

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

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APPLICATION TO CHANGE WATER RIGHT) NO. 40S 30162715 BY PINNACLE) RANCH INC)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On December 26, 2023, Pinnacle Ranch Inc. (Applicant) submitted Application to Change a Water Right, Additional Stock Tanks, No. 40S 30162715 to change Groundwater Certificate Nos. 40S 30162424 and 40S 81342-00 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 March 5, 2024. On April 29, 2024, the Department received the Applicant’s request to withdraw Groundwater Certificate 40S 81342-00, as well as an Amendment to Application. The amendment for the change application was to change Groundwater Certificate No. 40S 30162424 only. The Amendment reset the application timeline. The amended Application was determined to be correct and complete as of May 14, 2024. An Environmental Assessment for this Application was completed on May 8, 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 a Water Right, Additional Stock Tanks, Form 606-ST
- Attachments: Answers to Criteria Questions
- Maps: Aerial imagery showing the point of diversion, pipeline, storage tank, existing stock tanks and proposed stock tank location.

Information received after application filed:

- Authorization for Temporary Change in Appropriation Right Consent Form from Montana DNRC Trust Land Management Division received on February 2, 2024
- Letter from Montana Sage Grouse Habitat Conservation Program dated February 7, 2024
- Request to withdraw Water Right 40S 81342-00 received on April 29, 2024.

- Amendment to Application 40S 30162715 received on April 29, 2024.

Information within the Department’s Possession/Knowledge

- DNRC Memo to File – Prepared on February 13, 2024, by DNRC Acting Regional Manager Lih-An Yang regarding the means of diversion.
- Information contained in the active file of Groundwater Certificates 40S 30162424 and 40S 81342-00.
- Environmental Assessment dated May 8, 2024, by DNRC Water Resource Specialist Ashley Kemmis.

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).

NOTE: Department or DNRC means the Department of Natural Resources & Conservation; AF means acre-feet; GPM means gallons per minute; AU means animal units; AF/YR means acre-feet per year; POD means point of diversion; and POU means place of use.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change Groundwater Certificate 40S 30162424. Groundwater Certificate 40S 30162424 is for 18 GPM and 7.65 AF diverted volume from a well for 450 animal units (AU) of livestock use with a priority date of November 21, 2023. The period of use and the period of diversion are January 1, through December 31. The well is located in the SESENW Section 2, T23N, R46E in McCone County. Groundwater Certificate 40S 30162424 includes 17 stock tanks over 11 sections; their places of use are listed below Table 1. The project is located 24 miles northwest of Circle, MT.

Table 1: Water right proposed for change

Water Right	Purpose	Flow Rate (GPM)	Diverted Volume (AF)	Period of Diversion	Point of Diversion	Place of Use (all in McCone County)	Priority Date
Groundwater Certificate 40S 30162424	Stock 450 AU	18	7.65	1/1-12/31	SESENW Sec. 2, T23N, R46E	17 stock tanks (See Below)	11/21/2023

Place of Use for Groundwater Certificate 40S 30162424 is as follows:

1. SESENW Sec 2, Twp 23N, Rge 46E
2. SESESE Sec 3, Twp 23N, Rge 46E
3. SWSENW Sec 11, Twp 23N, Rge 46E
4. NWSWNW Sec 11, Twp 23N, Rge 46E
5. NENW Sec 14, Twp 23N, Rge 46E
6. SWNESE Sec 16, Twp 24N, Rge 46E
7. SESWSE Sec 16, Twp 24N, Rge 46E
8. NWNENW Sec 21, Twp 24N, Rge 46E
9. NWNENW Sec 22, Twp 24N, Rge 46E
10. NENESE Sec 22, Twp 24N, Rge 46E
11. SENESW Sec 23, Twp 24N, Rge 46E
12. SENENW Sec 26, Twp 24N, Rge 46E
13. SESESW Sec 26, Twp 24N, Rge 46E
14. NWNWNE Sec 27, Twp 24N, Rge 46E
15. NESWSE Sec 27, Twp 24N, Rge 46E
16. SESWSE Sec 27, Twp 24N, Rge 46E
17. NESESW Sec 35, Twp 24N, Rge 46E

2. Groundwater Certificate 40S 30162424 was originally issued on November 30, 2023 and associated with Groundwater Certificate 40S 81342-00. They are the same well. After the Applicant withdrew Groundwater Certificate 40S 81342-00, the Department reissued Groundwater Certificate 40S 30162424 on May 6, 2024. The water right was reissued to reflect the total flow rate of 18 GPM and total volume of 7.65 AF serving 450 AU year-round with 17 stock tanks on private land.

3. The Applicant is the sole owner of Groundwater Certificate 40S 30162424. The water right currently does not have a supplemental water right and has not had any previous change authorization.

4. Figure 1 shows the location of the existing well and stock tanks.



Pinnacle Ranch

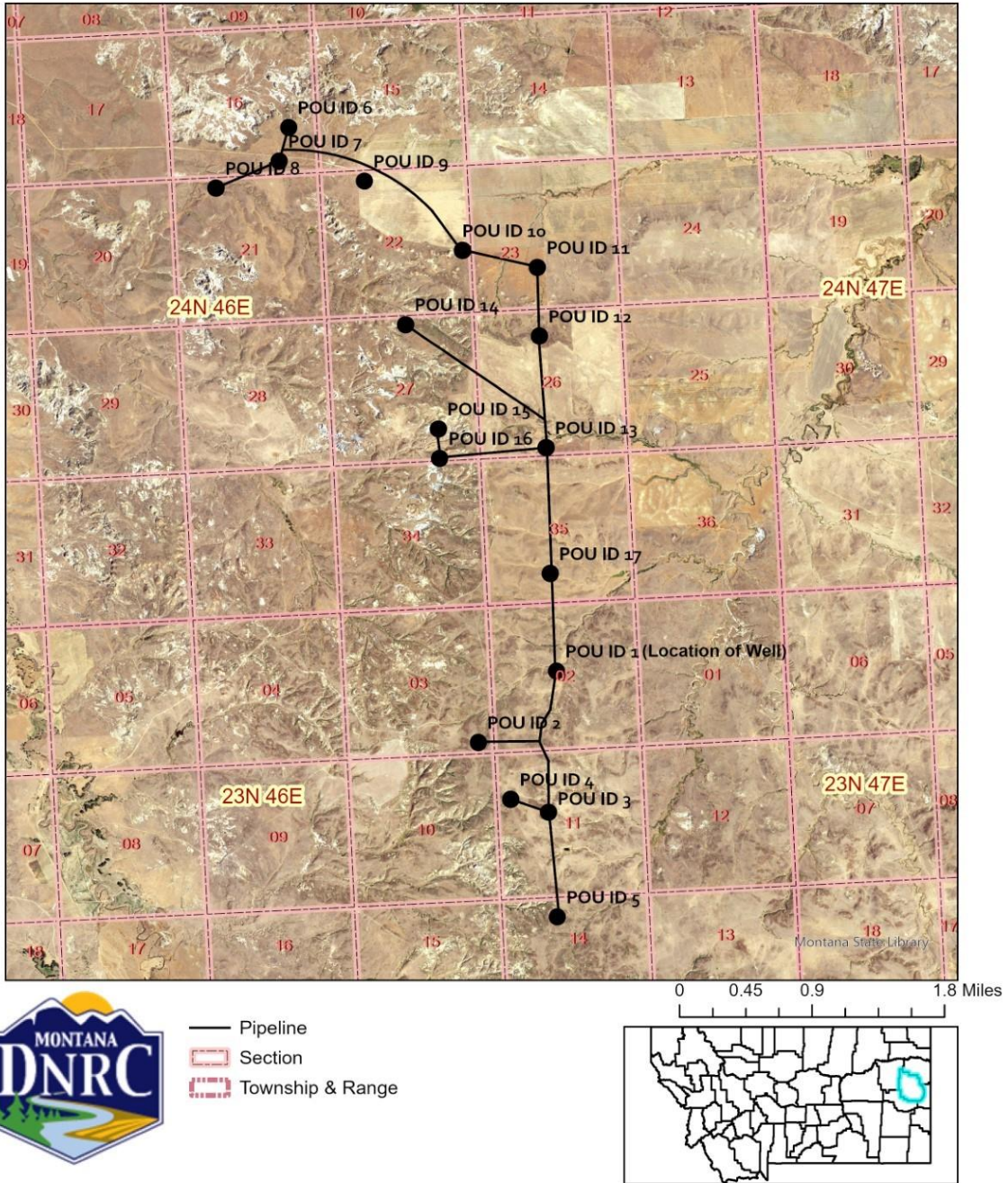


Figure 1: Location of historical well and places of use.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to temporarily change the place of use by adding one stock tank to Groundwater Certificate 40S 30162424. The Applicant is proposing to add one stock tank in NENENE Section 16, T24N, R46E, McCone County, which is owned by the State of Montana Trust Lands Management Division. The Applicant holds Agricultural and Grazing Lease No. 8130 on this State section.

6. Pursuant to §§85-2-407 and -441, MCA., the Applicant proposes to add one stock tank on school trust land through a temporary change in appropriation right to use the lessee's water right on State trust land for the duration of State Lease No. 8130. An authorization for Temporary Change in Appropriation Right, signed by the Applicant, DNRC Eastern Land Office and DNRC Ag & Grazing Bureau, was received by DNRC Glasgow Regional Office on February 2, 2024.

7. Agricultural and Grazing Lease No. 8130 took effect on March 1, 2020, for a term of 10 years with an expiration date of February 28, 2030. The temporary change to add this place of use to Groundwater Certificate 40S 30162424 will be for the term of this lease and must be renewed when the lease is renewed for the Applicant to continue using the place of use associated with this temporary change. In the instance Temporary Change Authorization 40S 30162715 is not renewed, expires, or is terminated, Groundwater Certificate 40S 30162424 will be used in accordance with the terms set forth in their issuance.

8. Under this temporary change proposal, Groundwater Certificate 40S 30162424 will divert 7.65 AF of water at 18 GPM for 450 AU livestock. A total of 18 stock tanks will be included in the appropriation. The period of use and period of diversion will continue to be January 1 through December 31. Flow rate and volume will not increase on the source of supply as a result of this change.

9. An existing water right, Statement of Claim 40S 43049 00 held by Montana State Board of Land Commissioners, provides water for 60 AU from a spring located in NENENE Section 16, T24N, R46E, near the proposed stock tank. According to DNRC Eastern Land Office, the Applicant's livestock have access to this spring. The proposed additional tank will be able to provide a reliable water supply year-round.

10. Table 2 summarizes the water right under the change authorization. A map of the proposed stock tank and pipeline is shown in Figure 2.

Table 2: Summary of proposed change

Water Right	Purpose	Flow Rate (GPM)	Diverted Volume (AF)	Period of Diversion	Point of Diversion	Place of Use (all in McCone County)	Priority Date
Groundwater Certificate 40S 30162424	Stock 450AU	18	7.65	01/01- 12/31	SESENW Sec. 2 T23N R46E	18 stock tanks, listed below	11/21/2023

1. SESENW Sec 2, Twp 23N, Rge 46E
2. SESESE Sec 3, Twp 23N, Rge 46E
3. SWSENW Sec 11, Twp 23N, Rge 46E
4. NWSWNW Sec 11, Twp 23N, Rge 46E
5. NENW Sec 14, Twp 23N, Rge 46E
6. SWNESE Sec 16, Twp 24N, Rge 46E
7. SESWSE Sec 16, Twp 24N, Rge 46E
8. NWNENW Sec 21, Twp 24N, Rge 46E
9. NWNENW Sec 22, Twp 24N, Rge 46E
10. NENESE Sec 22, Twp 24N, Rge 46E
11. SENESW Sec 23, Twp 24N, Rge 46E
12. SENENW Sec 26, Twp 24N, Rge 46E
13. SESESW Sec 26, Twp 24N, Rge 46E
14. NWNWNE Sec 27, Twp 24N, Rge 46E
15. NESWSE Sec 27, Twp 24N, Rge 46E
16. SESWSE Sec 27, Twp 24N, Rge 46E
17. NESESW Sec 35, Twp 24N, Rge 46E
18. NENENE Sec 16, Twp 24N, Rge 46E (proposed temporary change)



Figure 2: Location of the proposed temporary stock tank

11. The following condition is proposed to satisfy the possessory interest criterion:
 In the present case, the Applicant is the owner of Groundwater Certificate 40S 30162424. The Applicant proposes to take water diverted from the well located on private property, and temporarily use it for stock purpose on State Trust Land for the duration of Agricultural & Grazing Lease of State Lands Agreement No. 8130. The Applicant obtained written consent from the

DNRC Trust Land Management Division to temporarily use Groundwater Certificate 40S 30162424 on the State Trust Land for the 10-year duration of Agricultural & Grazing Lease of State Lands Agreement No. 8130. Expiration or termination of Agricultural & Grazing Lease of State Lands Agreement No. 8130 will result in the revocation of temporary change authorization 40S 30162715, and Groundwater Certificate 40S 30162424 will be used in accordance with the terms set forth in its issuance.

CHANGE CRITERIA

12. 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 probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

13. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

14. In addition to the §85-2-402(2), MCA, an applicant for a temporary change authorization must comply with the requirements and conditions set forth in §85-2-407, MCA. Section 85-2-441, MCA, provides that a water right owner may temporarily apply water diverted from a well or developed spring located on private land to beneficial use on state trust land for the duration of a state land lease held by the water right owner. Pursuant to §85-2-407, MCA, a temporary change may be approved for a period not to exceed 10 years. Upon expiration of the temporary change, the water right will automatically revert to its original terms. This temporary change may be renewed an indefinite number of times but may not exceed 10 years for each renewal. An application for renewal requires the written consent of the DNRC Trust Land Management Division.

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

15. Groundwater Certificate 40S 30162424 is for stock purpose from a well (GWIC ID 128166) located in the SESENW Section 2, T23N, R46E with a priority date of November 21, 2023. The historical diverted flow rate was 18 GPM for 450 cow/calf pairs. The period of use and period of diversion have historically been January 1 through December 31. Per DNRC water use standard (ARM 36.12.115) of 0.017 AF consumptive use per year per animal unit (1 cow/calf pair = 1AU), the consumptive volume of Groundwater Certificate 40S 30162424 is 7.65 AF per year (0.017 AF/AU/Year * 450 AU = 7.65 AF). The well supplies to 17 stock tanks on deeded land through a network of pipelines and storage tank.

16. The Department finds that there is no conveyance loss in this pipeline/storage tank conveyance system.

17. The Department considers stock use to be 100% consumptive per 2018 Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping by the Water Science Bureau. With no loss of water to the conveyance structure, historic diverted volume for stock also

equals historic consumptive volume. The historic consumptive and diverted volume for all 450 animal units included in Groundwater Certificate 40S 30162424 is 7.65 AF.

18. The Department finds the following historic use.

Table 3: Historic water use

Water Right	Priority Date	Purpose	Flow Rate	Diverted Volume (AF)	Consumed Volume (AF)	Place of Use	Point of Diversion
Groundwater Certificate 40S 30162424	11/21/2023	Stock 450 AU	18 GPM	7.65	7.65	17 stock tanks (see below)	SESENW Sec. 2, T23N, R46E

Place of Use for Groundwater Certificate 40S 30162424 is as follows, all in McCone County:

1. SESENW Sec 2, Twp 23N, Rge 46E
2. SESESE Sec 3, Twp 23N, Rge 46E
3. SWSSE Sec 11, Twp 23N, Rge 46E
4. NWSWNW Sec 11, Twp 23N, Rge 46E
5. NENW Sec 14, Twp 23N, Rge 46E
6. SWNESE Sec 16, Twp 24N, Rge 46E
7. SESWSE Sec 16, Twp 24N, Rge 46E
8. NWNENW Sec 21, Twp 24N, Rge 46E
9. NWNENW Sec 22, Twp 24N, Rge 46E
10. NENESE Sec 22, Twp 24N, Rge 46E
11. SENESW Sec 23, Twp 24N, Rge 46E
12. SENENW Sec 26, Twp 24N, Rge 46E
13. SESESW Sec 26, Twp 24N, Rge 46E
14. NWNWNE Sec 27, Twp 24N, Rge 46E
15. NESWSE Sec 27, Twp 24N, Rge 46E
16. SESWSE Sec 27, Twp 24N, Rge 46E
17. NESESW Sec 35, Twp 24N, Rge 46E

FINDINGS OF FACT – Adverse Effect

19. The proposed use for Groundwater Certificate 40S 30162424 is 18 GPM and 7.65 AF for stock purpose for 450 AU year-round. The proposal will include 18 stock tanks that are connected via pipeline. The proposed change will reduce the distance cattle have to travel for water and improve pasture utilization. Herd size will not increase under the proposed change, nor will the rate and timing of stock use. The volume, flow rate and pumping schedule will not change from the historical use. All tanks have a float switch and shut-off valve that the Applicant can use to shut down the stock tank pipeline system if call is made.

20. For the purpose of evaluating adverse effect, the Department defined the area of potential impact as the nine sections adjoining and including Section 16, T24N, R46E, where the point of diversion is located. The following water rights are in the area of potential impact:

Table 4: Water rights considered for adverse effect. All rights are sourced from groundwater.

Water Right	Owner	Purpose	Priority Date	Flow (GPM)	Volume (AF)
40S 168919-00	Pinnacle Ranch	Stock	10/21/1946	6	For 420 AU
40S 168920-00	Pinnacle Ranch	Stock	12/30/1952	6	For 420 AU
40S 69255-00	BLM	Stock/wildlife/waterfowl	09/26/1988	2	1.5
40S 53385-00	BLM	Stock	01/11/1984	10	1.61
40S 15884-00	Bernis & Liz Taylor	Stock	10/31/1977	6	1.5
40S 10935-00	Flaten Ranch Inc.	Stock	1/10/1977	6	Not assigned

21. The proposed application will continue to use the same pipeline/storage tank system to deliver water to the proposed temporary tank on State trust land. There will not be water loss in the conveyance structure.

22. The proposed consumptive volume of all 450 animal units included in the Groundwater Certificate 40S 30162424 is 7.65 AF. Consumption for livestock is 100% per 2018 Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping by the Water Sciences Bureau. With no conveyance loss, the proposed diverted volume is also 7.65 AF. The source of water and flow rate of the well will remain the same; the proposed consumed and diverted volumes for this change are the same as the historic consumed and diverted volumes of 7.65 AF.

23. Based on this information, the Department finds the proposed change will not have an adverse effect.

BENEFICIAL USE

FINDINGS OF FACT

24. The Applicant proposes to use water for livestock, which is recognized as a beneficial use under the Montana Water Use Act. §85-2-102 (5), MCA.

25. The Applicant proposes to supply 7.65 AF from a well operating at 18 GPM for 450 AU year-round. This beneficial use is supported by the historical beneficial use as well as by DNRC

standards. By adding the temporary stock tank on State Land, the Applicant will be able to provide reliable water to a total of 18 stock tanks and manage grazing rotation more effectively.

26. The Department finds that the appropriation of 18 GPM and 7.65 AF, and the temporary stock tank on State trust land, is the beneficial use for the Applicant's proposed change.

ADEQUATE DIVERSION

FINDINGS OF FACT

27. The point of diversion consists of a stock well completed in 1992. The well and original stock tank are located in the SESENW Section 2, T23N, R46E in McCone County. The well, with GWIC ID 128166, was tested at 25 GPM for 24 hours when it was drilled in 1992. The Applicant uses a 3-HP variable frequency drive pump to transport water 165 feet uphill to a 16,000-gallon storage tank with a 2-inch HDPE pipeline that is buried 5.5-ft deep. The storage tank is 16-ft tall and buried 4-ft into the ground. In the warm months, gravity feed pushes water from storage tank to the stock tanks, while in winter, the Applicant uses only the pipelines. Currently, there are 17 stock tanks on deeded land that are dispersed throughout 11 sections and are operational with this system. Under the change authorization, the pipeline will be extended to the temporary tank on the State section. All the stock tanks have a float switch and Jobe Megaflo 1-inch valves which can be shut off if necessary. The Applicant stated that the existing system has been supplying sufficient flow for the herd.

28. The Department finds the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

29. 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.

30. The additional place of use proposed in the NENENE Section 16, T24N, R46E, McCone County, is located on property owned by the State of Montana Trust Lands Management Division and leased by the Applicant. This place of use is being added through this temporary change in appropriation right to use the lessee's water rights on School Trust Land for the duration of State Lease No. 8130 pursuant to §§85-2-407 and -441, MCA. An authorization for Temporary Change in Appropriation Right has been signed by the Applicant and approved by the Trust Lands

Management Division. Agricultural and Grazing Lease No. 8130 took effect on March 1, 2020, for a term of 10 years with an expiration date of February 28, 2030. If the Applicant renews the lease, they must apply to renew the temporary change authorization to continue using this place of use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

31. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer

Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

32. 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, at ¶¶43-45.²

33. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of 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

¹ DNRC decisions are available at:

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

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A 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. §85-2-234, MCA

expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District 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

34. 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

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

use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; 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; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 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

35. 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 ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

36. 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

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, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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).

37. 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. Admin.R.M. 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. Admin.R.M. 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. Admin.R.M. 36.12.1901 and 1903.

38. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic appropriation of Groundwater Certificate 40S 30162424 of 7.65 AF diverted volume and 18 GPM flow rate with a consumptive use of 7.65 AF. (FOF Nos. 15—18)

39. Based upon the Applicant’s comparative analysis of historic water use to 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. §85-2-402(2)(b), MCA. (FOF 19-23)

BENEFICIAL USE

40. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 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).

41. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock use is beneficial and that 7.65 AF of diverted volume and 18 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 24-26)

ADEQUATE MEANS OF DIVERSION

42. 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).

43. 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);

44. 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 27-28)

POSSESSORY INTEREST

45. 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 Admin.R.M. 36.12.1802

46. 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 29-30)

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 Tank, No. 40S 30162715 should be GRANTED subject to the following.

The Applicant may temporarily add one stock tank in the NENENE Section 16, T24N, R46E, McCone County. The temporary change to add this place of use will be for the term of Agricultural and Grazing Lease No. 8130 and must be renewed when the lease is renewed in order for the Applicant to continue using this place of use. Agricultural and Grazing Lease No. 8130 took effect on March 1, 2020, for a term of 10 years with an expiration date of February 28, 2030. In the instance Temporary Change Authorization 40S 30162715 is not renewed, expires, or is terminated, Groundwater Certificate 40S 30162424 will be used in accordance with the terms set forth when issued. Groundwater Certificate 40S 30162424 diverts groundwater from a well located in SESENW Section 2, T23N, R46E in McCone County at 18 GPM for 7.65 AF for 450 AU year-round.

This change authorization is subject to the following condition:

In the present case, the Applicant is the owner of Groundwater Certificate 40S 30162424. The Applicant proposes to take water diverted from the well located on private property, and temporarily use it for stock purpose on State Trust Land for the duration of Agricultural & Grazing Lease of State Lands Agreement No. 8130. The Applicant obtained written consent from the DNRC Trust Land Management Division to temporarily use Groundwater Certificate 40S 30162424 on the State Trust Land for the 10-year duration of Agricultural & Grazing Lease of State Lands Agreement No. 8130. Expiration or termination of Agricultural & Grazing Lease of State Lands Agreement No. 8130 will result in the revocation of temporary change authorization 40S 30162715.

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 4th day of June, 2024.

/Original signed by Lih-An Yang/
Lih-An Yang, Acting Regional Manager
Glasgow Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 4th day of June, 2024, by first class United States mail.

PINNACLE RANCH INC
1204 PRAIRIE ELK RD
WOLF POINT, MT 59201

Glasgow Regional Office (406) 228-2561