

# THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



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April 29, 2025

Shane Schwenke/Thornhill Ranch Partnership  
2210 Power Plant Ferry Rd  
Zortman, MT 59546

Subject: Updated Draft Preliminary Determination to Grant Water Right Change Application No. 40EJ 30164552

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has reviewed any information submitted to your application during the granted extension. This review consists of an updated evaluation of the criteria for issuance of a Change authorization found in §85-2-402, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the updated Draft Preliminary Determination (PD) to Grant your application is attached.

The Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA. If no public comments are received, the Department will issue the updated Draft PD as final pursuant to §85-2-307(5)(c), MCA. If public comments are received, the Department will consider the public comments and issue a non- draft PD within 30 days of the closing date of the public comment period.

Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, appearing to read "Ashley Kemmis".

Ashley Kemmis  
Water Resource Specialist  
Water Rights Bureau  
Water Resources Division



**DNRC.MT.GOV**

CC: American Prairie Foundation



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April 29, 2025

American Prairie Foundation  
PO Box 908  
Bozeman, MT 59771-0908

Subject: Updated Draft Preliminary Determination to Grant Water Right Change Application No. 40EJ 30164552

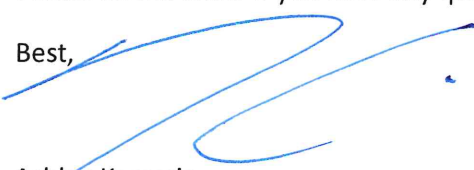
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Please let me know if you have any questions.

Best,



Ashley Kemmis  
Water Resource Specialist  
Water Rights Bureau  
Water Resources Division



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CC: Shane Schwenke/Thornhill Ranch Partnership



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

\*\*\*\*\*

<b>APPLICATION TO CHANGE WATER RIGHT – ADDITIONAL STOCK TANKS-- NO. 40EJ 30164552 by SHANE SCHWENKE, THORNHILL RANCH PARTNERSHIP AND AMERICAN PRAIRIE FOUNDATION</b>	<b>) DRAFT PRELIMINARY DETERMINATION ) TO GRANT CHANGE</b>
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On September 30, 2024, Shane Schwenke and Thornhill Ranch Partnership (Applicant) submitted Application to Change Water Right--Additional Stock Tanks No. 40EJ 30164552 to change Water Right No. 40EJ 30103397 to the Glasgow 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 November 8, 2024. American Prairie Foundation was added as an Applicant on January 13, 2025. An Environmental Assessment for this Application was completed on March 6, 2025. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on March 25, 2025, to which the Department granted seven days to submit additional information. The Applicant submitted additional information on March 25, 2025.

**INFORMATION**

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

Application as filed:

- Application to Change a Water Right—Additional Stock Tanks, Form 606-ST
- Maps: Department created map on Montana Spatial Data Infrastructure (MSDI) National Agricultural Imagery Program (NAIP) 2017 aerial photos
- Letter from Montana Sage Grouse Habitat Conservation Program dated September 5, 2024

Information Received after Application Filed

- Email from William Moore of DMS Natural Resources, LLC, dated March 25, 2025, regarding typographical errors in the Draft PD and clarification that there are two stock tanks in the place of use NWNWNE Section 20, T24N R24E.

Information within the Department's Possession/Knowledge

- Provisional permit file for 40EJ 30103397

- Ownership Update #268398 filed by American Prairie Foundation on December 5, 2024 including 40EJ 30103397

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 or 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; AU means animal units; and AF/YR means acre-feet per year.

## **WATER RIGHTS TO BE CHANGED**

### **FINDINGS OF FACT**

1. Applicant seeks to change the place of use of Provisional Permit No. 40EJ 30103397 in this Application. Provisional Permit No. 40EJ 30103397 is appropriated for 20 GPM flow rate and 16.1 AF diverted volume from Siparyann Creek via means of a pump for the purpose of stock use for 900 AU. The period of use and the period of diversion are October 1 to March 31. The point of diversion is in the SWNWSW, Section 21, T24N, R24E, Philips County and water is conveyed to nine stock tanks by means of a pipeline.

Table 1: Water Right Proposed for Change							
Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
40EJ 30103397	20 GPM	16.1 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E  SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks)  SESENW, Sec. 17, 24N, 24E  SENENW, Sec. 17, 24N, 24E  NENENW, Sec. 17, 24N, 24E  NENWNW, Sec. 17, 24N, 24E	SWNWSW, Section 21, T24N, R24E, Philips County	August 11, 2015

					NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)		
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2. There are no supplemental water rights for the place of use and no previous changes have been requested or authorized on Provisional Permit 40EJ 30103397.

3. A project completion notice was received on October 13, 2016, for Provisional Permit 40EJ 30103397 and was verified by the Department on November 18, 2016.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

4. The Applicant proposes to change the POU by adding six stock tanks on five places of use to Provisional Permit 40EJ 30103397 for stock use with a flow rate of 20 GPM for 16.1 AF out of Siparyann Creek. The period of use and the period of diversion are October 1 to March 31.

5. These six stock tanks were previously supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but have been disconnected from the wells due to inadequate flow. The Applicant requested to remove the six tanks from the place of use of Groundwater Certificates 40EJ 30000128 and 40EJ 30052429 on September 27, 2024. The Department issued the reduced versions on October 4, 2024.

6. If authorized, the proposed change will add these five POUs to Provisional Permit 40EJ 30103397. The remaining elements of the permit will remain the same, as described in Table 2.

Table 2: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Period of Diversion	Period of Use
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E  SESWSE Sec. 18, T24N, R24E  NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks)  NESWNE Sec. 13, T24N, R23E  SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Philips County	20 GPM	10/01-3/31	10/01-3/31

7. The 606-ST application to change a water right was initially submitted by Shane Schwenke and Thornhill Ranch Partnership on September 30, 2024. A portion of the place of use was sold to American Prairie Foundation in the fall of 2024. In a warranty deed provided to the DNRC with the water right ownership update #268398 received on December 5, 2024, a provision for co-ownership of the water right/change authorization for provisional permit 40EJ 30103397 was expressed. American Prairie Foundation was added as an Applicant after DNRC received their signature on the application on January 13, 2025.



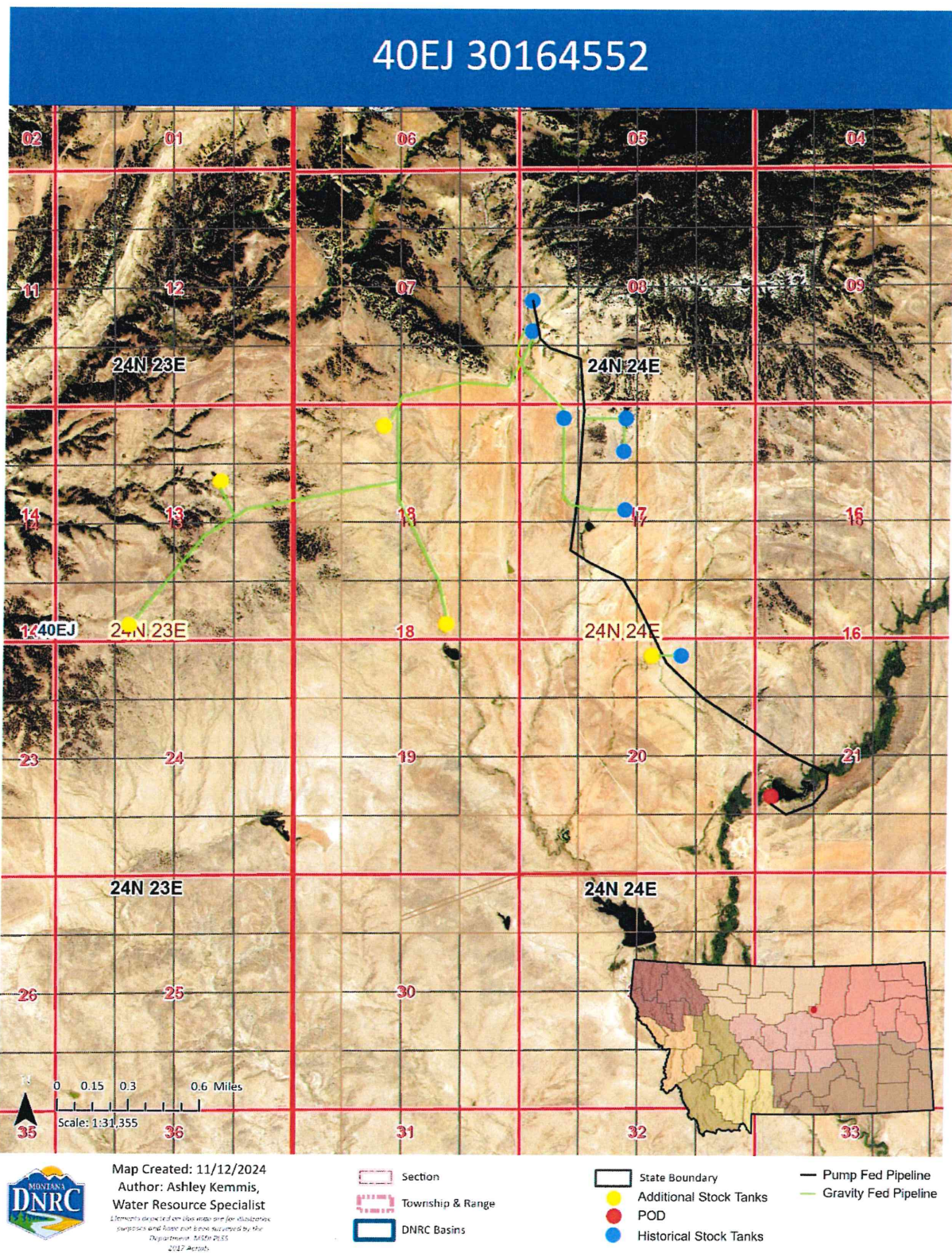


Figure 1. Map of Proposed and Historical Stock Tanks

## **CHANGE CRITERIA**

8. 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.

9. 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**

10. Per ARM 36.12.1902(1)(c), historic information for a certificate of water right must be described as it was used at the filing date of the completion notice (date October 13, 2016). As of October 13, 2016, the pump historically diverted 20 GPM and 16.1 AF of water to supply 900 AU. ARM 36.12.115(2)(c) designates year-round consumptive use for 1 animal unit (AU) at 0.017 AF per year, which equates to a consumptive volume of 7.63 AF ( $900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days/365 days}$ ). Because the pump ran continuously to prevent freezing and to adequately serve nine stock tanks, the total system diverted water at 20 GPM up to 16.1 AF annually. Overflow water that was not consumed by stock was discharged back into Siparyann Creek through a 1-mile-long drain line. The Department has determined that stock use is 100% consumptive; therefore 7.63 AF is the total consumed volume, and 16.1 AF is the total diverted volume. See Table 3 for a summary of historical use.

Table 3: Historic Use for Provisional Permit 40EJ 30103397								
Priority Date	Water Right Number	Flow Rate	Diverted Volume	Consumed Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion
August 11, 2015	40EJ 30103397	20 GPM	16.1 AF	7.63 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks) SESENW, Sec. 17, 24N, 24E SENENW, Sec. 17, 24N, 24E NENENW, Sec. 17, 24N, 24E NENWNW, Sec. 17, 24N, 24E NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)	SWNWSW, Section 21, T24N, R24E, Philips County

## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

11. Provisional permit No. 40EJ 30103397 was filed for stock use serving 900 AU from October 1 to March 31 using a flow rate of 20 GPM. The diverted volume of 16.1 AF is needed for the Applicant to meet the beneficial use. No additional animal units will be grazed under the



proposed change. By connecting the six stock tanks to the existing permit, the Applicant would ensure that water reliably reaches these six tanks. Therefore, the proposed application will not exceed the historic consumptive volume of 7.63 AF and the historic diverted volume of 16.1 AF. A summary of the proposed change is shown in Table 4.

Table 4: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Proposed Consumptive Volume	Proposed Diverted Volume
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E  SESWSE Sec. 18, T24N, R24E  NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks)  NESWNE Sec. 13, T24N, R23E  SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Philips County	20 GPM	7.63 AF	16.1 AF

12. Each tank can be shut off via float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow reduction is needed.
13. If a call is made, the Applicant has the ability to stop flow with the shut-off valves and cease pumping to the additional tanks.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

14. The Applicant has historically used water for stock use from October 1 to March 31. Stock use is recognized by the Department as a beneficial use of water and has a water use standard of 0.017 AF/AU/YR. The Applicant has historically watered 900 AU, which equates to a consumptive volume of 7.63 AF ( $900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days}/365 \text{ days}$ ). The Applicant will continue to run the pump continuously at 20 GPM (0.045 CFS) for the requested 182 days to prevent freezing, for a total diverted volume of 16.1 AF per year ( $0.045 \text{ CFS} * 1.98 \frac{\text{AF}}{\text{Day} * \text{CFS}} * 182 \text{ days}$ ).
15. The requested flow rate is necessary to ensure optimal operation of the pipeline during the winter and adequately supply 15 stock tanks (9 historically and 6 proposed). The additional

stock tanks used to be supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but were disconnected due to inadequate pressure. The Applicant stated that these tanks would be more reliably fed by the proposed gravity-fed pipeline.

16. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

## **ADEQUATE DIVERSION**

### **FINDINGS OF FACT**

17. Water is diverted from Siparyann Creek at a single diversion point at SWNWSW, Section 21, T24N, R24E, Philips County using a 2-HP FPS Series Five submersible pump (Model 20F2S4-PE). The system will feed a total of 15 rubber, winterized stock tanks (9 historically and 6 proposed) via a 1.5-inch PVC pipeline that is buried 6-ft deep. There are float tank valves at each stock tank with a small valve to allow for circulation and prevent freezing. Each tank can be shut off via the float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow rate reduction is needed.

18. The pump conveys water up to Section 8 via the 1.5-inch PVC pipeline (see Figure 1). The proposed POUs will be supplied by an additional pipeline that runs from Section 8 through Section 18, T24N, R24E. Water is gravity fed through this additional portion (Section 8 to 18) where the ground elevation decreases by approximately 185-ft. The pipeline branches in Section 18, T24N, R24E, to serve the two tanks in Section 13, T24N, R23E. A drain line runs from Section 8 down to Section 17 in T24N, R24E. This is used to relieve spillover water when all tanks are full. Water returns to the Siparyann Creek from this drain line.

19. The Department finds the proposed means of diversion is adequate.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

20. The Applicants signed the affidavit on the application form affirming the Applicants have 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.

## **CONCLUSIONS OF LAW**

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

21. 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>

22. 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>

23. 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>

24. 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>

25. 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.

26. 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).

27. 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.

28. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 40EJ 30103397 to be a diverted volume of 16.1 AF, a historically consumed volume of 7.63 AF, and flow rate of 20 GPM. (FOF 10)

29. Based upon the Applicant's comparative analysis of historic water use and water use 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)(a), MCA. (FOF Nos. 11-13)

### BENEFICIAL USE

30. 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).

31. Applicant proposes to use water for stock use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence stock use is a beneficial use and that 16.1 acre-feet of diverted volume and 20 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. Section 85-2-402(2)(c), MCA (FOF Nos. 14-16).

#### ADEQUATE MEANS OF DIVERSION

32. 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).

33. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989) (whether party presently has easement not relevant to determination of adequate means of diversion);

34. 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. 17-19)

#### POSSESSORY INTEREST

35. 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.

36. 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 No. 20).

### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right—Additional Stock Tanks No. 40EJ 30164552 should be granted subject to the following.

The Department has determined that the Applicant may add six stock tanks to Water Right 40EJ 30103397 in the following places of use:

#### Proposed additional stock tanks

- NENENW, Sec. 18, T24N, R24E
- SESWSE Sec. 18, T24N, R24E
- NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks)
- NESWNE Sec 13, T24N, R23E
- SWSESW, Sec. 13, T24N, R23E

The point of diversion in SWNWSW, Sec. 21, T24N, R24E, Phillips County and original places of use (listed below) on Water Right No. 40EJ 30103397 will remain unchanged. The period of use and period of diversion are October 1 to March 31. The flow rate is 20 GPM and the diversion volume is 16.1 AF per year for stock use.

#### Historical stock tanks

- SWNWSW, Sec. 8, 24N, 24E
- SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks)
- SESENW, Sec. 17, 24N, 24E
- SENENW, Sec. 17, 24N, 24E
- NENENW, Sec. 17, 24N, 24E
- NENWNW, Sec. 17, 24N, 24E
- NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)

## NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 29th day of April, 2025.



Lih-An Yang, Manager  
Glasgow Regional Office

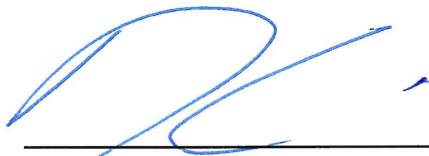
Montana Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 29th day of April, 2025, by first class United States mail.

SHANE SCHWENKE  
THORNHILL RANCH PARTNERSHIP  
2210 POWER PLANT FERRY RD  
ZORTMAN, MT 59546

AMERICAN PRAIRIE FOUNDATION  
PO BOX 908  
BOZEMAN, MT 59771-0908

A handwritten signature in blue ink, appearing to be 'R.', is written over a horizontal line.

GLASGOW Regional Office, (406) 228-2561