

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

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<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 40C 30160642 by R &amp; S GOFFENA ) RANCH, INC. )</b>	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On May 30, 2023, R & S Goffena Ranch, Inc. (Applicant) submitted Application to Change Water Right No. 40C 30160642 to change Statements of Claim Nos. 40C 30154264 and 40C 215290-00 to the Lewistown 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 Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), September 5, 2023. The Applicant responded with information dated January 5, 2024. A preapplication meeting was held between the Department and the Applicant on May 11, 2023. The Application was determined to be correct and complete as of March 14, 2024. The Department met with the Applicant on September 21, 2023. An Environmental Assessment for this application was completed on March 22, 2024.

**INFORMATION**

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

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606-IR
- Maps:
  - USDA Musselshell County Farm 3762 Tract 1380 (created May 15, 2018, imagery undated) showing the proposed point of diversion; the current point of diversion for subject right 40C 30154264; and both the current and proposed measurement location.
  - Goffena 2023 (created by Scott Swenson of Big Sky Irrigation, imagery undated) showing current and proposed pipeline locations.

Information Received after Application Filed

- Response to Department Deficiency Letter from Applicant, received January 5, 2024

- Confirmation that Statement of Claim 40C 215290-00 should have been listed in the Application (IR.1.B) as a second “water right(s) you are proposing to change”
- The “Flow Rate needed for the project” in IR.1.B for Statement of Claim 40C 215290-00 was stated to be 1.50 CFS (reduced from “Current flow Rate” of 2.01 CFS)
- Corrected proposed Point of Diversion Legal Land Description quarter sections from SENWSW to SENESW
- Clarification that 2021 was the last year water was both appropriated and was the last period of non-use and explanation of how resumption of use will not affect other water users
- Proposed conveyance facilities, design plans, and specifications; including pump curve for the 8-inch Gorman Rupp 88B2-B 25HP
- Clarification that the two Subject Water Right’s Places of use would be irrigated from the pump station simultaneously
- Proof of notice that written notice of the application was provided to each owner of an appropriation right sharing the point of diversion or means of conveyance, as required by MCA 85-2-30(4)(c)
- Signature of Jocce Hendrick, Manager of the DNRC Lewistown Unit Office, added to Change Application 40C 30160642 (Section 9. Affidavit & Certification) on March 20, 2024, upon the transfer of the lease of the property/place of use from one Mike Goffena to R & S Goffena Ranch, Inc.

Information within the Department’s Possession/Knowledge

- Files for Statements of Claim 40C 30154264 and 40C 215290-00
- Irrigation Change Application Technical Report for Change Application 40C 30160642, dated March 14, 2024
- Environmental Assessment dated March 22, 2024
- 1948 Musselshell County Water Resources Survey materials, including maps and field notes
- USDA aerial photograph No. 178-224, dated September 19, 1979
- DNRC created map created for Change Application 40C 30160642 showing the historical Place of Use (which will remain unchanged); proposed point of diversion/pump site and pipeline; and a scale bar and a north arrow
- Montana Cadastral parcel and property information

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 Lewistown Regional Office at 406-538-7459 to request copies of the following documents.

- DNRC Memorandum: *Development of standardized methodologies to determine Historic Diverted Volume*, dated September 13, 2012

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; AF/YR means acre-feet per year; and “Claim” will be synonymous with Statement of Claim.

## **WATER RIGHTS TO BE CHANGED**

### **FINDINGS OF FACT**

1. Applicant seeks to change the point of diversion of Claims No. 40C 30154264 and 40C 215290-00 in this Application. Claim No. 40C 30154264 is filed for a maximum flow rate of 5.00 CFS; on a maximum 25.91 AC; and a diverted volume not to exceed the amount put to historical and beneficial use from the Musselshell River, via means of a pump, for the purpose of flood irrigation. Claim No. 40C 30154264 has two places of use, both in Section 36 Township 9 North Range 27 East in Musselshell County. The first place of use is 18.32 AC in the S2NESE and the second is 7.59 AC in the S2NWSE. The period of use and period of diversion is April 1 to September 30. Statement of Claim 40C 30154264's current abstract lists its POD in Government Lot 1, SENWNW Section 1 Township 8 North Range 27 East Musselshell County. However, based on the scanned documents for the Statement of Claim as well as the course the Musselshell River takes through Section 1 of Township 8 North Range 27 East, the Department finds that legal land description to be a coding error and should read Government Lot 3, W2 Section 1 Township 8 North Range 27 East Musselshell County. Water is conveyed to the place of use by means of pipeline.

2. Claim No. 40C 215290-00 is filed for 2.01 CFS flow rate on a maximum 36.00 AC. Pursuant to active Change Authorization No. 40C 30155439, historical diverted volume is 145.30

AF and historical consumptive volume is 43.60 AF. Water is sourced from the Musselshell River, via means of a pump, for the purpose of flood irrigation. The single place of use is in the SW of Section 36 Township 9 North Range 27 East in Musselshell County. The period of use and period of diversion is April 1 to October 15. The point of diversion is in the NESESE Section 35 Township 9 North Range 27 East in Musselshell County and water is conveyed to the place of use by means of pipeline. The Claim was filed late (June 30, 1973) and thus, as mandated by Section 85-2-221(3), MCA is subordinate, and therefore junior to all Indian and federal reserved water rights and all valid timely filed claims based on state law. The elements of the water rights proposed for change are shown below:

**Table 1: WATER RIGHT(S) PROPOSED FOR CHANGE**

<b>Water Right Number</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>	<b>Purpose</b>	<b>Period Of Use</b>	<b>Place Of Use</b>	<b>Point Of Diversion</b>	<b>Priority Date</b>
40C 30154264	5.00	Unquantified	Flood Irrigation	4/1-9/30	S2NESE, Sec 36, Twp 9N, Rge 27E, Musselshell County; S2NWSE, Sec 36, Twp 9N, Rge 27E, Musselshell County	*Govt Lot 1, (SENWNW), Sec 1, Twp 8N, Rge 27E, Musselshell County	5/31/1904
40C 215290-00	2.01	43.60	Flood Irrigation	4/1-10/15	SW, Sec 36, Twp 9N, Rge 27E, Musselshell County	NESESE, Sec 35, Twp 9N, Rge 27E, Musselshell County	6/30/1973
<p><i>*Statement of Claim 40C 30154264's current abstract lists its POD in Government Lot 1, SENWNW Section 1 Township 8 North Range 27 East Musselshell County. However, based on the scanned documents for the Statement of Claim as well as the course the Musselshell River takes through Section 1 of Township 8 North Range 27 East, the Department finds that legal land description to be a coding error and should read Government Lot 3, W2 Section 1 Township 8 North Range 27 East Musselshell County.</i></p>							

3. The two subject rights are not supplemental and there are no other water rights supplemental to the subject water rights. Subject Claim No. 40C 215290-00 has been associated with Claim No. 40C 204985-00 as both rights have been diverted into the same point of diversion. Claim 40C 204985-00 is not included as a water right to be changed via this change application and its association with subject right 40C 215290-00 will be dissolved because of this change. The two subject rights will become associated because of this change since they will share a point of diversion and means of conveyance (pipeline).

4. Claim No. 30154264 is a child right resulting from a split with parent right 40C 205073-00 on November 22, 2021. The parent right underwent a change authorization (Operating Authority date of July 22, 1999) to change the point of diversion. Means of diversion were also changed from a headgate on the Krueger-Spendiff Ditch to pumping directly from the Musselshell River to pipeline and gated-pipe at the place of use. Historic volume was not calculated by the Department either during the change authorization nor the splitting of the rights.

Claim No. 215290-00 has an active Change Authorization No. 40C 30155439, with Operating Authority date of June 2, 2023. The change relocated the point of diversion to a pump station along the Musselshell River. Prior to the change, water had been (since 2005) conveyed to gated-pipe at the place of use by pumping diverted water from the Kruger-Spendiff Ditch. Before 2005, the Goffena Ditch conveyed water. The change was proposed due to irreparable flood damage to and subsequent abandonment of the Goffena Ditch and later, the Kruger-Spendiff Ditch.

5. The water rights being changed in this application are in the Musselshell River Basin (Basin 40C) which is subject to a legislative water right basin closure.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

6. The Applicant's proposed change is to replace the respective points of diversion for the subject water rights with a single, common point of diversion in the SENESW Section 36 Township 9 North Range 27E Musselshell County. The subject rights will become associated rights based on this shared point of diversion and means of conveyance. The change is being proposed due to channel shifting and flood washouts to the Musselshell River, which have rendered the current points of diversion unusable. The new point of diversion will be a pump in the Musselshell River. Approximately 500-feet of buried 15-inch pipeline will tie into roughly 8,400-feet of 12-inch gated-pipe. The gated pipe will irrigate the two subject water rights' separate, but adjacent historic places of use, which will remain unchanged. The new pump site will convey up to 5.00 CFS for the flood irrigation of the 61.91 cumulative acres (25.91 AC for 40C 30154264; 36.00 AC for 40C 215290-00) comprising the two subject water rights' adjoining places of use. The requested flow rate for Claim 40C 30154264 is 3.50 CFS, a reduction from the current maximum flow rate of 5.00 CFS. The needed flow rate for 40C 215290-00 was stated by the Applicant to be 1.50 CFS, a reduction from 2.01 CFS. Periods of diversion and periods of use are proposed to remain the same as the historical periods. Figure 1 shows the elements of the proposed change.

7. The Applicant is R & S Goffena Ranch, Inc. The Applicant is named as the Statement of Claim (Claim) owner on DNRC records and as the owner of the property/place of use for Claim 40C 30154264 on Montana Cadastral.

8. DNRC records show the Montana State Board of Land Commissioners Trust Land Management Division as owner of Claim 40C 215290-00 and Montana Cadastral names DNRC School Trust Land as owner of the property/place of use associated with Claim 40C 215290-00. According to Trust Lands Division Hydrologist, Dennis Meyer, in an email dated February 13, 2023, Montana State Board of Land Commissioners Trust Land Management Division and DNRC School Trust Land are synonymous entities. Jocee Hendrick, Manager of the DNRC Lewistown Unit Office, added her signature to Change Application 40C 30160642 (Section 9. Affidavit & Certification) on March 20, 2024, upon the transfer of the lease of the property/place of use from one Mike Goffena to R & S Goffena Ranch, Inc.

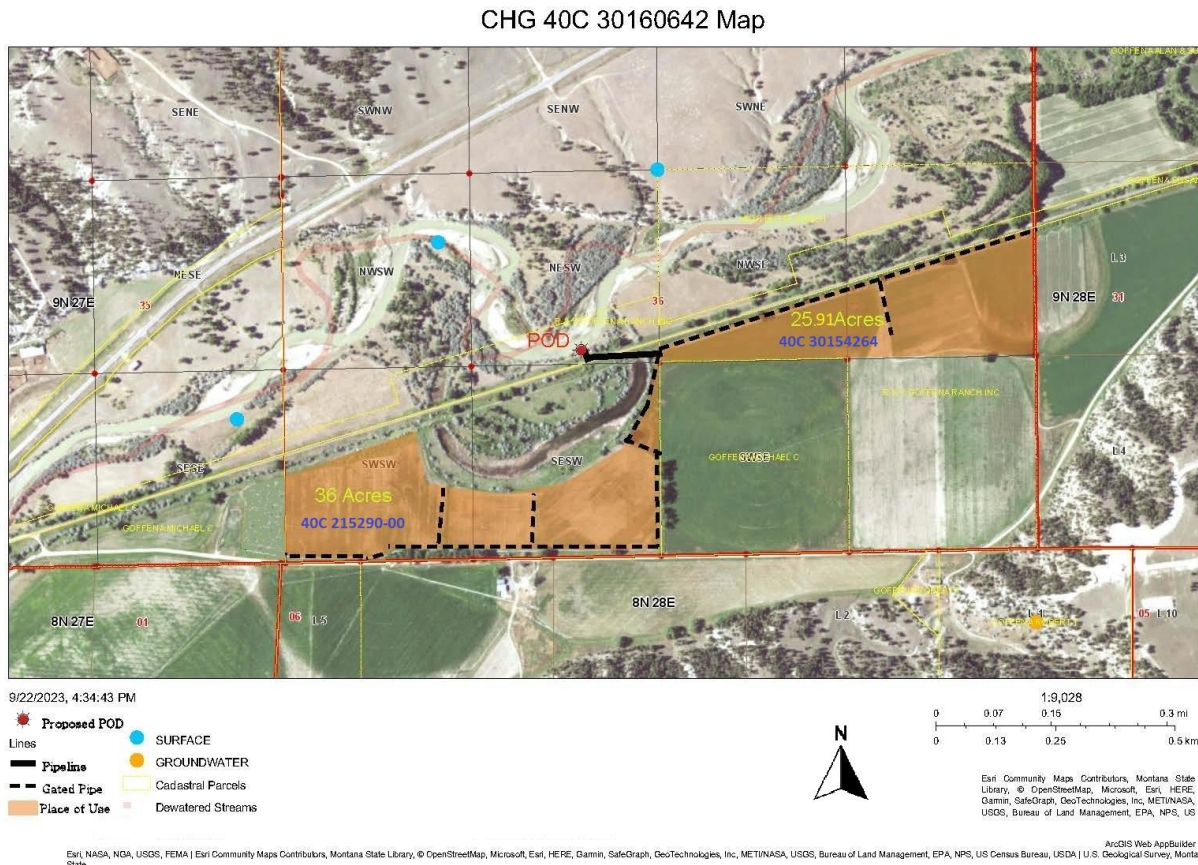


Figure 1. Places of use and proposed point of diversion for Statements of Claim 40C 30154264 and 40C 215290-00.



HISTORIC AND PROPOSED POINTS OF DIVERSION

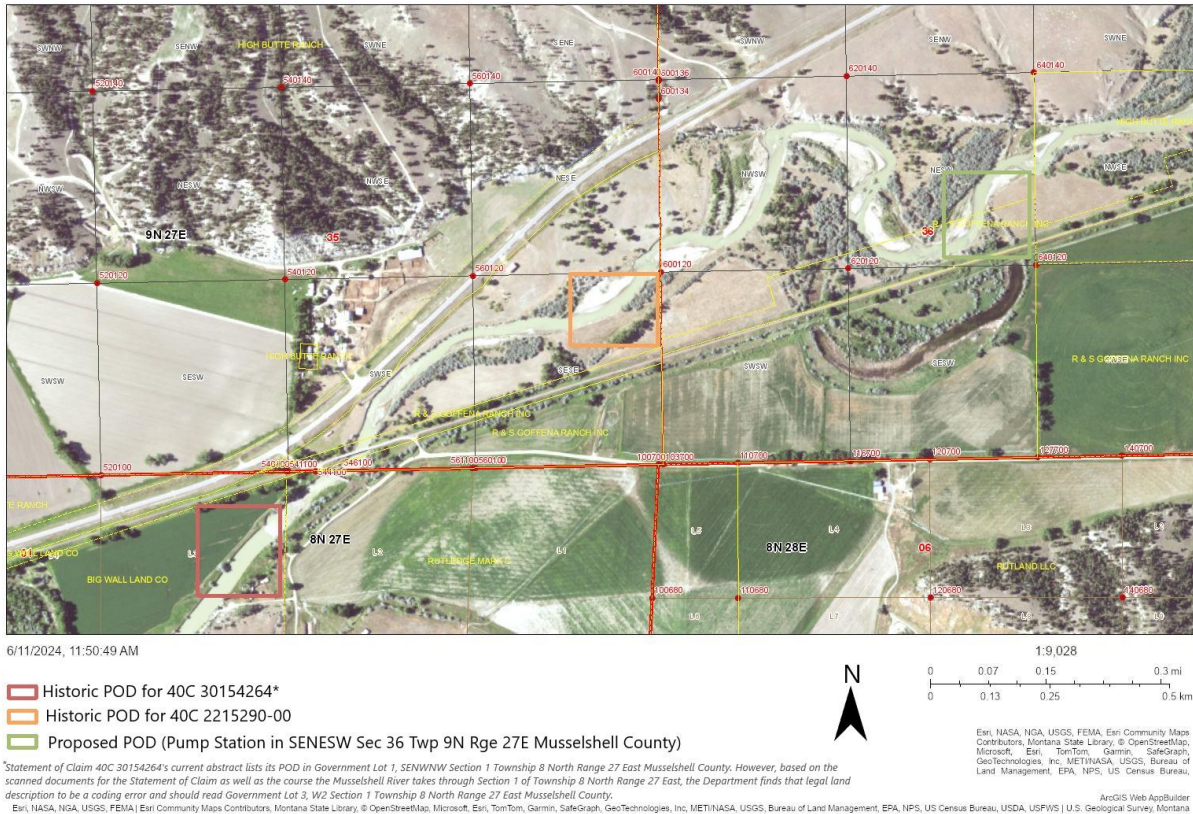


Figure 2. Historic and proposed points of diversion for Statements of Claim 40C 30154264 and 40C 215290-00.

**CHANGE CRITERIA**

9. 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.

10. 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**

11. Claim 40C 30154264 has a priority date of May 31, 1904. This is the priority date of the parent right (40C 205073-00) from which subject right 40C 30154264 was split on November 22, 2021. Because the parent right 40C 205073-00 obtained post decree status on April 14, 2020, prior to the split, Claim 40C 30154264's decree status is considered post decree. (The parent right has a decree status of post decree—split.)

12. Statement of Claim 40C 30154264's current abstract lists its POD in Government Lot 1, SENWNW Section 1 Township 8 North Range 27 East Musselshell County. However, based on the scanned documents for the Statement of Claim as well as the course the Musselshell River takes through Section 1 of Township 8 North Range 27 East, the Department finds that legal land description to be a coding error and should read Government Lot 3, W2 Section 1 Township 8 North Range 27 East Musselshell County.



13. Claim 40C 215290-00 has a priority date of June 30, 1973, because this claim was filed late. The decree status of this subject right, as of April 3, 2019, is post decree.

14. The historic place of use for Claim No. 40 30154264 consists of 25.91 AC, 7.59 AC of which are in the S2NWSE of Section 36 Township 9 North Range 27 East and 18.32 AC are in the S2NESE of Section 36 Township 9 North Range 27 East. The historic place of use and its acreage totals were verified by the Department at the time child right 40C 30154264 was split from parent right 40C 205073-00 (November 22, 2021). The historic place of use and acreage can also be verified in the Musselshell County Water Resource Survey map dated July 1949.

15. As noted in the Preliminary Determination to Grant Change for Application to Change Water Right No. 40C 30155439, the Department, using ARM 36.12.1902 and standard methodology, calculated the historical diverted volume and historical consumptive volume to be 145.30 AF and 43.60 AF, respectively. Because the proposed change will continue to irrigate the same 36.00 AC historical place of use, the consumptive volume figure of 43.60 will remain unchanged.

16. In a previous Change Authorization (40C 30155439) to Claim No. 40C 215290-00, the Department's review of the Musselshell County Water Resources Survey from 1949 supported historical irrigation of 40 AC. The Musselshell County USDA Photograph 178-224 from 1979 and the Department's original adjudication examination report both show 45.8 AC of irrigated land on this parcel. The Applicant for Change Application No. 40C 30155439 stated that a maximum of 36 AC was historically irrigated on the place of use, which is in the SW of Section 36 Township 9 North Range 27 East. Based on that information, the Department found (in the Preliminary Determination to Grant change No. 40C 30155439) the extent of the historical irrigation place of use to be 36.00 AC.

17. The claimed period of use for Claims 40C 30154264 is April 1 to September 30, while Claim 40C 215290-00 has a period of use of April 1 to October 15. According to information submitted in the Application materials, irrigation of each of the historical places of use has typically occurred in three 10-day intervals, in early June, late July, and August. Historic consumptive use for Claim 40C 30154264's historic places of use was calculated as part of this change authorization, per ARM 36.12.1902(16). The historic consumptive use for Claim 40C 215290-00 was calculated when the claim underwent change authorization 40C 30155439.

18. In the case of both subject rights, the Department utilized an on-farm efficiency of 25% for wild flood irrigation, as per ARM 36.12.115(2)(e); a 1964-1973 historical management factor of

50%; and an evapotranspiration irrigation water requirement of 24.22-inches, as measured at the Musselshell County weather station in Melstone. The historic field application and consumptive use volumes for Claim 40C 30154264's 25.91 AC place of use were calculated to be 104.60 AF and 31.40 AF, respectively, according to ARM 36.12.1902. Historic field application and consumptive use volumes for Claim 40C 215290-00's 36.00 AC place of use, as determined in Change Authorization No. 40C 30155439, are 145.30 AF and 43.60 AF, respectively. The variables considered in this historic use assessment are summarized in Tables 2 and 3.

**Table 2. Historically consumed volume (HCV) and field application volume for Claim 40C 30154264's historical places of use:**

Melstone-Musselshell County Wild Flood ET	Historic (1964-1973) Management Factor, Musselshell 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)
24.22	50.0	25.91	26.10	25.0	104.60	5.20	31.40

**Table 3. Historically consumed volume (HCV) and field application volume for Claim 40C 215290-00's historical places of use:**

Melstone-Musselshell County Wild Flood ET	Historic (1964-1973) Management Factor, Musselshell 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)
24.22	50.0	36.00	36.30	25.0	145.30	7.30	43.60

19. The two subject rights are not supplemental and there are not any additional water rights supplemental to the subject water rights.

20. The historical points of diversion for both subject rights were comprised of pump sites in the Musselshell River with buried 15-inch pipelines conveying water to the respective places of use. The water is applied to the fields via 12-inch gated pipe. The historical flow rate for Claim 40C 30154264 is 5.00 CFS and Claim 40C 215290-00's historic flow rate is 2.01 CFS.

21. The historical period of use for Claim 40C 30154264 is April 1 to September 30. Claim 40C 215290-00 has a period of use of April 1 to October 15. Both subject rights' period of diversion is consistent with the respective period of use. Thus, the possibility exists for Claim 40C 215290-00 to irrigate its place of use without Claim 40C 30154264 irrigating from October 1 to October 15. However, according to information submitted in the Application materials, irrigation of each of

the historical places of use has typically occurred in three 10-day intervals, in early June, late July, and August. This means a total of 30-days of irrigation has typically historically occurred for each water right's place of use, on the same calendar dates.

22. Water has been and will continue to be conveyed to the subject rights' respective places of use exclusively via pipeline. Thus, no conveyance losses will be considered in this change application.

23. Per Department standard practice, the Historical Diverted Volume is the sum of the Field Application Volume and the Calculated Conveyance Loss. Since there are no conveyance losses associated with water conveyed via pipeline, the field applied volumes of the subject rights are equal to the respective historically diverted volumes. The variables used to calculate the historically diverted volumes are shown in Table 4.

**Table 4: Historically diverted volume of Claims 40C 30154264 and 40C 215290-00**

Water Right Number	Field Application Volume (AF)	Conveyance Loss Volume (AF)	Historically Diverted Volume (AF)
40C 30154264	104.6	0.0	104.6
40C 215290-00	145.3	0.0	145.3

24. The Department finds the following historical use, as shown in Table 5.

**Table 5. Summary of historical use findings for 40C 30154264 and 40C 215290-00**

WR #	Priority Date	Diverted Volume (AF)	Flow Rate (CFS)	Purpose (Total Acres)	Consumptive Use (AF)	Place of Use	Point of Diversion
40C 30154264	5/31/1904	104.6	5.00	Flood Irrigation, 25.91	31.40	S2NESE, Sec 36, Twp 9N, Rge 27E, Musselshell County; S2NWSE, Sec 36, Twp 9N, Rge 27E, Musselshell County	*Govt Lot 1, (SENWNW), Sec 1, Twp 8N, Rge 27E, Musselshell County
40C 215290-00	6/30/1973	145.3	2.01	Flood Irrigation, 36.00	43.60	SW, Sec 36, Twp 9N, Rge 27E, Musselshell County	NESESE, Sec 35, Twp 9N, Rge 27E, Musselshell County
<p><i>*Statement of Claim 40C 30154264's current abstract lists its POD in Government Lot 1, SENWNW Section 1 Township 8 North Range 27 East Musselshell County. However, based on the scanned documents for the Statement of Claim as well as the course the Musselshell River takes through Section 1 of Township 8 North Range 27 East, the Department finds that legal land description to be a coding error and should read Government Lot 3, W2 Section 1 Township 8 North Range 27 East Musselshell County.</i></p>							

## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

25. The proposed change is to replace the two respective points of diversion for the subject water rights, both in Musselshell County, with a single, common point of diversion in the SENESW Section 36 Township 9 North Range 27 East of Musselshell County. The respective places of use and purposes are not changing. The new point of diversion will be a pump site in the Musselshell River. The new point of diversion is 1.5-miles downstream from the Claim 40C 30154264's historic point of diversion (using the legal land description found in the scanned documents which has the point of diversion in Government Lot 3, instead of Government Lot 1). Claim 40C 215290-00's historic point of diversion is 0.8-miles upstream of the proposed point of diversion. (Both distances are actual river channel not "as the crow flies.") Five-hundred feet of buried 15-inch pipeline is proposed to tie into 8,400-feet of 12-inch gated-pipe. Water will be applied to the subject claims' places of use using a gated pipe flood irrigation system.

26. The new pump will have a capacity of 5.00 CFS. The maximum flow rate for Claim 40C 30154264 is proposed to be reduced from 5.00 CFS to 3.50 CFS and 104.6 AF will of water will be diverted. Claim 40C 215290-00's maximum flow rate is proposed to be reduced from 2.01 CFS to 1.50 CFS and 145.3 AF of water will be diverted. The Applicant stated that the places of use would be irrigated simultaneously. To accomplish this, the Applicant will be using two meters and a gate valve to separate the flow rate into the respective places of use so that they can irrigate with a controlled, combined flow rate that is within the pump's capacity. Proposed flow rates and volumes are based on historical use.

27. The proposed change involves no change in method of irrigation nor a change in place of use of irrigation. Thus, the Department finds that the respective proposed consumed and field applied volumes are equal to the historically consumed and field applied volumes.

28. Return flows will enter back into the source where they have historically returned upstream of or at the location of the next downstream appropriator. Thus, monthly return flows under historical and proposed practices will not be modeled unless the Application receives a valid objection.

29. The proposed change will not enlarge the flow rates nor consumptive uses of the subject rights. The Applicant asserted that no adverse effect would result from this change as the

maximum flow rate for Claim 40C 30154264 is proposed to be reduced from 5.00 CFS to 3.50 CFS and 104.6 AF will of water will be diverted. Claim 40C 215290-00's maximum flow rate is proposed to be reduced from 2.01 CFS to 1.50 CFS and 145.3 AF of water will be diverted. The Applicant stated that the places of use would be irrigated simultaneously. To accomplish this, the Applicant will be using two meters and a gate valve to separate the flow rate into the respective places of use so that they can irrigate with a controlled, combined flow rate that is within the pump's capacity (5.00 CFS). The Applicant proposes to use a Department approved measuring device to measure flow rates and diverted volumes. The Applicant also cites that a Water Commissioner will be verifying use. Should call be made, the Applicant attests to the ability to turn off the pump and cease appropriation.

30. The year 2021 was both the last time water was appropriated and used beneficially to the extent identified in the subject rights and marked the start of the only period of non-use, which extends to the present time. The Applicant claims that resumption of use of the subject rights water will not adversely affect other users due to: the relatively small quantities involved having never created adverse effect previously; the relatively brief non-use period being an exception to historically consistent irrigation; and regulation by a Water Commissioner.

31. The Department finds that consumptive and diverted volumes will be unchanged from historical amounts. Flow rates of the subject rates are proposed to be reduced. Thus, the Department finds the Applicant's assertion that no adverse effect will result from the proposed change to be accurate by a preponderance of evidence.

32. The Application proposes no changes to the historical timing or pattern of diversion for the subject water rights.

33. The subject rights will become associated rights because of this change since they will share a point of diversion and means of conveyance. Subject Claim No. 40C 215290-00 has been associated with Claim No. 40C 204985-00 as both rights have been diverted into the same point of diversion. Claim 40C 204985-00 is not included in the Application as a water right to be changed and its association with subject right 40C 215290-00 will be dissolved.

34. The Department finds that no other water rights will be impacted because of this change due to the location, rate, and timing of return flows remaining the same as they have historically. Additionally, the proposed means of diversion is not capable of diverting water more than the historical flow rates. The Applicant will measure appropriations and comply with the District Court

enforced water distribution project on the Musselshell River. Accordingly, the Department imposes a water measurement and reporting condition as part of this preliminary determination.

35. Under the conditions set forth in this preliminary determination, the Department finds the proposed change will not adversely affect the use of 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.

36. The Applicant proposes to use two midway flow meters and a gate valve to measure the diverted flow rates and ensure the amounts of water diverted after this change do not exceed the historically diverted volumes of the subject rights. The pump can be immediately shut off in case call is made on this water right by downstream senior appropriators. Furthermore, the Applicant will be required to follow the law of priorities on the stream by complying with distribution as directed by Water Commissioners under District Court order.

37. This authorization as granted will be subject to the following measurement condition:

The Appropriator shall install a measuring device in the conveyance facility as near as practical to the pump site, in order to measure appropriations. The type and location of the device must be approved by the Department. The Appropriator shall keep a written record of the flow rate and volume of water diverted, including the period of time of diversion. Records must account separately for any appropriations under this authorization from appropriations under any other water right using the same diversion works and conveyance facility. Records shall be submitted by December 31 of each year and upon request at other times during the year. Failure to submit reports as required by these conditions may be cause for revocation of the change. The records must be sent to the Lewistown Water Resources Regional Office. The Appropriator shall maintain the measuring/monitoring device, so it always operates properly and measures flow rate accurately during periods of appropriation.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

38. The Applicant proposes to use water for irrigation of agricultural crops with Claims 40C 30154264 and 40C 215290-00 after this change. Irrigation is identified as a beneficial use in § 85-2-102(4)(a), MCA.



39. System specifications for the proposed appropriation were provided by the Applicant and include a maximum pump capacity of 5.00 CFS. The maximum flow rate for Claim 40C 30154264's 25.91 AC place of use is proposed to be reduced from 5.00 CFS to 3.50 CFS and the volume of water that will be diverted is 104.6 AF. Claim 40C 215290-00's maximum flow rate is proposed to be reduced from 2.01 CFS to 1.50 CFS and 145.3 AF of water will be diverted. The Applicant stated that the places of use would be irrigated simultaneously. To accomplish this, the Applicant will be using two meters and a gate valve to separate the flow rate into the respective places of use so that they can irrigate with a controlled, combined flow rate that is within the pump's capacity.

40. The volume that will be diverted for the continued irrigation of Claim 40C 30154264's 25.91 AC gated-pipe system will not exceed 104.60 AF. The volume that will be diverted for the continued irrigation of Claim 40C 215290-00's 36.00 AC with a gated-pipe system will not exceed of 145.3 AF. The proposed diverted flow rates of 3.50 CFS for Claim 40C 30154264 and 1.50 CFS for Claim 215290-00 are required to deliver the respective post-change diverted volumes of 104.60 AF and 145.30 AF to the places of use. The proposed consumed volumes of 31.40 AF for Claim 40C 30154264 and 43.60 AF for Claim 40C 215290-00 result in an AF to AC ratio of 1.21 AF/AC. The consumptive volumes are based on the needs of a 25% efficient wild flood irrigation system in Montana. Because both subject rights will continue to irrigate exclusively within their respective historical footprints, the Department continued to employ an on-farm efficiency of 25% for wild flood irrigation, as per ARM 36.12.115(2)(e).

41. After this change, Claim 40C 20 30154264 will be diverted into the same pump as Claim 40C 215290-00, making them associated water rights. In aggregate, the maximum flow rate and volume that will be diverted into the new point of diversion is 5.00 CFS and 249.90 AF. These quantities will be used to irrigate the cumulative 61.91 AC which constitutes the adjacent, but non-supplemental places of use.

42. The Department finds the proposed flow rate and volume to be a beneficial use of water.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

43. The Applicant is proposing to install an 8-inch Gorman Rupp 88B2-B pump, rated at 5 CFS, in the Musselshell River in the SENESW Section 36 T9N R27E and use a 500-foot, 15-inch pipeline to carry water to a 12-inch gated-pipe irrigation system for the continued irrigation of the

respective 25.91 AC and 36.00 AC places of use, which are adjacent but non-supplemental. After this change, an aggregate maximum flow rate of 5.00 CFS and volume of 249.90 AF of water will be delivered to the respective places of use. The new pump will have a capacity of 5.00 CFS. The maximum flow rate for Claim 40C 30154264's 25.91 AC place of use is proposed to be reduced from 5.00 CFS to 3.50 CFS and the volume of water that will be diverted is 104.6 AF. Claim 40C 215290-00's maximum flow rate is proposed to be reduced from 2.01 CFS to 1.50 CFS and 145.3 AF of water will be diverted. The Applicant stated that the places of use would be irrigated simultaneously. To accomplish this, the Applicant will be using two meters and a gate valve to separate the flow rate into the respective places of use so that they can irrigate with a controlled, combined flow rate that is within the pump's capacity.

44. Based on proposed diversionary system specifications and additional information provided in the application materials, the Department finds the proposed means of diversion, new conveyance method, and operation of the new diversion works are adequate for the proposed beneficial use of 5.00 CFS and 249.90 AF.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

45. 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. The Applicant is R & S Goffena Ranch, Inc. The Applicant is named as the Statement of Claim (Claim) owner on DNRC records and as the owner of the property/place of use for Claim 40C 30154264 on Montana Cadastral. (See Department file 40C 30160642.)

46. DNRC records show the Montana State Board of Land Commissioners Trust Land Management Division as owner of Claim 40C 215290-00 and Montana Cadastral names DNRC School Trust Land as owner of the property/place of use associated with Claim 40C 215290-00. According to Trust Lands Division Hydrologist, Dennis Meyer, in an email dated February 13, 2023, Montana State Board of Land Commissioners Trust Land Management Division and DNRC School Trust Land are synonymous entities. Jocee Hendrick, Manager of the DNRC Lewistown Unit Office, added her signature to Change Application 40C 30160642 (Section 9. Affidavit & Certification) on March 20, 2024, upon the transfer of the lease of the property/place of use from Mike Goffena to R & S Goffena Ranch, Inc.

(See Department file for Change Application No. 40C 30160642.)

## **CONCLUSIONS OF LAW**

### **HISTORICAL USE AND ADVERSE EFFECT**

47. 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).<sup>1</sup>

48. 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*

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

*Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.<sup>2</sup>

49. 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 potential for adverse effect.<sup>3</sup> 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

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<sup>2</sup> 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).

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

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).<sup>4</sup>

50. 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

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<sup>4</sup> 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.)

subsequent water users).<sup>5</sup>

51. 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.

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

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<sup>5</sup> 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).



53. 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 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.

54. 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).

55. 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).

56. 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).

57. 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/has not elected to proceed under ARM 36.12.1902. (FOF No.11-24).

58. 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").

59. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 40C 30154264 to be a diverted volume of 104.60 AF, a historically consumed volume of 31.40 AF, and flow rate of 5.00 CFS/GPM. (FOF Nos. 11-24)

60. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 40C 215290-00 to be a diverted volume of 145.30 AF, a historically consumed volume of 43.60 AF, and flow rate of 2.01 CFS/GPM. (FOF Nos. 11-24)

61. 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. 25-37)

### BENEFICIAL USE

62. 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).

63. In *Sitz Ranch v. DNRC*, the applicant could only demonstrate need for 200 to 300 acre-feet of water but requested 800 acre-feet. *Sitz Ranch v. DNRC*, DV-10-13390, 2-3, Fifth Judicial District Court, *Order Affirming DNRC Decision* (2011). The court upheld DNRC's decision that the applicant requested more water than could be beneficially used and thus did not prove beneficial use.

64. Applicant proposes to use water for irrigation, which is a recognized beneficial use, per Section 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that diverted volumes of 104.6 and 145.3 AF and flow rates of 3.50 and 1.50 CFS are the amounts needed to sustain the beneficial use for Statements of Claim No. 40C 30154264 and No. 40C 215290-00, respectively. Section 85-2-402(2)(c), MCA (FOF Nos. 38-42).

#### ADEQUATE MEANS OF DIVERSION

65. 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).

66. 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. 43-44)

#### POSSESSORY INTEREST

67. 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.

68. 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. 45-46).

#### 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. 30160642 should be GRANTED subject to the following.

The Applicant may change the point of diversion of Statement of Claim Nos. 40C 30154264 and 40C 215290-00. After this change the Applicant will no longer divert water into the historical points of diversion which are in Government Lot 1 (SENWNW) Section 1 Township 8 North Range 27 East for Claim No. 40C 30154264 and NESESE Section 35 Township 9 North Range 27 East for Claim No. 40C 215290-00. The new point of diversion will consist of a pump in the Musselshell River in the SENESW of Section 36 Township 9 North Range 27 East. The maximum flow rate and volume that will be diverted to irrigate Claim No. 40C 30154264's 25.91 AC historical place of use after this change is 3.50 CFS and 104.60 AF. The maximum flow rate and volume that will be diverted to irrigate Claim No. 40C 215290-00's 36.00 AC historical place of use after this change is 1.50 CFS and 145.30 AF. Statement of Claim Nos. 40C 30154264 and 40C 215290-00 will be associated water rights as both water rights will be diverted into the same point of diversion. The maximum flow rate that may be diverted at this point of diversion with both water rights cannot exceed 5.00 CFS.

This change will be subject to the following measurement condition:

#### **MEASUREMENT CONDITION**

The Appropriator shall install a measuring device in the conveyance facility as near as practical to the pump site, in order to measure appropriations. The type and location of the device must be approved by the Department. The Appropriator shall keep a written record of the flow rate and volume of water diverted, including the period of time of diversion. Records must account separately for any appropriations under this authorization from appropriations under any other water right using the same diversion works and conveyance facility. Records shall be submitted by December 31 of each year and upon request at other times during the year. Failure to submit reports as required by these conditions may be cause for revocation of the change. The records must be sent to the Lewistown Water Resources Regional Office. The Appropriator shall maintain the measuring/monitoring device, so it always operates properly and measures flow rate accurately during periods of appropriation.

#### **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 12th day of June, 2024.

/Original signed by Steven B Hamilton/  
Steven B. Hamilton, Manager  
Lewistown Regional Office  
Montana 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 12th day of June, 2024, by first class United States mail.

R & S GOFFENA RANCH, INC.  
18335 HWY 12 E  
ROUNDUP, MT 59072-6116

JOCEE HENDRICK, UNIT MANAGER  
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