total annual evaporation from the proposed reservoir would be 8.19 acres x 1.2 ft/acre/year, or 9.8 AF. The total proposed diverted volume is the fill volume plus evaporation, or 42.6 AF per year. Flow rates are not calculated for on-stream reservoirs; therefore, no flow rate will be issued for the proposed use since the dam is the primary diversion and no secondary diversions are proposed. Since the proposed use is within the pond itself, the consumptive volume is the same as the fill volume plus evaporation. The Department finds that the proposed diverted volume and proposed consumptive volume are 42.6 AF.

18. The Technical Report incorrectly apportioned the proposed diverted and consumed volumes for the individual claims. The calculations found below represent the correct apportionment between the two claims. The total historical consumptive use for both claims proposed for change is 55.6 AF. The proposed total consumptive use for the proposed change is 42.6 AF, which is 13.0 AF less than the total historical consumptive use. The historical consumptive use for Claim 41B 88648-00 is 36.9 AF, and the historical consumptive use for Claim 41B 88661-00 is 18.7 AF. Irrigation Claim 41B 88648-00 will provide all of the 32.8 AF fill volume and 4.1 AF of evaporation, for a proposed consumptive use and diverted volume for this claim of 36.9 AF. Stock Claim 41B 88661-00 will provide the remaining 5.7 AF of consumptive use and diverted volume to account for the remainder of the evaporative losses. The individual proposed consumptive volumes for each water right proposed for change are found in Table 9 below. The proposed diverted volume and consumed volume are the same since there are no conveyance losses associated with the proposed use.

Table 9: Total Individual Proposed Diverted and Consumed Volumes

Water Right	Evaporative DV (AF)	Fill DV (AF)	Total (AF)
41B 88648	4.1	32.8	36.9
41B 88661	5.7	0.0	5.7

19. The period of diversion for Claim 88648-00 is March 20 to November 14. The USGS Streamstats monthly flow estimates for Sheep Creek at the location of the proposed dam indicate that peak flows of approximately 4.5 CFS and 5 CFS occur in May and June, respectively. At a flow rate of 4.5 CFS, the reservoir fill volume of 32.8 AF would be reached in just under 4 days ($4.5 \text{ CFS} \times 1.983 \text{ AF/day/1 CFS} = 8.9 \text{ AF per day}$, $32.8 \text{ AF}/8.9 = 3.7 \text{ days}$). Once the reservoir fills during runoff in the spring, additional inflows will continue to flow downstream and will be available to other users on Sheep Creek. Based on these estimates, the 32.8 AF required to fill the reservoir will be met within the period of diversion for Claim 88648-00, as well as the additional 4.1 AF of volume required under this claim to cover a portion of the evaporative losses. The period of diversion for Claim 41B 88661-00 is January 1 through December 31, therefore the remaining 5.7 AF of evaporative losses covered under this claim will fall within the historical period of diversion as well.

20. The Department Surface Water Change Report by Jack Landers, Groundwater Hydrologist, identified Blacktail Deer Creek and Poindexter Slough as the receiving sources of return flows from irrigation on the historical place of use. This report identified the monthly volumes that accrued under historical practices for each source. The Department Technical Report identified a list of water rights on Blacktail Deer Creek and Poindexter Slough that could potentially be affected by a loss of return flows. While the proposed use in this change will result in a reduction of 19.9 AF of return flows to these sources associated with the 35 acres of historical use under Claim 41B 88468-00, 61 acres including all of the historical place of use continues to be irrigated under Provisional Permit 41B 24930-00, with a flow rate of 600 GPM, a volume of 140.8 AF, and a period of use of April 15 to October 1. The Applicant states that flow in Sheep Creek became less reliable at the historical point of diversion as upstream irrigation use began to convert to sprinkler irrigation after 1973, therefore a well was drilled and groundwater permit 41B 24930-00 was issued March 21, 1980, to irrigate 80 acres. The Department identified 61 acres of current irrigation under this permit, resulting in return flows to Blacktail Deer Creek and Poindexter Slough of approximately 24.9 AF based on an estimated applied volume of 124.2 AF and an estimated consumed volume of 99.3 AF. The place of use continues to be irrigated under this permit, resulting in the continuation of return flows to Blacktail Deer Creek and Poindexter Slough, in excess of historic return flows. The Department finds that no adverse effect to users on the identified sources where return flows historically accreted will occur.

21. The Applicant proposes to move the point of diversion approximately 12 miles upstream from the historical location for claim 41B 88468-00. The Department Technical Report, by Russ

Gates, Hydrologist/Water Resources Specialist, identified 8 water rights below the proposed diversion on Sheep Creek. One senior right (41B 30132489) for Livestock Direct from Source is located between the historic and proposed diversion for Claim 41B 88648-00, The proposed reservoir is on-stream, and the amount of water that can be diverted is limited by the capacity of the reservoir and evaporation, or 42.6 AF. Once the fill volume of 32.8 AF and evaporative losses of 9.8 AF have been reached, excess water flowing into the reservoir will continue to flow down Sheep Creek either as overflow or seepage. Seepage from the reservoir will resurface and continue to flow down Sheep Creek beginning approximately 200 yards below the dam. The next user on Sheep Creek below the dam is approximately 4 miles downstream. Any water not used to fill the reservoir or account for evaporation will continue to flow down Sheep Creek by accreting upstream of the intervening users.

22. The Department finds that the proposed change will not adversely affect other users. The proposed diversion is not capable of diverting more than the proposed volume of 42.6 AF. The proposed combined diverted volume of 42.6 AF is 32.9 AF less than the historic combined diverted volume of 75.5 AF, and the proposed combined consumptive volume of 42.6 AF is 13.0 AF less than the historic combined consumptive volume of 55.6 AF. By leaving 32.9 AF of historically diverted volume in the source of supply, the Applicant will not adversely affect senior intervening Claim 41B 30132489 for Livestock Direct from Sheep Creek by moving the proposed POD upstream.

BENEFICIAL USE

FINDINGS OF FACT

23. The proposed purpose for both claims involved in this change is for a fishery pond. The pond is an on-stream reservoir with a capacity of 32.8 AF and an annual net evaporation of 9.8 AF. The proposed diverted volume is the capacity plus evaporation, or 42.6 AF. A letter from Montana Fish, Wildlife, and Parks Hydropower, Native Species & Beaverhead-Ruby Program Manager Matt Jaeger, dated January 3, 2024, states that the pond is a benefit to the wild fishery. The pond allows wild fish to persist year-round in the upper reaches of Sheep Creek when they would otherwise be eliminated in drought years. The pond also allows fish to survive through the winter and to recolonize reaches of Sheep Creek that may go dry during periods of low flow.

24. The Department finds that the purpose of Fishery and the diverted volume of 42.6 AF is a beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

25. The diversion is an existing dam on Sheep Creek with an overflow outlet and an emergency spillway. The proposed surface area corresponds to measurements taken by the Department utilizing GIS and aerial photos. The proposed capacity of 32.8 AF corresponds to the standard methodology for estimating reservoir capacity utilized by the Department. Once the reservoir is full, excess inflows pass through and continue into Sheep Creek. Stored water seeps out from the reservoir and begins to surface in Sheep Creek approximately 200 yards below the dam.

26. The Department finds that the proposed diversion is adequate for the proposed use.

POSSESSORY INTEREST

FINDINGS OF FACT

27. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

28. The historical place of use for Claim 41B 88468-00 currently consists of 5 lots – Lots 1-3 and 6.46-acre Remainder of Meine Minor Subdivision, and Tract A of COS 780. Deeds in the file show that Claim 41B 88468-00 was withheld from the property transfer when the Applicant sold Lot 1, Lot 3, and Tract A. Cadastral records indicate that Lot 2 is owned by Richard and Sadie Blake and the 6.46 Remainder lot is owned by Bobbie Mussard and Richard and Sadie Blake. A notarized affidavit in the file includes signed statements by both Bobbie Mussard and Richard and Sadie Blake indicating their consent to the proposed changes for Claim 41B 88648-00.

HISTORICAL USE AND ADVERSE EFFECT

29. 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*, ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied).¹

30. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11, 103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.²

31. 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*, ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

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).

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*, ¶ 44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); *Matter of Application For Beneficial Water Use Permit By City of Bozeman, Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

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

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

32. 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*, ¶ 44; *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *Popham v. Holloron*, 84 Mont. 442, 275 P. 1099, 1102 (1929); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909); *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731; *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; 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

33. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. *Royston*, 249 Mont. at 431, 816 P.2d at 1059-60; *Hohenlohe*, at ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There

not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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).

35. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. 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.

36. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In *McDonald v. State*, the Montana Supreme Court explained:

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

unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; *see also Matter of Clark Fork River Drainage Area*, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

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

38. 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; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

39. The Department has adopted a rule providing for the calculation of historic consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No. 7).

40. If an Applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g.*, *Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to*

Change Water Right No. 41H 1223599 by MGRR #1, LLC.; 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”).

41. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 41B 88468-00 to be a diverted volume of 56.8 AF, a historically consumed volume of 36.9 AF, and flow rate of 1.33 CFS. (FOF Nos. 5-11)

42. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 41B 88661-00 to be a diverted volume of 18.7 AF, a historically consumed volume of 18.7 AF, and flow rate of 22.9 GPM. (FOF Nos. 12-16)

43. 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. Section 85-2-402(2)(b), MCA. (FOF Nos. 17-22)

BENEFICIAL USE

44. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. 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 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (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).

45. Applicant proposes to use water for a fishery which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence a Fishery is a beneficial use and that 42.6 acre-feet of diverted volume of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 23-24).

ADEQUATE MEANS OF DIVERSION

46. 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).

47. Pursuant to § 85-2-402 (2)(b), MCA, Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 25-26)

POSSESSORY INTEREST

48. 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.

49. 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 Nos. 27-28).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41B 30123390 should be GRANTED subject to the following.

For Claim 41B 88648-00, the Applicant is authorized to change the purpose to Fisheries by retiring 35 acres of flood irrigated land in the S2S2 S24, T8S, R9W, Beaverhead County, and change 36.9 AF of historically diverted volume from Sheep Creek to supply an on-stream fishery pond in the W2SENE S14, T10S, R9W, Beaverhead County.

For Claim 41B 88661-00, the Applicant is authorized to change the purpose to Fisheries by discontinuing livestock use of a spring in the SWSENE S14, T10S, R9W, Beaverhead County, and change 5.7 AF of historically diverted volume from the spring to supply an on-stream fishery pond in the W2SENE S14, T10S, R9W, Beaverhead County.

NOTICE

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

DATED this 8th day of April, 2024.

/Original Signed by Jennifer Daly/
Jennifer Daly, Manager
Helena 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 8th day of April, 2024, by first class United States mail.

ROBERT & DOROTHY MEINE REVOCABLE TRUST
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