

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

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APPLICATION TO CHANGE WATER RIGHT NO. 40C 30105634 by Foster Ranch and Feedlot, LLC and Bergin Land and Livestock, LTD)))	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On November 13, 2023, Applicant’s Foster Ranch and Feedlot, LLC, and Bergin Land and Livestock, LTD submitted Change Application No. 40C 30162292 to change Stock Water Permit No. 40C 30105634 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 Application was determined to be correct and complete as of December 20, 2023. An Environmental Assessment was completed by the Department on December 29, 2023.

INFORMATION

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

Application as filed:

- Application to Change Water Right, 606 Stock Tank
- A map detailing the additional Stock Tank locations
- Two photos taken by the Applicant on June 5, 2023, detailing two separate wells and their components.
- Sage Grouse letter dated on November 9, 2023

Information within the Department’s Possession/Knowledge

- Water right files for existing Provisional Permit No. 40C 30105634, Statement of Claim (SOC) No. 40C 208664 and Provisional Permit No. 40C 103329
- Environmental Assessment dated December 29, 2023
- Technical Report dated December 18, 2023
- Kimsey, D.W. and P.K. Flood, 1987. Domestic consumptive use, technical memorandum to the Chief Engineer of the State of Colorado, 16p.
- Paul, W., Poeter, E., and R Laws, 2007. Consumptive loss from and individual sewage

disposal system in a semi-arid mountain environment. Colorado Water, Newsletter of the Water Center of Colorado State University, August/September 2007, Volume 24, Issue 4.

- Natural Resources Conservation Service (NRCS), 2003. Irrigation Water Requirement (IWR) computer program, <http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/manage/?cid=stelprdb1044890>.

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 and 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. The Applicant is proposing to change Provisional Permit No. 40C 30105634, which lists a flow rate of 116 gallons per minute (GPM) and volume of 97.35- acre feet (AF) of groundwater for stock, domestic, lawn and garden, commercial, and water marketing uses with a priority date of September 11, 2017. The period of use and period of diversion are January 1 - December 31.

There are five (5) wells comprising the points of diversion for this operation. Their legal land descriptions are listed below.

Table 1: Points of Diversion

ID	TRS	Quarters	GWIC ID #
Creek 1	9N 30E S17	SWSENE	208319
Creek 2	9N 30E S17	NESWNE	286338
Trailer Well	9N 30E S17	NESWNE	289580
17 South	9N 30E S17	SWSESE	276234
20 Well	9N 30E S20	NWNENE	Listed as “Unknown”

All points of diversion (PODs) and places of use (POUs) are in Musselshell County.

Table 2: Current Places of Use

ID	TRS	Quarters
1	9N 29E S1	NWNWNE
2	9N 30E S6	SENESE
3	9N 30E S6	SENESE
4	9N 30E S6	NENWSE
5	10N 29E S32	SENENW
6	10N 29E S33	NWSENW
7	10N 29E S34	SWSWNW
8	10N 29E S34	NESESE
9	9N 30E S7	SENESE
10	9N 30E S7	SENESE
11	9N 30E S8	NWNWSW
12	9N 30E S17	N2
13	9N 30E S17	SWSENE

The places of use are located roughly 5 miles southwest of Melstone, Montana just south of Highway 12.

CHANGE PROPOSAL

FINDINGS OF FACT

2. Applicant proposes to add eight (8) stock tanks to an existing system of stock tanks drawing from five (5) wells. The existing system is spread across multiple parcels with varying ownership across multiple different sections, townships, and ranges. All the proposed stock tanks to be added are owned by one of the applicants or involve parcels for which permission has been granted for involvement in this change.
3. Provisional Permit No. 40C 30105634 has two water rights are supplemental, 40C 208664 and 40C 103329. The original Permit application states that water right 40C 208664-00 shares a place of use with Permit 40C 30105634. Additionally, there are 10 stock tanks supplied by Water Right 40C 103329 are supplemented by water right 40C 30105634 to “include summer use”.
4. Provisional No. 40C 30105634 is for a set of five (5) wells supplying thirty-eight (38) stock tanks.

The Applicant proposes to add eight new stock tanks to the existing system. The wells supply two (2) 16,000-gallon fiberglass storage tanks. From these two large fiberglass tanks, water is gravity fed through two-inch HDPE pipelines to connect the multiple places of use. The change proposal does not request an increase in Animal Units. The Applicant is proposing to add eight (8) additional stock tank sot an existing pipeline system to facilitate distribution. The proposed new places of use are listed in the following table.

Table 3. Proposed New Places of Use

ID	TRS	Quarters
ST 39	10N 29E S29	NENESW
ST 40	10N 29E S35	SWSWNW
ST 41	9N 30E S17	NWSWNW
ST 42	9N 30E S17	NESWNW
ST 43	9N 30E S17	NWSENW
ST 44	9N 30E S8	NWSWSW
ST 45	9N 30E S8	SESWNW
ST 46	9N 30E S8	NESWNW

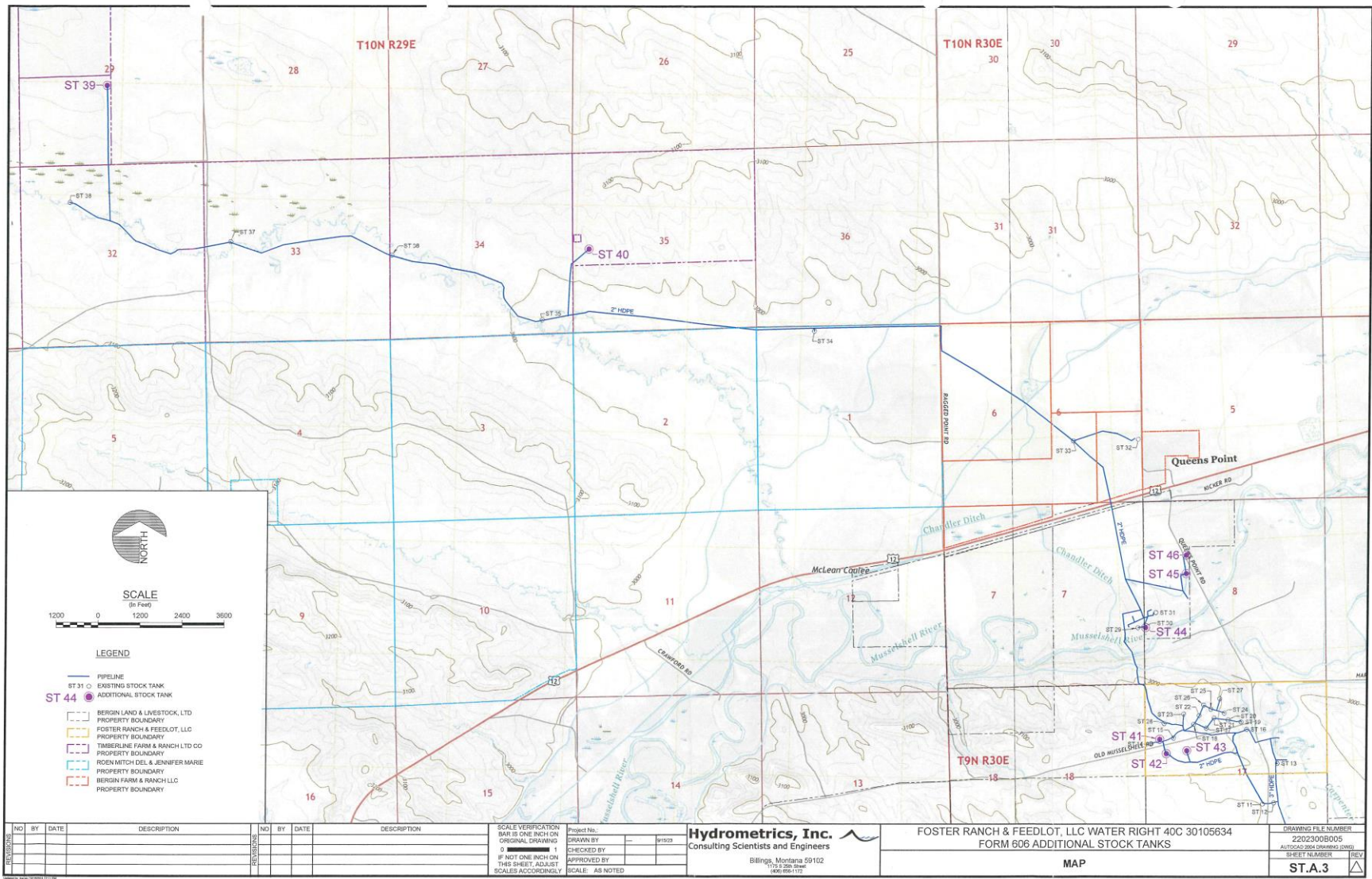


Figure 1: Map of Existing and Proposed Uses of 40C 30105634

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CHANGE CRITERIA

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

6. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe, ¶¶ 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*

7. The Water Right proposed for change is Provisional Permit No. 40C 30105634 with a priority date of September 11, 2017. A project completion form was received by the DNRC on November 10, 2023. This permit was verified by the Department on November 15, 2023, for a total diverted volume of 97.35 AF and a flow rate of 116 GPM per year. This permit has historically been used for livestock watering up to 4.25 AF/YR; domestic use for four (4) households up to 4 AF/YR; lawn and garden watering on one (1) acre up to 2.5 AF/YR; commercial for 18 tanks in a feedlot using up to 76.75 AF/YR; and water marketing up to 9.85 AF/YR.
8. The consumptive use for is 100% of the diverted volume. For Provisional Permit No 43C 30105634 the commercial and water marketing purposes are also 100% consumptive. The commercial use consists of water use at 18 tanks located in a feedlot. The water marketing use is 100% consumptive because the water is taken off-site by the purchaser. Water use for domestic where the water disposal method is by drainfield is considered to be 10% consumptive (Kimsey and Flood (1987), Vanslyke and Simpson (1974), and Paul, Poeter, and Laws (2007)). Water used for lawn and garden turf irrigation is considered to be 70% consumptive based on IWR net irrigation requirements.
 - a. The Technical Report for Application No. 40C 30162292 erroneously omitted the consumptive use rates for the domestic, lawn and garden, commercial, and water marketing purposes. The following consumptive use volumes for these purposes will be considered when determining the historical use of provisional permit 40C 30105634.

9. The diverted and consumed volumes for livestock, commercial, and water marketing are equal, because the aforementioned purposes are considered to be 100% consumptive by the Department and the historical system had no conveyance losses. The diverted and consumed volume for stock is 4.25 AF/YR. The diverted and consumed volume for commercial is 76.75 AF/YR. The diverted and consumed volume for water marketing is 9.85 AF/YR. The diverted volume for domestic is 4 AF and the consumed volume is 0.4 AF. The diverted volume for lawn and garden is 2.5 AF and the consumed volume is 1.75 AF/YR. The total diverted volume for all purposes is 97.35 AF and the total consumed volume for all purposes is 93 AF. The volumes for each beneficial use are displayed in Table 4 below.

Table 4: Current Water Right Beneficial Use Description:

WR Number	Purpose	Flow Rate	Volume (diverted/consumed)	Period of Use	Point of Diversion	Place of Use	Priority Date
40C 30105634	Commercial	116 GPM	76.75 AF / 76.75 AF	JAN 1 – DEC 31	See Table 1 (above)	See Table 2 (above)	09/11/2017
40C 30105634	Domestic	116 GPM	4.00 AF / 0.4 AF	JAN 1 – DEC 31	See Table 1 (above)	See Table 2 (above)	09/11/2017
40C 30105634	Lawn and Garden	116 GPM	2.50 AF / 1.75 AF	MAY 1 – OCT 15	See Table 1 (above)	See Table 2 (above)	09/11/2017
40C 30105634	Stock	116 GPM	4.25 AF / 4.25 AF	JAN 1 – DEC 31	See Table 1 (above)	See Table 2 (above)	09/11/2017
40C 30105634	Water Marketing	116 GPM	9.85 AF / 9.85 AF	JAN 1 – DEC 31	See Table 1 (above)	See Table 2 (above)	09/11/2017

FINDINGS OF FACT – Adverse Effect

10. The Applicant is proposing to add eight (8) stock tanks and is not proposing to change any other elements of this water right. The stock tanks are equipped with one-inch Hudson valves to stop the water when the stock tank is full.

11. Provisional Permit No. 40C 30105634 was filed for multiple uses which are explained in the findings above and in Table 4. A flow rate of 116 GPM with a total diverted volume of 97.35 AF was permitted and perfected. The beneficial use of 97.35 AF is within the DNRC standards for

8000 AU, 5 Households and 1 Acre of lawn & garden. No additional animal units will be added under proposed change No. 40C 30162292. The only difference will be additional locations where water is used. Due to the large scale of the operation, the Applicant is incorporating additional stock tanks into the existing network to ease the burden of distributing water to 8,000 AU. The historic diverted and consumed volumes of 97.35 AF and 93 AF, respectively, approved for Permit 40C 30105634 will not be exceeded. The addition of eight (8) new stock tanks will not increase the flow rate or volume.

12. If a valid call is made the Applicant is capable of stopping diversions with a check valve and can cease pumping to the added tanks.
13. The Department finds there will be no adverse effect resulting from the proposed change under the terms and conditions set out in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

14. The existing water right has five separate uses detailed above in *Table 4*. Each listed use is recognized as a beneficial use per § 85-2-102(5). The marketing contracts submitted with Provisional Permit Application 40C 30105634 are still in effect and have provisions that allow for them to be extended.
15. By adding eight (8) additional stock tanks, the Applicant will be able to better distribute water to the historical number of animal units associated with the operation.
16. The Provisional Permit has historically been used to provide 97.35 AF of diverted water at a rate of 116 GPM for 8000 animal units (AU) from January 1 – December 31. These 8000 AUs are apportioned across commercial, marketing and stock use. 7000 AUs are appropriating water through commercial beneficial use. There are 750 AUs listed as part of the purpose for marketing and another 250 AUs for stock use. The period of use for most of the stock and marketing animal units is also year-round use, however 250 AUs for water marketing are only serviced for one

month out of the year. This volume is consistent with the historical practice and the flow rate of 116 GPM will not change.

17. The Department finds the proposed addition of eight (8) stock tanks for the purposes of appropriating a volume of 97.35 AF of water at a flow rate of 116 GPM to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

18. The diversion system consists of five (5) wells. Their Legal Land Description can be found in *Table 1* above. The first well is described as “Creek 1”, and it is 8-inch steel to a depth of 18 ft and then 5-inch PVC from 10 to 70 ft. The static water depth is 6 ft, and the total depth is 70 ft. The second well is referred to as the “Creek 2” well. The well has 8-inch steel to a depth of 32 ft and PVC-SCHED 40 from 8 to 60 ft. The static water level is 8 ft with a total depth of 60 ft. The third listed well is referred to as the “17 south” well. The fourth well is referred to as the “Trailer” well. This well has 6-in steel to a depth of 42 ft with PVC-SDR 17 from 10-90 ft in depth. The static water level is 22 ft, and the maximum depth is 90 ft. The fifth well does not have a well log report and only the Legal Land Description of the well and a brief description was provided. This information is collected through the Montana Ground Water Information Center well log reports.
19. The diversion system consists of five (5) wells with several different pump models used for distribution. The “Creek 1” and “Creek 2” wells are reported to have the same pump model. This is a 1 HP Aermotor 4” 16 GPM. The 2 HP model 40S20-7 Grundfos Motor can pump at a rate of 39.6 GPM and is used to pump water from the “Trailer” well. Specifications for the 7.5 HP Gould Model 85GS75 show a capacity range between 40-120 GPM, however it operates most efficiently at 85 GPM. This pumps water from the “17 south” well. The 5 HP Grundfos MS 4000 has a capacity of at least 15 GPM and is associated with the well missing a GWIC ID. When combining the GPM pump rate capabilities of the listed pumps the Department finds that the Applicant can produce the historical flow rate of 116 GPM. Although these capacities have the potential to exceed the permitted flow rate, the one-inch Hudson brass valves allow the applicant to control the flow rate of water into the stock tanks within the granted flow rate.

20. Once the water is pumped from the distribution wells, it is stored in two 16,000- gallon fiberglass tanks before being conveyed through two-inch HDPE pipe to the stock tanks as needed. Both of the 16,000-gallon fiberglass tanks are equipped with valves to stop flow in the event of a leak. The pipelines are connected to stock tanks via a one-inch brass check valve and a Hudson valve. This equipment will help ensure that there are no unnecessary losses.
21. The Department finds the means of diversion, construction, and operation of the appropriation works are adequate for the proposed project.

POSSESSORY INTEREST

FINDINGS OF FACT

22. 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 and the new stock tanks will be located.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

23. 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

24. 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
25. 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,

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).

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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.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 not effect a change of use transferring more water than he had historically consumptively used; Preliminary Determination to Grant

26. 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
27. 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.
28. 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

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).

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).

29. 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.

30. Based on the Applicant's evidence of historical use, the applicant has proven by a preponderance of the evidence the historical use of Provisional Permit No. 40C 30105634 of 97.35 AF diverted volume and 116 GPM flow rate with a consumptive use of 93 AF. (FOF Nos. 7-9).
31. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 10- 13)

BENEFICIAL USE

32. Applicant seeks a change authorization to market water to others for beneficial use, which is a recognized beneficial use. Section 85-2-102(5), and -310(9)(c)(v), MCA; Mont. Const. Art. IX, § 3(2) (1972). The Montana Legislature enacted additional requirements upon Applicants seeking permits to market water to others for use, codified at § 85-2-310(9)(c)(v), MCA, which provides:
 - (v) except as provided in subsection (10), if the water applied for is to be appropriated above that which will be used solely by the Applicant or if it will be marketed by the Applicant to other users, information detailing:
 - (A) each person who will use the water and the amount of water each person will use;
 - (B) the proposed place of use of all water by each person;
 - (C) the nature of the relationship between the Applicant and each person using the water; and
 - (D) each firm contractual agreement for the specified amount of water for each person using the water;

Failure to satisfy these criteria mandates that “the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. . . .” Section 85-2- Preliminary Determination to Grant

310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(5), and -311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

33. The legislative purpose of § 85-2-310(9)(v), MCA was to prohibit the appropriations of water based upon a speculative intent. Chapter 399, Laws of Montana 1985. To that end, § 85-2-310(9), MCA, includes express criteria for the DNRC to consider when evaluating an application for a permit or change authorization to market water to others for use. *See* DNRC Written Testimony, HB No. 396 (Mar. 25, 1985). These criteria ensure that other water users are committed to the beneficial use of the full quantity of water requested by the Applicant. The terms of a “firm contractual agreement” must include sufficient certainty to ensure that a specific volume of water will actually be put to beneficial use by the contracting party in order to comply with the anti-speculation doctrine and satisfy the requirement of bona fide intent to put the water to beneficial use. *See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979) (Applicant failed to prove intent to appropriate water for beneficial use where it did not have firm contractual commitments or other evidence of privity between the Applicant and the actual beneficial user of the water).

34. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive

control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

35. The Applicant proposes to use water for stock, domestic, commercial, lawn and garden, and marketing which are each recognized as a beneficial use per § 85-2-102(5), MCA. The Applicant has proven by a preponderance of evidence that stock, domestic, commercial, lawn and garden, and marketing are beneficial uses and that 97.35 AF of diverted volume, and 116 GPM flow rate of water requested is the amount needed to sustain the beneficial uses and is within the standards set by DNRC rule/other standard and will not change as a result of this application § 85-2-402(2)(c), MCA (FOF Nos. 14-17)

ADEQUATE MEANS OF DIVERSION

36. 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).

37. 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. 18-21)

POSSESSORY INTEREST

38. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the Preliminary Determination to Grant Application to Change Stock Water Permit No. 40C 30105634

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.

39. The Applicant has proven by a preponderance of the evidence that they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 22)

PRELIMINARY DETERMINATION

Subject to the terms and analysis this Preliminary Determination Order, The Department preliminarily determines that this Application to Change Water Right No. 40C 30105634 should be granted subject to the following.

The Department has determined that the Applicant may add eight (8) places of use at which stock watering tanks will be located. The locations of the proposed additional places of use are as follows:

ID	TRS	Quarters
ST 39	10N 29E S29	NENESW
ST 40	10N 29E S35	SWSWNW
ST 41	9N 30E S17	NWSWNW
ST 42	9N 30E S17	NESWNW
ST 43	9N 30E S17	NWSENW
ST 44	9N 30E S8	NWSWSW
ST 45	9N 30E S8	SESWNW
ST 46	9N 30E S8	NESWNW

The point of diversion consists of a series of five (5) existing wells, listed above in *Table 1*. The period of use and period of diversion are January 1 – December 31. The flow rate is 116 GPM, and the volume is 97.35 AF per annum for stock, commercial, domestic, lawn and garden, and marketing.

NOTICE

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

Dated this 13th day of March 2024

/Original signed by Steven B Hamilton/

Steven B. Hamilton, Regional Manager
Lewistown Water Resources Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 13th day of March 2024, by first class United States mail.

Foster Ranch and Feedlot, LLC

Bergin Land & Livestock, LTD

Attn: Foster Ranch and Feedlot, LLC, and Bergin Land & Livestock, LTD

1175 S 25th St

Billings, MT 59102

Lewistown Regional Office, (406) 535-1924