

CORRECTED COPY

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

* * * * *

On August 7, 2023, Ross P. and Jennifer B. Mitchell (Applicant) submitted Application to Change Water Right No. 41G 30159590 to change Permit 41G 30153029 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 24, 2024. The Applicant responded with information dated March 3, 2023. A preapplication meeting was held between the Department and the Applicant on February 7, 2023. The Application was determined to be correct and complete as of May 31, 2024. An Environmental Assessment for this application was completed on September 25, 2024.

INFORMATION

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

Application as filed:

- Irrigation Application for Change of Appropriation Water Right, Form 606-IR
 - Addenda:
 - Aquifer Testing Addendum, Brancheau, Nicole, "A Hydrogeologic Evaluation of the Waterloo Area in the Upper Jefferson River Valley, Montana" (2015). Graduate Theses & Non-Theses.11.
 - Attachments:
 - Variance Request Letter, submitted by Applicant on April 12, 2023
 - Brancheau, Nicole, "A Hydrogeologic Evaluation of the Waterloo Area in the Upper Jefferson River Valley, Montana" (2015). Graduate Theses & Non-Theses.11.
 - Aerial photographs of historical place of use, 2002 and 2005
 - Maps:
 - Completed Place of Use for Permit 41G 92516-00 Map, dated December 11, 2017
 - Permit 41G 92156-00 Place of Use as Completed Map, undated topography map

CORRECTED COPY

- Proposed Point of Diversion for Permit 41G 30153029 Map, undated
- Groundwater and Surface Water Monitoring Network Map, undated

Information Received after Application Filed

- Deficiency Letter Response from Applicant dated March 3, 2024
- Email chain between Applicant (Ross Mitchell) and DNRC (Savannah Telander) dated March 5, 2024, Re: Deficiency Letter for Application to Change Existing Water Right No 41G 30153029
- Email chain between Applicant (Ross Mitchell) and DNRC (Savannah Telander) dated June 10, 2024, Re: Ross & Jennifer Mitchell 41G 30159590 Correct and Complete

Information within the Department's Possession/Knowledge

- Provisional Permits 41G 92516-00 and 41G 30153029 files
- Withdrawn Provisional Permit 41G 117127-00 file
- DNRC Irrigation Change Application Technical Report: Technical Report dated May 31, 2024
- DNRC Groundwater Change Report, dated May 16, 2024
- Internal DNRC emails (Evan Norman and Savannah Telander) dated May 10, 2024, Re: 41G 30159590 – Variance Request Recommendations
- Variance Request Response Letter, dated May 31, 2024
- Water Resources Survey, Madison County, 1954
- NAIP Photo m_451123_ne_12_1, dated August 4, 2005
- NAIP Photo m_4511223_ne_12_1, dated July 23, 2009
- Esri Aerial Imagery Baselayer Maxar, dated August 9, 2018
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Bozeman Regional Office at 406-586-3136 to request copies of the following documents.
 - “Development of Standardized Methodologies to Determine Historic Diverted Volume” (Roberts and Heffner, 2012)
 - Technical Memorandum: Net Surface Water Depletion from Groundwater Pumping, dated July 6, 2018

CORRECTED COPY

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; and AF means acre-feet.

FRONT MATTER

Provisional Permit 41G 92516-00 is an irrigation permit that was originally filed by Floyd Fredrickson on April 5, 1995. Permit 41G 92516-00 was originally filed for water from a well in NESWNE Section 26, T1S, R5W, Madison County, for sprinkler irrigation of 200 acres in Section 23 and 26, T1S, R5W, Madison County. The original permitted acres vary slightly from the final completed acres. DNRC guidance at the time was to use the project completion notice versus a change application, as the acreage fell within the same sections (see Figure 1 and page 6 and page 8 in the scan of permit file 41G 92516-00, documenting this DNRC decision and showing manual guidance at the time). The original permit Applicant remained the owner through the project of completion notice, which was filed on September 26, 2001. After the project was completed, a contract for deed was enacted on October 23, 2001.

Since that first update, the Permit has served multiple owners. DNRC was approached starting in 2013 by new parcel owners, as a single well was no longer working with multiple parcel owners. The process to split the water right into individual ownerships was started so that individual wells could then be pursued. Splitting the Permit required a certification of Permit 41G 92516-00. DNRC conducted a field visit on May 21, 2019, and completed certification of the Permit on January 8, 2020. Some contention remains with this permit, as some parties argue that the Mitchell portion was severed or abandoned by a previous owner. DNRC does not have any recorded filings that allow us to change the owner of record from the appurtenant landowner.

Permit 41G 92516-00 was perfected on the Applicant's parcel based on evidence that was available between issuance (1995) to project completion (2001). Evidence included affidavits from previous landowners, historical aerial imagery, and a site visit conducted by the Department on May 21, 2019. Permit 41G 92516-00 was split on January 10, 2020, with child rights represented by Permit 41G 30153027, Permit 41G 30153028, and Permit 41G 30153029. Under the split, the rights were assigned maximum volumes based on the split portion of the verified place of use

Preliminary Determination to GRANT
Application to Change Water Right No. 41G 30159590

Page 3 of 26

CORRECTED COPY

(POU) and an undivided flow rate. No easement or right of access to the point of diversion (POD) in the split agreement is in place for the Applicant. The Applicant's water right, Permit 41G 30153029, was assigned 63.1 acres of irrigation based on the mapped place of use, proportional volume of 138.20 AF, and no flow rate or POD, as the Applicant had no access or control of the well. Change Application 41G 30159590 was submitted to add a POD to Provisional Permit 41G 30153029. If Change Application No 41G 30159590 is granted, the Applicant will submit a Permit Application for the flow rate from the proposed POD.

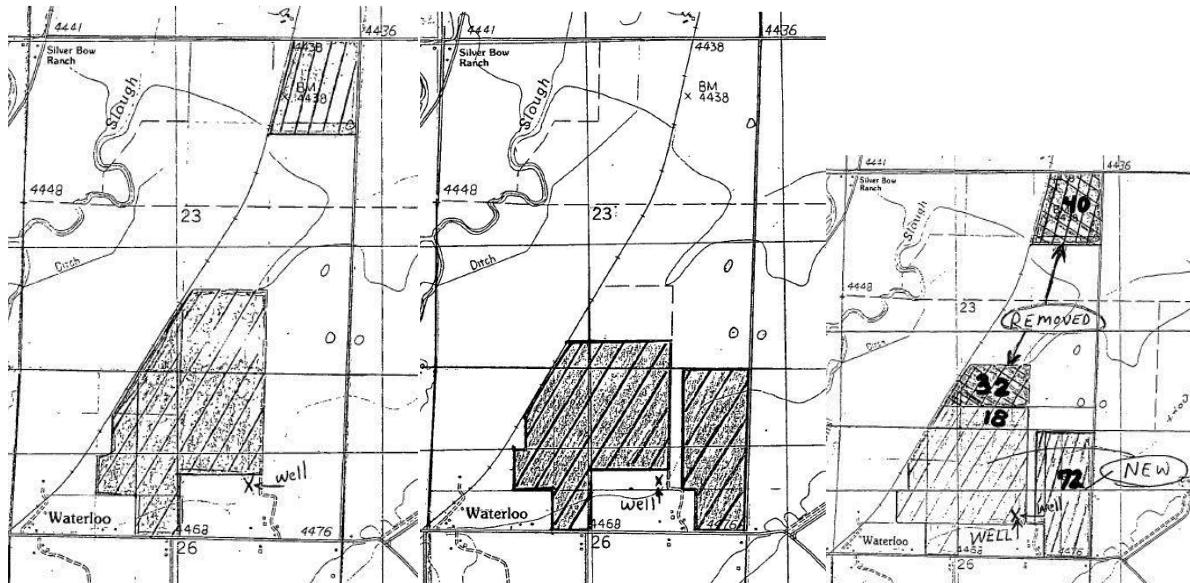


Figure 1. Insets of three maps from Permit 41G 117127-00 (a later permit for additional flow rate that was withdrawn). The left map was labeled "permitted place of use"; the middle was labeled "current place of use"; and the right map was labeled simply "place of use." The Mitchell parcel is shown in the right two maps and is labeled with "72" and "NEW" on the rightmost map. (ARCGIS tools allow for more accurate acreage mapping, and 63.1 acres is how the defined area maps today.) These maps were used to confirm intent and completion of the place of use of Permit 41G 92516-00, as the withdrawn permit file also confirms the same place of use as the project completion notice.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the POD of Provisional Permit No 41G 30153029 in this Application. Table 1 below summarizes the water right proposed for change as currently permitted.

CORRECTED COPY

Table 1. Water right proposed for change

Water Right	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
41G 30153029	N/A ¹	138.20 AF	Irrigation	4/15 to 10/15	E2NE Section 26, T1S, R5W, Madison County	NA ²	1995.04.05

¹No flow rate is assigned, water right is for volume only

²No point of diversion assigned per verification field report

2. Permit 41G 30153029 was split from parent right Permit 41G 92516-00 in 2020. As seen in Front Matter above, Permit 41G 30153029 was split from Permit 41G 92516-00 with no point of diversion or flow rate. Permit 41G 30153029 is a groundwater right diverted by a well that has historically been used for 63.1 acres of wheel line sprinkler irrigation within E2NE Section 26, T1S, R5W, Madison County. The maximum historical volume not to exceed 138.2 AF. The period of use is April 15 to October 15.

3. Permit 41G 30153029 is not supplemental to another water right. The Applicant owns 35 shares of water from the Parrot Ditch Company. The 35 shares have been historically utilized to irrigate the POU permitted under Permit 41G 30153029 from mid-April to mid-October as an alternative source when groundwater is not available or accessible for use. These two water sources have never been used at the same time.

4. No documented history of call on the water right included in this Change Application exist.

5. The water right is owned solely by the Applicant. Ownership of the Provisional Permit is clear based on acreage.

6. No previous Change Authorizations are associated with the water right to be changed.

CHANGE PROPOSAL

FINDINGS OF FACT

7. The Applicant proposes to add a POD in NESENE Section 26, T1S, R5W, Madison County. The proposed POD is shown on the map provided as Figure 2. The proposed means of diversion is a well that will feed water directly into the historical mainline of the wheel line sprinkler system appurtenant to the Applicant's property and irrigate the historical POU. The historical

CORRECTED COPY

conveyance system (mainline¹), period of diversion, period of use, purpose, and POU will remain unchanged. This water right does not include a place of storage. The Applicant proposes to divert groundwater from the new well for irrigation of 63.1 acres in the historical POU (E2NE Section 26, T1S, R5W, Madison County). The period of use and diversion will remain April 15 to October 15.

8. Permit 41G 30153029 was not assigned a flow rate and is a volume-only water right. One of the contingencies of this Change Application is the Applicant filing for a separate Provisional Permit for flow rate use from the proposed well. If Change Application No 41G 30159590 is granted, the Applicant will submit a Permit Application for the flow rate from the proposed POD.

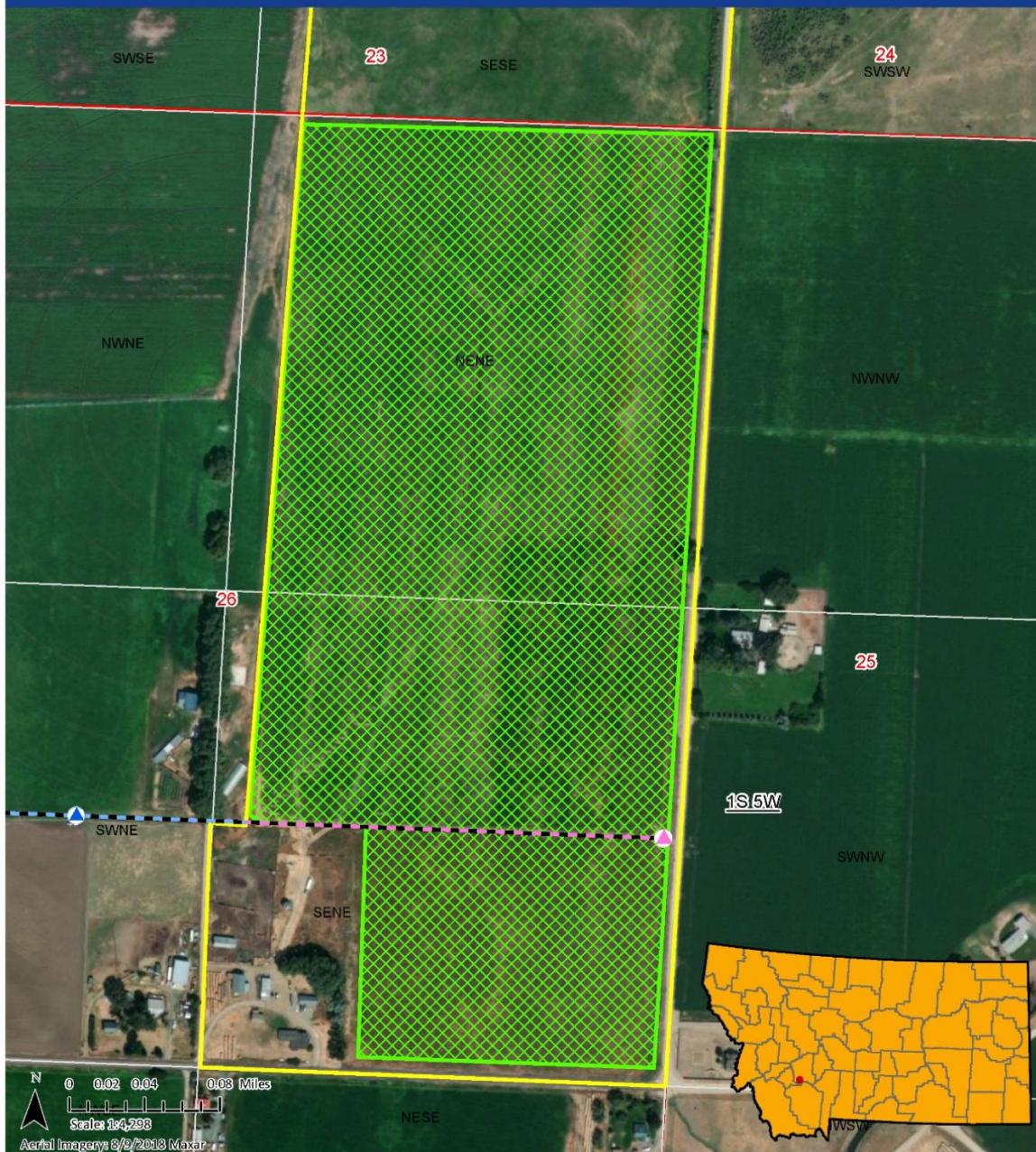
9. This Change Application will be subject to the following conditions to fulfill the adequacy of diversion analysis criteria:

CONDITION

USE OF WATER UNDER THIS CHANGE AUTHORIZATION FOR PROVISIONAL PERMIT 41G 30153029 IS CONDITIONED UPON OBTAINING A PERMIT FOR FLOW RATE FROM THE PROPOSED WELL TO UTILIZE THIS VOLUME OF WATER. THE WELL MUST BE COMPLETED AT NESENE OF SECTION 26, T1S, R5W, MADISON COUNTY AND MUST STAY WITHIN THE ALLUVIAL TERRACE DEPOSITS OF THE JEFFERSON RIVER, SO NOT TO EXCEED 160 FEET BELOW GROUND SURFACE.

¹ The historical mainline was disconnected from the historical POD on the mainline at the Applicant's property line between 2008 and 2009. The disconnection point can be seen on Figure 2 where the symbology of the mainline changes from a blue hash line to pink hash line. The Applicant has been using the historical mainline for irrigation from their 35 Parrot Ditch Shares, since the line was disconnected. The Applicant proposes to utilize the historical mainline under this proposed Change Application.

Jennifer B. & Ross P. Mitchell - 41G 30159590



Map Created: 6/25/2024
 Author: Savannah Telander,
 Water Resource Specialist
 Elements depicted on this map are for illustrative
 purposes and have not been surveyed by the
 Department. World Topographic Map, Esri, TomTom,
 Garmin, FAO, NOAA, USGS, EPA, USFWS

Historic and Proposed Use

- | | |
|---|---------------------------------|
| Jennifer B. & Ross P.
Mitchell Property Border | Proposed & Historic
Mainline |
| Historic POD | Historic Mainline |
| Proposed POD | POU |

Figure 2. Change Application 41G 30159590 Historical and Proposed Use

CHANGE CRITERIA

10. 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.

11. 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

CORRECTED COPY

12. Provisional Permit 41G 30153029 is a split permit of irrigation Provisional Permit 41G 92516-00 with a priority date of April 5, 1995. Permit 41G 30153029, for irrigation of 63.1 acres, was split with no POD. The Department found evidence to support 63.1 acres upon review of imagery Photo NAIP Photo m_451123_ne_12_1 dated August 4, 2005, and Photo m_45211223_ne_12_1 NAIP, dated July 23, 2009. The Department conducted a field visit on May 21, 2019, to the Applicant's property, where DNRC confirmed the irrigation project was completed. Permit 41G 30153029 is not supplemental to another privately held water right. Parrot Ditch canal shares have been used on this property. The maximum historical acres for this Permit is 63.1 acres located in E2NE Section 26, T1S, R5W, Madison County. Findings from the DNRC 2019 field visit are included below:

- a. This parcel is clearly irrigated in the 2002 and 2005 aerials, and based on available information, including the affidavits submitted by the Schlabachs (original permit holders), the source was groundwater from Permit 41G 92516-00.
- b. The predecessor-in-interest applied for Permit 41G 117127-00 on September 26, 2001, for additional flow rate from the same well as the one serving Permit 41G 92516-00 (and the same 200-acre place of use). This application received objections and was ultimately withdrawn as a result of the 2006 Smith River decision in the Montana Supreme Court.
- c. According to all owners, the mainline from the well to the Mitchell parcel was disconnected around 2008 or 2009. Mr. Mitchell explained that he currently uses the same system but operates it in reverse with surface water pumped from a Parrot Ditch lateral.
- d. In July and August 2017, Vern, Duane, and Devon Schlabach – the previous owners of this property and this water right – submitted affidavits to DNRC. These affidavits all explain that on July 9, 2009, Devon Schlabach, who owned Mr. Mitchell's parcel, “sold and transferred 100% of [his] portion of Water Right # 41G-92516-00, to be shared by Vern Schlabach and Duane Schlabach for their properties.” Vern and Duane owned the properties now subdivided to the owners of the other split portions of original Permit 41G 92516-00.
- e. These affidavits explain that Devon transferred his portion of the water right in exchange for \$1,500 each and that he subsequently purchased a pump and materials to convert his system to Parrot Ditch water and acquired sufficient water from the Parrot Ditch to irrigate the property. Devon states that he “abandoned” use of the well “forever.” He further states that he “abandoned and relinquished all future claims” to the well and that he did not sell any groundwater rights to Ross and Jennifer Mitchell. Devon Schlabach submitted a DNRC water

CORRECTED COPY

right ownership update on July 9, 2009. This ownership update consisted of a Form 608: Water Right Ownership Update with no accompanying legally filed documents – for example, a deed – that indicated a severance, extinguishment, or other anything other than a straight transfer to Vern and Duane Schlabach.

f. Available evidence indicates that, between issuance in 2001 and the property sale in 2009, groundwater from Permit 41G 92516-00 was perfected on the Mitchells' place of use. This water use was still being developed under an unperfected permit. Since 2009, Parrot Ditch water has irrigated the Mitchell parcel instead.

g. The 2009 ownership update removed Devon from this water right. An ownership update is used by the Department for updating water right ownership records, but the deed or other legally filed instrument controls the ownership of a water right. The contemporary deeds filed for the Mitchell parcel are silent on water right ownership and include only standard language stating that "all appurtenances" transfer with the property.

h. A preponderance of the evidence indicates that this water right was perfected on the Mitchell parcel. The question, then, is whether Devon's actions were sufficient to extinguish this portion of the water right.

i. The affidavits describe the disconnection of the mainline from the Mitchell parcel, and Devon states that his intent was to abandon his portion of the water right. Nothing was formally filed at that time, withdrawing this place of use from the water right or severing the water right.

j. The brothers made, essentially, a handshake agreement regarding ownership of this water right, in exchange for payment. At the time, Devon's portion of the water right was not severed, withdrawn, or otherwise legally removed from this permit through any of the mechanisms required in statute. A water right ownership form submitted to DNRC is not sufficient to overturn a deed or other legally filed instrument.

k. In Montana, water rights are property rights with real value and one cannot be deprived of a property right without due process. With respect to reducing a property right, the Department should err on the side of caution. The certification proceeded with including the Mitchell parcel irrigation portion.

13. The Applicant asserts that the Permit was historically diverted from a groundwater well (GWIC ID 190166 claimed under parent Permit 41G 92516-00, drilled in 2001) directly into the mainline to irrigate 63.1 acres in the historical POU. The Applicant states that water was

CORRECTED COPY

historically diverted from mid-April (4/15) to mid-October (10/15), with two 5-day pauses in irrigation for cutting. A total of 173 days of irrigation each year. Given the historical use description, the Department calculated historical consumptive volume assuming full-service irrigation for the 173 days irrigated. The historical POU was sprinkler irrigated by a wheel line to cultivate alfalfa and grass hay.

14. The Applicant elected to have the Department calculate historical use for the water right pursuant to ARM 36.12.1902. The water right being changed is a Provisional Permit, and the historical use will be evaluated as the right existed when filed in 1995. No prior Change Authorizations for the water right being changed have occurred. No documented history of calls on Permit 41G 30153029 exist.

15. The historical POU is in Madison County, near Waterloo, MT. The Department assigned the wheel line sprinkler field efficiency of 70%. The Department found the Twin Bridges Weather Station to be the closest and most representative, which has an adjusted evapotranspiration of 16.98 inches (April 15 to October 15). The Department selected the Madison County Management Factor from 1973 to 2006 of 79%. The Department calculated the historical consumptive volume (HCV) using the Department's standard methodology, pursuant to ARM 36.12.1902. The HCV for this Change Application is 110.56 AF. The HCV was found using the following equations, which are summarized in Table 2.

$$HCV = \text{Crop Consumption} + \text{Irrecoverable Losses (IL)}$$

Crop Consumption

$$= \text{Twin Bridges Weather Station ET} * \frac{1\text{ft}}{12\text{inches}} * \text{Madison County Management Factor} * \text{Historical Acres}$$

$$\text{Irrecoverable Losses} = \text{Applied Volume} * \text{IL\%}$$

$$\text{Field Application} = \frac{\text{Crop Consumption}}{\text{Field Efficiency}}$$

Table 2. Historical consumed volume proposed for change

Water Right	Acres	County	Weather Station	NIR (in)	Management Factor	Field Efficiency	Crop Consumption (AF)	Applied Volume (AF)	IL (AF)	Total Consumed Volume (AF)
41G 30153029	63.1	Madison	Twin Bridges	16.98	0.79	0.7	96.74	138.2	13.82	110.56

CORRECTED COPY

16. The historical means of conveyance is a pipeline. No conveyance losses were found in the historical use of Permit 41G 30153029.

17. The historical diverted volume (HDV) for Permit 41G 30153029 is the maximum volume calculated by the Department in the 2021 Split of Provisional Permit 41G 92516-00. The volume was calculated based on the proportion of the acres split from the Permit 41G 92516-00 POU. Permit 41G 92516-00 had a verified diverted volume of 438.7 AF for irrigation of 200 acres. The proportion of the diverted volume associated with the 63.1 acres, equal to 31.5% of the total volume, was assigned to Permit 41G 30153029. The Department calculated the HDV for 41G 30153029 to be 138.2 AF.

18. The Department finds the following historical use for Permit 41G 30153029, as shown in Table 3.

Table 3. Summary of historical use for Provisional Permit 41G 30153029

Water Right	Priority Date	Diverted Volume (AF)	Flow Rate	Acres	Consumptive Use (AF)
41G 30153029	1995.04.05	138.2	0	63.1	110.56

ADVERSE EFFECT

FINDINGS OF FACT

19. The Applicant proposes to change the POD for Provisional Permit 41G 30153029 to add a well in NESENE 26, T1S, R5W, Madison County. No change in purpose or POU is proposed. The proposed well is located approximately 1,600 feet east of the historical well (GWIC ID 190166) permitted under parent right 41G 92516-00. Though the depth of the proposed well is yet to be determined, the Department identified the proposed well must be completed in the same aquifer, so a maximum depth below surface of 160 feet, as the historical POD, in alluvial terrace deposits of the Jefferson River, shown in Figure 3 (May 16, 2024, Groundwater Change Report).

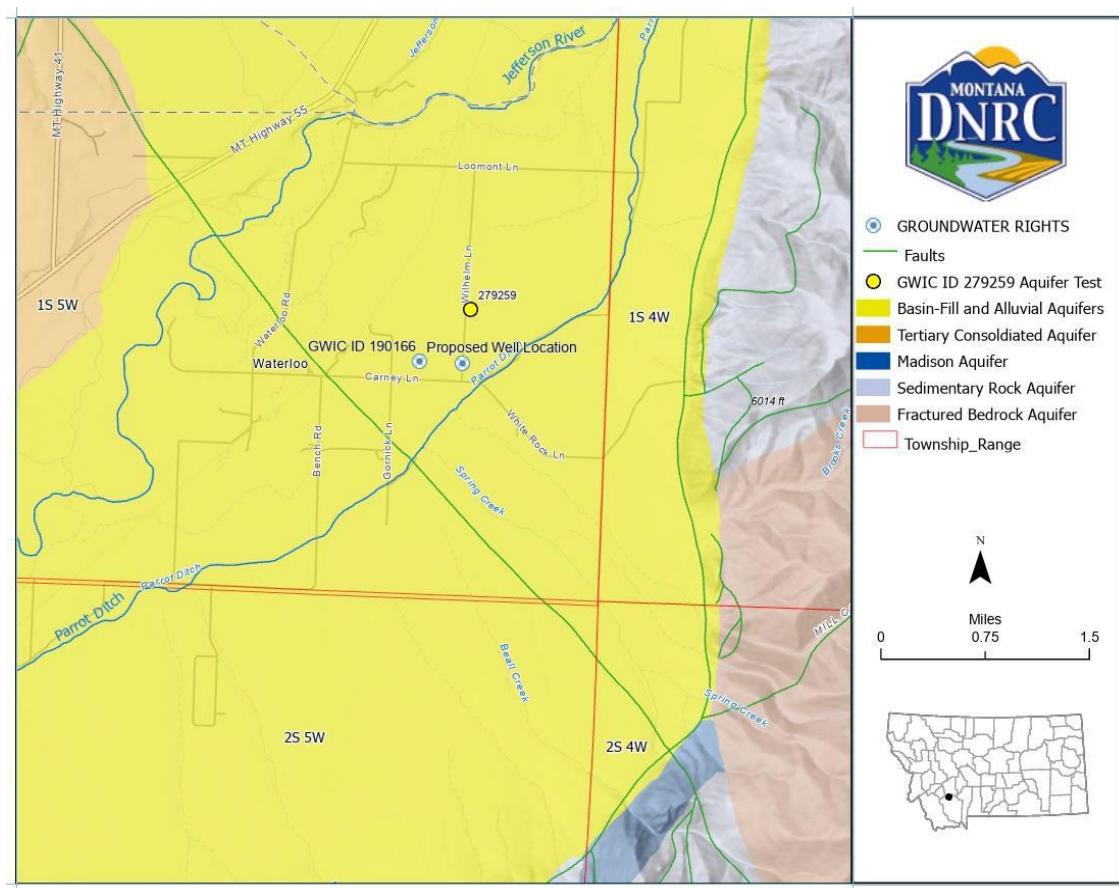


Figure 3. Map of the historical well (GWIC ID 190166), proposed well location (no GWIC ID) for Change Application No. 41G 30159590 and nearby aquifer test on GWIC ID 279259.

20. The Department modeled the drawdown in existing aquifer wells for the existing well under Permit 41G 92516-00, and the proposed POD with the Theis (1935) solution, using a transmissivity of 41,000 ft²/day, storage coefficient of 0.1 (Lohman, 1972), and the monthly pumping schedule identified in Table 5 for a period of five years. The Department delineated a 0.1 foot drawdown contour with a radius of 240 ft, or zone of adverse effect. No additional water rights from the original permit zone in the source aquifer are predicted to experience drawdown greater than 1-foot from the proposed POD, thus no significant change is occurring in the aquifer, due to the close proximity of the wells.

Table 2. Historical and proposed monthly pumping schedule

Month	IWR ¹ (inches)	Volume (AF)	Monthly Flow Rate (gpm)
January	0.00	0.0	0.0
February	0.00	0.0	0.0
March	0.00	0.0	0.0
April	0.00	0.0	0.0
May	1.43	11.7	85.1
June	4.36	35.5	267.8
July	6.04	49.1	358.6
August	4.91	39.9	291.6
September	0.24	2.0	14.8
October	0.00	0.0	0.0
November	0.00	0.0	0.0
December	0.00	0.0	0.0
Total	16.98	138.2	

¹Net Irrigation Requirements for Twin Bridges Weather Station (NRCS, 2003).

21. Net depletion is equal to the consumed volume for a proposed groundwater use and is described as the calculated volume, rate, timing, and location of reductions to surface water that are offset by return flows (non-consumed water) from the POU (27.6 AF). Net depletion is evaluated by 1.) quantifying the consumed volume associated with the proposed use (110.56 AF); 2.) identifying hydraulically connected surface waters; and 3.) calculating the monthly rate and timing of depletions to affected surface water(s).

22. The Department identified the Jefferson River as the closest perennial surface water body that is hydraulically connected to the source aquifer. The Groundwater Change Report identified that net depletions to the Jefferson River will occur at a constant rate of 68.5 GPM under the proposed conditions, as they did under historical practices, so this surface water zone of adverse effect is also unchanged from original permit conditions. The Applicant proposes to continue to irrigate the 63.1 acres as historically irrigated, so the proposed consumed volume is equal to the historical consumed volume of 110.56 AF. No changes to the net depletions of the Jefferson River will occur as a result of the proposed change to Permit 41G 30153029.

23. The affected reach of the Jefferson River that corresponds with this Change Application, seen on Figure 4, is the same as the affected reach analyzed when Permit 41G 92516-00 was verified. No additional groundwater rights in the source aquifer are predicted to experience drawdown greater than 1-foot from the proposed POD. No new water rights are being considered for adverse effect with respect to this Change Application.

24. The Applicant proposes to add a well to Permit 41G 30153029. The proposed well will be connected to the historical wheel line appurtenant to the Applicant's property that was disconnected from the total mainline, for irrigation of 63.1 acres. No conveyance loss is associated with the proposed POD and the new diverted volume using the well is equal to the historical diverted volume 138.2 AF. The Department finds the proposed use is equal to or less than the historical use of Permit 41G 30153029.

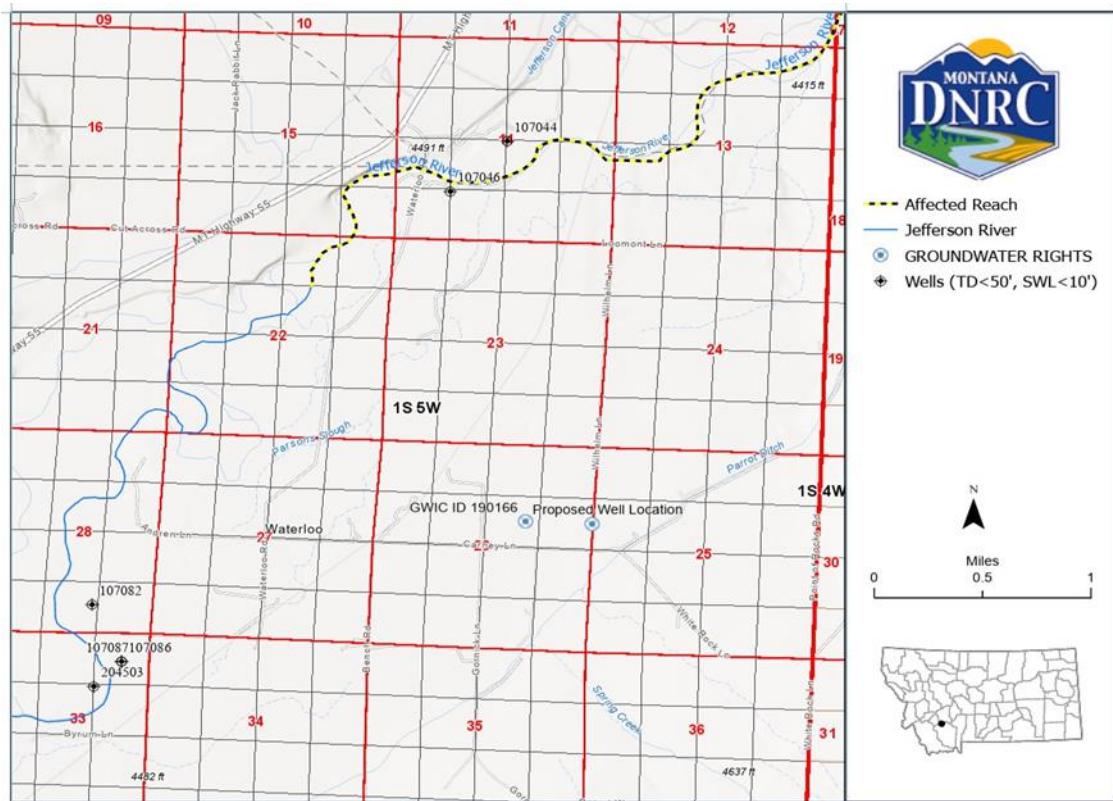


Figure 1. Existing and proposed well location and affected reach of the Jefferson River.

25. Permit 41G 30153029 was issued with no flow rate. The Applicant proposes to file for an additional Provisional Permit from the proposed well once this Change Application is issued. The Applicant states that water will be used as it historically has been, with the same infrastructure, period of diversion, period of use, irrigated acres, and place of use, and will ensure that the historical use will not be exceeded. Restarting this use after the mainline was cut in 2008 or 2009 will not cause an adverse impact as the basin was closed at this time, along with the court decision that connected surface water and groundwater, and no new consumptive permits were able to come on the source of supply.

26. The Department finds no adverse effect from the proposed change under the terms and condition set out in this Preliminary Determination will occur.

BENEFICIAL USE

FINDINGS OF FACT

27. The Applicant proposes to use water for irrigation, which is recognized beneficial use of water in the State of Montana. The Applicant also provided evidence of the necessity for the change in POD due to the well (GWIC 190166) and mainline historically utilized under Permit 41G 92516-00 being disconnected from the Applicant's property, and the Applicant prohibited from use of groundwater. The Applicant explained that the existing well (GWIC 190166) was disconnected when the ownership of the property where the well is located changed hands between 2008 and 2009. The Applicant's shares from the Parrot Ditch do not provide enough water for the Applicant's irrigation requirements. The disconnected access to the groundwater source has created strain on the Applicant's irrigation needs. The proposed project will allow accessibility and flexibility for the Applicant to continue irrigating 63.1 acres of the property.

28. The Applicant proposes to divert a volume of 138.2 AF for continued irrigation of the 63.1-acre POU. This amount is determined by the Department standards in ARM 36.12.1902 for calculating consumptive and diverted volume for irrigation of 63.1 acres.

29. The Department finds the proposed 138.2 AF diverted volume and 110.56 AF consumptive volume for irrigation purpose to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The Applicant proposes to drill a well, using a licensed well driller, in NESENE Section 26, T1S, R5W, Madison County, for sprinkler irrigation of 63.1 acres. The Applicant proposes to connect the proposed well to the historical 8-inch mainline with two 5-inch aluminum wheel lines that have 66 sprinkler heads. The Applicant proposes to use the historical wheel line infrastructure to irrigate the 63.1 acres within the POU.

31. The Applicant proposes to drill the well following the grant of Change Application No 41G 30159590. As a condition of Change Application No 41G 30159590, the Department will assess the adequacy of diversion when the Applicant submits a Permit Application for a flow rate to the proposed well.

32. The Department finds the conditional infrastructure to be adequate for the proposed irrigation. This Application will be subject to the following conditions:

CONDITION

USE OF WATER UNDER THIS CHANGE AUTHORIZATION FOR PROVISIONAL PERMIT 41G 30153029 IS CONDITIONED UPON OBTAINING A PERMIT FOR FLOW RATE FROM THE PROPOSED WELL TO UTILIZE THIS VOLUME OF WATER. THE WELL MUST BE COMPLETED AT NESENE OF SECTION 26, T1S, R5W, MADISON COUNTY AND MUST STAY WITHIN THE ALLUVIAL TERRACE DEPOSITS OF THE JEFFERSON RIVER, SO NOT TO EXCEED 160 FEET BELOW GROUND SURFACE.

POSSESSORY INTEREST

FINDINGS OF FACT

33. 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. (Change Application 41G 30159590 File).

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

34. 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

CORRECTED COPY

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).²

35. 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*, ¶¶ 43-45.³

36. 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.⁴ 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

² DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

³ 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).

⁴A 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

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).⁵

37. 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.

⁵ 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.)

CORRECTED COPY

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).⁶

38. 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.

39. 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

⁶ 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).

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).

40. 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.

41. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. *E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See *MacDonald*, 220 Mont. at 529, 722 P.2d at 604; *Featherman*, 43 Mont. at 316-17, 115 P. at 986; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

42. The Department has adopted a rule providing for the calculation of historic consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No. 14).

CORRECTED COPY

43. If an Applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g., Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.; Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217, 1223-1224 (Colo., 1988) (historical use of a water right could very well be less than the duty of water); *Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

44. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Permit 41G 30153029 to be a diverted volume of 138.2 AF and a historically consumed volume of 110.56 AF. (FOF Nos. 12-18)

45. Based upon the Applicant’s comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(a), MCA. (FOF Nos. 19-26)

BENEFICIAL USE

46. 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.

CORRECTED COPY

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).

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

48. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 138.2 AF of diverted volume water requested is the amount needed to sustain the beneficial use and was verified within the standards set by DNRC Rule Section 85-2-402(2)(c), MCA (FOF Nos. 27-29).

ADEQUATE MEANS OF DIVERSION

49. 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).

50. 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. 30-32)

POSSESSORY INTEREST

51. 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.
52. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 33)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41G 30159590 should be GRANTED subject to the following.

The Applicant is authorized to add one new point of diversion to Provisional Permit 41G 30153029. The authorized point of diversion is NESENE Section 26, T1S, R5W, Madison County. No change in purpose or place of use is authorized. Irrigation will continue to occur on 63.1 acres located in E2NE Section 26, T1S, R5W, Madison County, with a maximum diverted volume of 138.2 AF and consumed volume of 110.56 AF from April 15 to October 15.

The authorization will be subject to the following condition(s):

CONDITION

USE OF WATER UNDER THIS CHANGE AUTHORIZATION FOR PROVISIONAL PERMIT 41G 30153029 IS CONDITIONED UPON OBTAINING A PERMIT FOR FLOW RATE FROM THE PROPOSED WELL TO UTILIZE THIS VOLUME OF WATER. THE WELL MUST BE COMPLETED AT NESENE OF SECTION 26, T1S, R5W, MADISON COUNTY AND MUST STAY WITHIN THE ALLUVIAL TERRACE DEPOSITS OF THE JEFFERSON RIVER, SO NOT TO EXCEED 160 FEET BELOW GROUND SURFACE.

NOTICE

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

Dated this 27th of September 2024

/Original signed by Kerri Strasheim/

Kerri Shrashiem, Manager
Bozeman Regional Office
Montana Department of Natural Resources and Conservation

CORRECTED COPY

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 27th day of September, 2024, by first class United States mail.

ROSS P. & JENNIFER B. MITCHELL
131 CARNEY LN
WHITEHALL, MT 59759

BOZEMAN Regional Office, (406) 586-3136