

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

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**APPLICATION TO CHANGE WATER RIGHT)
NO. 41H 30159389 by Lazy TJ Enterprises,)
LLC)**

**PRELIMINARY DETERMINATION TO
GRANT CHANGE**

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On 16 February 2023, Lazy TJ Enterprises, LLC (Applicant) submitted Application to Change Water Right No. 41H 30159389 to change Water Right Claim No. 41H 15887 00 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 Application was determined to be correct and complete as of August 15, 2023.

The Department met with the Applicant (Brent and Mark Amunrud) on January 24, 2023, for a preapplication meeting. An Environmental Assessment for this Application was completed on December 12, 2023.

INFORMATION

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

Application as filed:

- Application to Change Water Right, Form 606-NIR
- Maps:
 - IR.1.F Figure 1. Lazy TJ Ranch Location Map, basemap Montana NAIP – USDA Conus Prime, map produced by Respec Engineering
 - IR.1.F Figure 2. Point of Diversion, Place of Use, basemap Montana NAIP – USDA Conus Prime, map produced by Respec Engineering
 - IR.2.A-E Figure1. Historic and Proposed Water Systems, basemap Montana NAIP – USDA Conus Prime, map produced by Respec Engineering
 - ATA.2.a Figure 1. Aquifer Test Well Locations, basemap USGS Topo (Bozeman Quad), map produced by Respec Engineering
- Change in Purpose Addendum

Information Received after Application Filed

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- Email chain between Applicant (Brent Amunrud) and DNRC (Lyra Reynolds) dated August 14, 2023, Re: Period of diversion question

Information within the Department's Possession/Knowledge

- Petition to Modify Provisional Permit 41H 30148637
- Change Authorization 41H 30148636 file
- Provisional Permit 41H 30148637 file
- Water Right 41H 15887-00 file
- DNRC Ownership Update Exempt (Reserved)/Severed Water Right, Form 642, received May 18, 2022
- Water Resources Survey, Gallatin County, 1961
- DNRC Non-Irrigation Change Application Technical Report, dated August 15, 2023
- DNRC Groundwater Mitigation Change Report, prepared by Jack Landers, dated August 8, 2023

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.

- DNRC Technical Memorandum: Distributing Conveyance Loss on Multiple User Ditches (Water Management Bureau, February 14, 2020)
- DNRC Technical Memorandum: Calculating Return Flow (Levens et al., April 18, 2019)
- DNRC Policy Memorandum – Return Flows (Davis, April 1, 2016)
- DNRC Technical Memorandum – Assessment of new consumptive use and irrecoverable losses associated with change applications (Heffner and Roberts, April 15, 2013)

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).

WATER RIGHTS TO BE CHANGED**FINDINGS OF FACT**

1. Applicant seeks a second change to change Water Right Claim No. 41H 15887-00 for 282.74 gallons per minute (GPM) flow and 76.44 acre-feet (AF) diverted volume from Hyalite Creek for the purpose of aquifer recharge with a priority date of May 31, 1882 (Table 1). The Applicant seeks to build upon the first change, Change Authorization 41H 30148636, with Change Application 41H 30159389. The period of use and period of diversion under the previous Change Authorization is June 1st to August 31st. The point of diversion (POD) is the Hoy Ditch headgate in the SENWNW Section 14, T3S, R5E, Gallatin County. Water is conveyed through Hoy Ditch to the place of use (POU) in SENWNE Section 2, T3S, R5E, Gallatin County. The POU is located about 3.50 miles southwest of Montana State University's campus in Bozeman, MT.

Table 1. Water Right Proposed for Change

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
41H 15887-00	Aquifer Recharge	282.74 GPM	76.44 AF	06/01-08/31	06/01-08/31	SEWNNE Sec 2, T3S, R5E, Gallatin Co., MT	5/31/1882

2. Statement of Claim 41H 15887-00 is a severed water right and is the parent right to claim 41H 30155854. Of the 83 claimed acres, 43 remains appropriated by 41H 15887-00 and 40 were split to the child right (41H 30155854). The 43 acres left to the parent right were retired from irrigation and changed to aquifer recharge purpose through Change Authorization 41H 30148636.

3. There are no supplemental water rights in the historical POU. Water right 41H 15887-00 was part of Change Authorization 41H 30148636 to change the purpose from irrigation to aquifer recharge. Change Application 41H 30159389 is similar to the previous Change Authorization issued June 16, 2022. The motivation for a second change, Change Application 41H 30159389, is to change the period of use and diversion of the aquifer recharge use. The second change is intended to provide mitigation water earlier in the year, when water available and appropriated by 41H 15887-00 is more reliable. The Department will use the historical use findings established in the previous change for the portion of 41H 15887-00 appurtenant to the change. This Change Application, 41H 30159389, has a joint permit modification for Provisional Permit 41H 30148637

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to reflect the proposed change to the period of aquifer recharge. Figure 1 below shows the places of use for the parent and child rights.

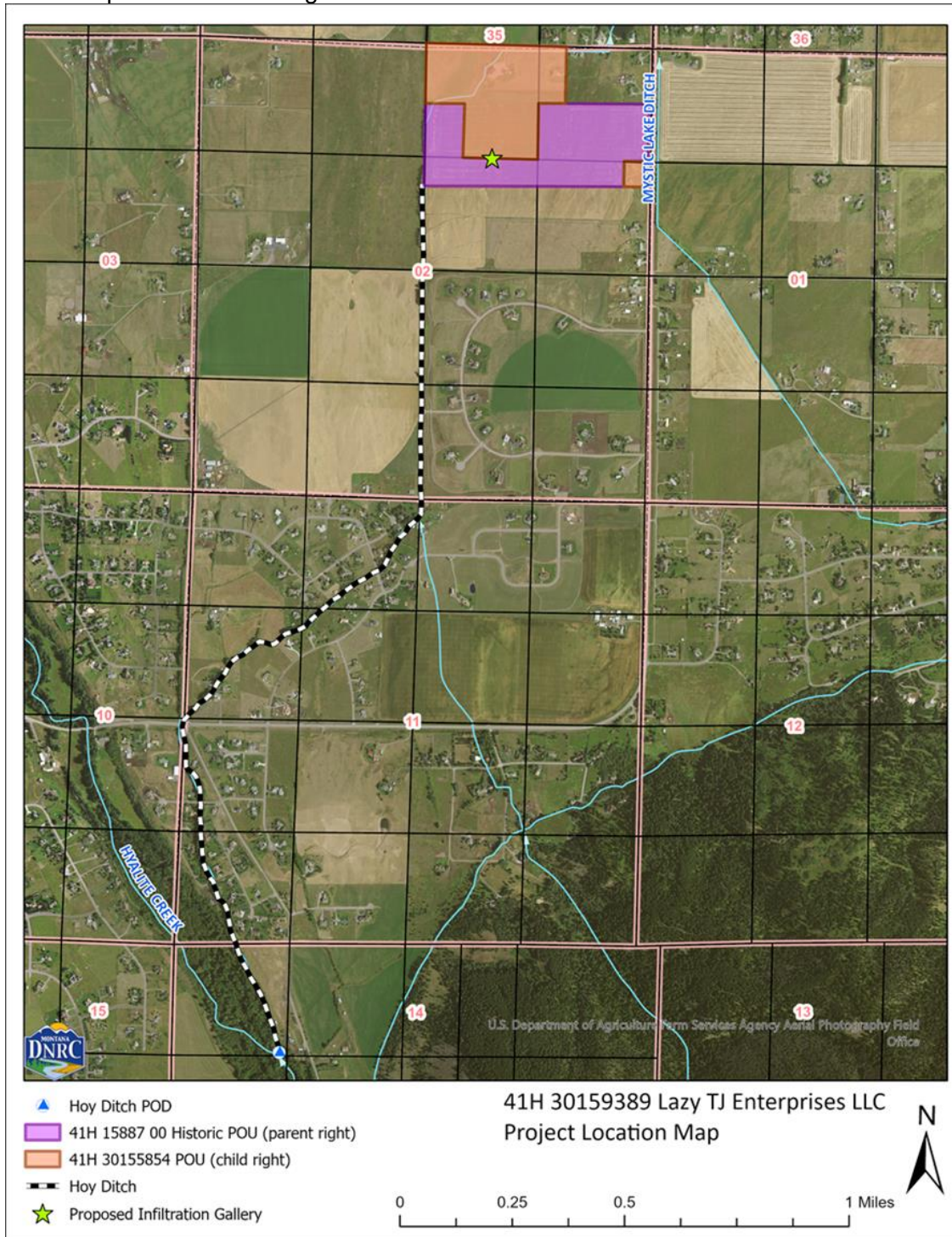


Figure 1. Change Application 41H 30159389 project location. Map depicts historical place of use for parent right 41H 15887-00 and current place of use for child right 41H 30155854.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the purpose of Statement of Claim 41H 15887-00 to aquifer recharge to offset depletions associated with Groundwater Permit 41H 30148637. The POU will be an infiltration gallery located in the in the SENWNE Section 2, T3S, R5E, Gallatin County. The Applicant proposes to divert 76.44 AF at a maximum flow rate of 282.74 GPM to an infiltration gallery from May 14th to July 31st instead of June 1st to August 31st of each year to offset consumption associated with Groundwater Permit Application 41H 30148637.
5. The Applicant proposes to continue diverting water from Hyalite Creek under Statement of Claim 41H 15887-00 at the Hoy Ditch headgate located on Hyalite Creek in the SENWNW Section 14, T3S, R5E, Gallatin County. Water will continue to be conveyed in the existing Hoy Ditch to an infiltration gallery.
6. The August 27, 2021, Technical Report for previous Change Authorization 41H 30148636 identified that 43 acres need to be retired from irrigation to mitigate depletions from Provisional Permit 41H 30148637. The previous Change Authorization retired the required acres and changed the purpose of Claim 41H 15887-00 to aquifer recharge. The Applicant proposes to change the period of diversion and use associated with the aquifer recharge purpose through this Change Application, 41H 30159389. The August 8, 2023, Groundwater Mitigation Change Report indicated that delivering 49 AF to the infiltration gallery from May 14th to July 31st is sufficient to offset year-round depletions from 41H 30148637. To offset depletions from the Groundwater Permit and replace the loss of return flows on 43 acres, the fully applied volume on 43 acres, equal to 70 AF, must be delivered to the infiltration gallery.
7. This Change Application will be subject to the same conditions as Change Authorization 41H 30148636:

IMPORTANT INFORMATION

NOTIFICATION REQUIREMENT: THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS CHANGE AUTHORIZATION; AND 2) THE PORTION OF THIS WATER RIGHT CHANGED TO MITIGATION PURPOSE CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS,

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FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

IMPORTANT INFORMATION

IN ORDER TO PREVENT ADVERSE EFFECTS TO OTHER APPROPRIATORS DUE TO LOSS OF HISTORICAL RETURN FLOWS, THE APPROPRIATOR SHALL DIVERT, OR CAUSE TO BE DIVERTED, 21 AC-FT PER YEAR OF WATER AND SHALL APPLY THIS WATER TO THE INFILTRATION GALLERY DESCRIBED IN THIS DOCUMENT BETWEEN MAY 14 AND JULY 31 OF EACH YEAR.

WATER MEASUREMENT INFORMATION – AQUIFER RECHARGE

THE APPROPRIATOR SHALL INSTALL A MEASURING DEVICE CAPABLE OF RECORDING THE RATE AND VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY UNDER CHANGE 41H 30159389. THE APPROPRIATOR MUST RECORD THE VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY. SUCH RECORDS SHALL BE SUBMITTED TO THE BOZEMAN DNRC WATER RESOURCES OFFICE BY NOVEMBER 30 OF EACH YEAR. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING PROPERLY. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

CHANGE CRITERIA

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

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appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

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

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

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

10. The Applicant proposes to change the purpose of Statement of Claim 41H 15887-00. Prior Change Authorization 41H 30148636 analyzed historical use for 41H 15887-00 as it existed prior to July 1, 1973. As the previous change is an unperfected change, the Department will use historical use findings established in the first change. Historical use was found for the full 83-acre water right but will be summarized for the portion of the water right appurtenant to Change

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Authorization 41H 30148636 (43 acres associated with parent right). Figure 2 shows the 43 acres irrigated in the historical POU.

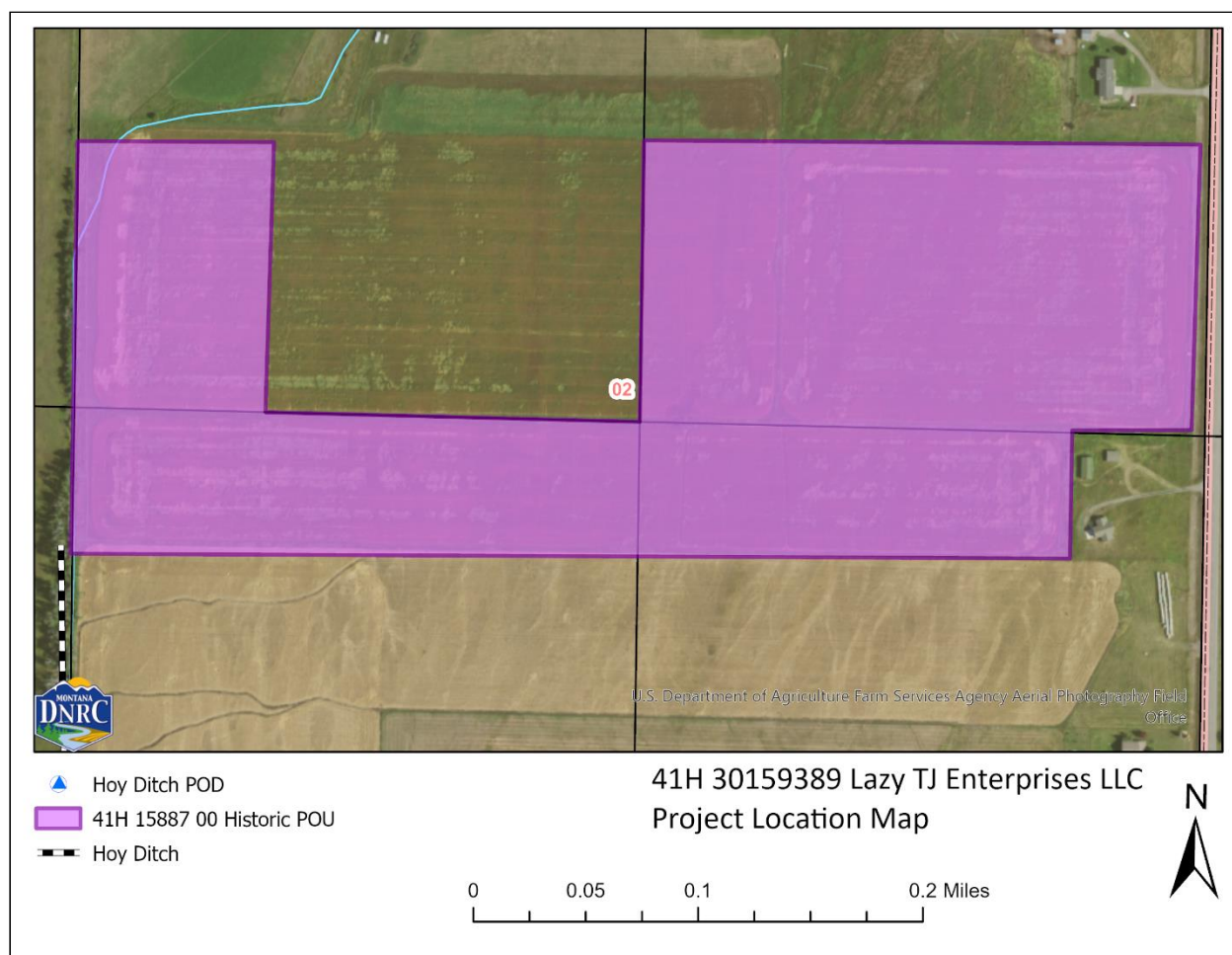


Figure 2. Historical place of use of 41H 15887-00

Historical use findings summarized

11. The source of water for 41H 15887-00 is Hyalite Creek with a point of diversion in the SENWNW Section 14, T3S, R5E, Gallatin County. Prior to July 1, 1973, Hoy Ditch was used to convey water to the irrigate 43 acres in the historical place of use in the NE Section 2, T3S, R5E, Gallatin County. The previous Change Authorization found, using Applicant provided measurements and operation plans, the capacity of Hoy Ditch is 54.0 CFS and is sufficient to carry the water right proposed for change. The previous Change Authorization found historical use for irrigation of 43 acres associated with the parent right (41H 15887-00) prior to July 1, 1973. Using Department standards for irrigation water rights found in ARM 36.12.1902, the total

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historical consumptive use of 43 acres is 49 AF. Utilizing ditch measurements and operation plans, historic diverted volume prior to July 1, 1973, was found to be 76.44 AF for irrigation of 43 acres. The Applicant stated water was usually diverted June 1st to September 15th for alfalfa production, but irrigation began as early as May in drier years. The pre-July 1, 1973, historical use findings found for Statement of Claim 41H 15887-00 in Change Authorization 41H 30148636 are summarized below:

Table 2. Pre-July 1, 1973, Historic Use Summarized

WR Claim #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion	Period of Use/Diversion
41H 15887-00	05/31/1882	76.44 AF	282.74 GPM	Irrigation (43 Acres)	49 AF	N2NE, S2NE SEC 2, T3S R5E, GALLATIN COUNTY	SENWNW SEC 14, T3S R5E, GALLATIN COUNTY	03/15 – 11/15

Unperfected change version

12. Change Authorization 41H 30148636 was issued on June 16, 2022, to change the purpose and place of use of Claim 41H 15887-00. No changes were made to the point of diversion, means of conveyance, or places of storage. The purpose was changed from irrigation of 43 acres to aquifer recharge, delivered to an infiltration gallery in the new POU. Through the change, 76.44 AF is diverted and delivered to the infiltration gallery from June 1st to August 31st. The use associated with Change Authorization 41H 30148636 was established using pre-July 1, 1973, historical use. The consumptive use is equal to the 49 AF historically consumed volume associated with irrigation of 43 acres. The diverted volume is equal to the 76.44 AF historically diverted volume; the historical consumptive use (49 AF), the historical non-consumed return flows (21 AF), and historic conveyance losses (6.44 AF). The diverted volume associated with the change is not perfected but the need for aquifer recharge mitigation to prevent adverse effect identified in Change Authorization 41H 30148636 remains unchanged. The historic use of Claim 41H 15887-00 after Change Authorization 41H 30148636 is summarized in Table 3 below:

Table 3. Change Authorization 41H 30148636 Use

WR Claim #	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Use	Place of Use	Point of Diversion	Period of Use/Diversion
41H 15887-00	05/31/1882	76.44 AF	282.74 GPM	Aquifer Recharge	49 AF	SEWNW SEC 2, T3S R5E, GALLATIN COUNTY	SEWNW SEC 14, T3S R5E, GALLATIN COUNTY	06/01 – 08/31

Period of diversion and place of use

13. Claim 41H 15887-00 was claimed for irrigation use from March 15th to November 15th. The Applicant stated, though, that flood irrigation was historically used to irrigate alfalfa with a period of diversion beginning in early June to middle of September. In drier years, irrigation began as early as May and continued for 107 days. The Hoy Ditch reaches the field at a point in the southwest corner of the field, at which point on-farm ditches deliver water across the historical place of use. On-farm ditches were damned and allowed to flow on a four to five-day cycle beginning on the north end of the parcel and working towards the southern boundary. The Applicant stated water was applied continuously except for harvest.

14. Change Authorization 41H 30148636 adjusted the period of use and diversion for the change in purpose. The aquifer recharge purpose resulted in a change in days used from March 15th to November 15th to June 1st to August 31st. The period was changed from 107 days for irrigation to 90 days for aquifer recharge. The adjusted period of use for the change in purpose remained within the claimed period of use.

15. The historically irrigated place of use and infiltration gallery lie within climatic area IV for moderately low consumptive use. The period of diversion and period of use standard for this climatic area per ARM 36.12.112 is April 20th to October 10th. The claimed period of use is beyond the climatic area standard, but the Applicant did not provide evidence to support a period starting as early as March. The period of diversion and use for appropriation through Change Authorization 41H 30148636 is within the climatic area standard and claimed period of use. Therefore, the Department finds that the maximum period of use and diversion for Claim 41H 15887-00 is the climatic area standard of April 20th to October 10th.

16. The Department finds the maximum historic diverted volume of Claim 41H 15887-00 is 76.44 AF: 49 AF consumed volume, 21 AF non-consumed volume, 6.44 AF conveyance loss volume.

FINDINGS OF FACT – Adverse Effect

17. The Applicant proposes to change the purpose of Statement of Claim 41H 15887-00. No changes are proposed to the point of diversion or place of use, and this water right does not involve a place of storage. The proposed change in purpose is specifically to change the timing of diversion and delivery of water to the aquifer recharge purpose.

18. No change in the point of diversion is proposed and water will continue to be conveyed in the Hoy Ditch as it occurred historically to the place of use at an infiltration gallery. Water users on Hoy Ditch will not be adversely affected because water will continue to be conveyed in the amount as occurred historically. The proposed change will adjust the timing of diversion and delivery of aquifer recharge water to earlier than authorized in Change Authorization 41H 30148636 but will not be outside the maximum historic period of diversion. The proposed period of diversion and delivery is May 14th to July 31st, which lies within the maximum historic period of diversion for Statement of Claim 41H 15887-00. The proposed change will build on the previous change, but diversions will be limited to the proposed period of diversion. The consumptive use for Provisional Permit 41H 30148637 is 34.6 AF. The Applicant will divert 70 AF into the infiltration gallery equal to the historically applied volume on 43 acres, as proposed in prior Change Authorization 41H 30148636. The historically consumed volume on 43 acres is more than the volume required in the associated permit. However, the volume required to be delivered to the infiltration gallery during the historical period of diversion is the volume required to offset year-round depletions associated with the groundwater permit. This results in over-mitigation in some months, but models show this mitigation plan fully offsets depletions in every month (August 8, 2023, Groundwater Mitigation Change Report).

19. The August 8, 2023 Groundwater Mitigation Change Report identified Hyalite Creek downstream of the southern boundary of Section 11, Township 3 South, Range 5 East and Bozeman Creek downstream of the southern boundary of Section 6, Township 3 South, Range 6 East to the confluence with the East Gallatin River as the receiving stream reaches for historical return flows. The Applicant proposes to divert the full field applied volume of 70 AF on 43 acres to an infiltration gallery in order to offset the consumptive use for Provisional Permit 41H 30148637 and the loss of return flows on 43 acres retired from irrigation. The infiltration gallery is located within the footprint of the historically irrigated area. The proposed mitigation plan will shift return

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flow timing to earlier in the year, but the full return flow will accrue to the same location as historical return flows (August 8, 2023, Groundwater Mitigation Change Report). Modeled historical return flows and accretions from aquifer recharge to Bozeman Creek and Hyalite Creek are shown in Table 4.

Table 4. Summary of net effect to Hyalite Creek and Bozeman Creek resulting from Permit 41H 30148637 and Change Application 41H 30159389. Net effect is the difference between net depletion or the loss of historical return flows and accretions from aquifer recharge. Positive values of net effect correspond to increased streamflow, while negative values correspond to reduced streamflow. The final 4 columns summarize the impact to the streams (net depletion plus loss of historical return flows minus total accretions from aquifer recharge).

	Net Effect - Net Depletion				Net Effect - Return Flows				Net Effect - Summary			
	Hyalite Creek		Bozeman Creek		Hyalite Creek		Bozeman Creek		Hyalite Creek		Bozeman Creek	
Month	AF	GPM	AF	GPM	AF	GPM	AF	GPM	AF	GPM	AF	GPM
January	0.3	2.0	0.3	1.9	-0.1	-0.8	-0.1	-0.5	0.2	1.2	0.2	1.3
February	0.3	2.1	0.2	1.8	-0.1	-0.7	-0.1	-0.5	0.2	1.4	0.2	1.3
March	0.2	1.7	0.2	1.5	-0.1	-0.5	-0.1	-0.4	0.2	1.3	0.1	1.1
April	0.2	1.6	0.2	1.4	-0.1	-0.4	0.0	0.0	0.2	1.2	0.1	1.1
May	0.3	2.2	0.2	1.3	0.0	0.0	0.0	0.0	0.3	2.5	0.2	1.2
June	1.1	8.1	0.4	3.3	0.4	3.3	0.1	1.0	1.5	11.4	0.6	4.3
July	2.1	15.1	0.9	6.5	0.6	4.2	0.3	1.9	2.6	19.3	1.2	8.4
August	2.3	16.8	1.2	8.7	0.3	2.3	0.2	1.7	2.6	19.1	1.4	10.4
September	1.1	8.3	0.9	6.8	-0.3	-2.2	0.0	0.0	0.8	6.1	0.9	6.7
October	0.4	3.1	0.5	3.8	-0.4	-2.7	-0.1	-1.1	0.1	0.5	0.4	2.7
November	0.3	2.1	0.3	2.6	-0.3	-1.9	-0.1	-1.0	0.0	0.2	0.2	1.6
December	0.3	2.1	0.3	2.1	-0.2	-1.2	-0.1	-0.7	0.1	0.8	0.2	1.4
Total	8.8		5.6		0.0		0.0		8.8		5.6	

20. The total volume required to be delivered to the infiltration gallery in order to offset depletions from the proposed use (49.0 AF), plus the loss of return flows (21.0 AF), is 70 AF.

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21. Water will need to be delivered to the infiltration gallery at a constant rate of 0.45 CFS, or 200.8 GPM, during May, June, and July (78) days to achieve the required volume of 70 AF. The claimed flow rate of 41H 15887-00 is 282.74 GPM, which is greater than the flow rate required for delivery of water for aquifer recharge.

22. Hyalite Creek was part of a recent enforcement project with a court-appointed Water Commissioner. The Hoy Ditch headgate and conveyance system is also operated by the Hoy Ditch Company. These factors will help ensure the Applicant's water right will continue to operate as it has historically with no expansion of the period of diversion, diverted volume, or flow rate.

23. The Applicant has proposed to measure the volume and flow rate delivered to the infiltration gallery from the Hoy Ditch. Flow meters will also be installed on the wells permitted by 41H 30148637. The measuring devices will help ensure that a sufficient volume of water is delivered to the infiltration gallery for mitigation of the groundwater permit and loss of return flows.

24. The Department finds the proposed change will not create an adverse effect. The Department finds the proposed change in purpose and timing of diversion and delivery of water is not expanding as proposed volume and flow rate will not exceed historic amounts and the proposed period for aquifer recharge lies within the maximum historic period of diversion and use.

BENEFICIAL USE

FINDINGS OF FACT

25. The Applicant proposes to continue to use water for aquifer recharge as proposed in Change Authorization 41H 30148636 with a new period of use and diversion to offset adverse effects resulting from net depletion of surface water and changes in return flows. Aquifer recharge is a beneficial use of water in the State of Montana.

26. The Applicant proposes to change the timing of diversion and delivery of aquifer recharge purpose to earlier in the year than what is authorized by Change Authorization 41H 30148636. The timing of diversion and delivery of mitigation water from the previous Change Authorization, 41H 30148636, is June 1st to August 31st, when Hyalite Creek flows are known to be lower. The Applicant proposes to continue to use 76.44 AF diverted volume and 282.74 GPM flow rate, reflecting the historical use of Claim 41H 15887-00. Of the total 76.44 AF diverted volume, 70 AF will be applied to the infiltration gallery for mitigation purpose and 6.44 AF will be needed for conveyance losses. The total volume applied to the infiltration gallery includes 49.0 AF of the

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historically consumed volume to offset the consumptive use in Provisional Permit 41H 30148637 and 21.0 AF to mitigate the loss of return flows from irrigation of 43 acres. The point of diversion and means of conveyance are not changing. The adjustment in the timing of delivery to the infiltration gallery will not affect the beneficial use amount needed for the aquifer recharge purpose.

27. Over-mitigation is not a beneficial use of water, but the full field-applied volume of 70.0 AF for historical irrigation of 43 acres must be diverted to the infiltration gallery in order to offset depletions in every month. Through numerous modeling iterations, DNRC Water Sciences Bureau hydrologists determined that 70.0 AF of the historically diverted volume delivered to the infiltration gallery is required to offset depletions from Permit 41H 30148637 (34.6 AF) and changes to return flows fully annually. The 70 AF applied is equivalent to the historically consumed volume plus the loss of returns flows from irrigation of 43 acres. A measurement condition will be placed on the claim to ensure the full amount required is delivered to the infiltration gallery.

28. The Department finds the proposed change to divert 76.44 AF from May 14th to July 31st is a beneficial use of water. The proposed change in purpose and adjustment of timing of diversion and delivery of 70 AF to the infiltration gallery will offset depletions and changes to annual return flows.

ADEQUATE DIVERSION

FINDINGS OF FACT

29. The Applicant proposes to continue diverting water under 41H 15887-00 at the historical point of diversion at the Hoy Ditch headgate on Hyalite Creek. The Hoy Ditch is a major irrigation structure for numerous water users with water rights from Hyalite Creek. The maximum capacity of the Hoy Ditch was recently calculated as part of recent Change Authorization 41H 30143744 based on culvert and ditch dimensions using HY 8 Culvert Hydraulic Analysis Program by DNRC staff. It was determined the maximum capacity of Hoy Ditch is 54 CFS, which is sufficient to carry the water right proposed for change.

30. The Applicant proposes to divert water to the infiltration gallery earlier in the year than authorized in Change Authorization 41H 30148636 to reliably provide water to offset depletions associated with Groundwater Permit 41H 30148637. The Applicant will continue to use the historic POD and means of conveyance. The Hoy Ditch has been and will continue to be adequate for conveying the requested volume and flow rate.

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31. The Applicant proposes to deliver water to an infiltration gallery in order to offset depletions from Groundwater Permit 41H 30148637. The proposed design consists of a buried pipe conveying water from the Hoy Ditch to an infiltration gallery located within the footprint of the historically irrigated area. Perforated pipes buried three feet below the ground surface will allow water to infiltrate to the underlying sand and gravel aquifer (Change Application 41H 30148636). Well logs provided in the file for Permit 41H 30148637 indicate that the water table is approximately 30 feet below ground surface in the vicinity of the proposed infiltration gallery. This will provide adequate separation between the infiltration gallery and the underlying aquifer to allow water to infiltrate below the root zone and satisfy the required aquifer recharge volume.

32. The Department finds the design of diversion works and means of operation are adequate for the proposed change in aquifer recharge plan.

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. (Department file)

DISCHARGE PERMIT

FINDINGS OF FACT

34. A discharge permit from the Department of Environmental Quality is not required. On December 6, 2021, the Applicant submitted email communication with the Montana Department of Environmental Quality stating that a Montana Ground Water Pollution Control Systems discharge permit is not required for operation of the infiltration gallery. The Department finds that a discharge permit is not required for the proposed change.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

35. 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

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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. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

36. 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

¹ DNRC decisions are available at:

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

Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

37. 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 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

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

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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

38. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶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; 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

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.)

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. 41I 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

39. 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).

40. 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

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).

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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).

41. 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.

42. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

43. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

44. 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).

45. 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. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has/has not elected to proceed under Admin. R.M. 36.12.1902. (FOF No. 11).

46. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .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)

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(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., supra; 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”).

47. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41H 15887-00 of 76.44 AF diverted volume and 282.74 GPM flow rate with a consumptive use of 49 acre-feet. (FOF Nos. 10-15)

48. Based upon the Applicant’s comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 16-24)

BENEFICIAL USE

49. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. 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,

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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).

50. Applicant proposes to use water for mitigation purposes which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that 76.44 acre-feet of diverted volume and 282.74 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 25-28)

ADEQUATE MEANS OF DIVERSION

51. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1) (a), MCA; see also, *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); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed

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for flow rates of 750 GPM, and maximum usage allowed during non-high water periods, is 144-247 GPM, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *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); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

52. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

53. 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. § 85-2-311(1)(c), MCA (FOF 29-32).

POSSESSORY INTEREST

54. 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

55. 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 for aquifer recharge use. § 85-2-402(2)(d), MCA. (FOF 33)

DISCHARGE PERMIT

56. Sections 85-2-362(3) and 85-2-364, MCA require that an Applicant receive the appropriate water quality permits for a mitigation or an aquifer recharge plan pursuant to Title

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75, chapter 5 MCA, as required by §§75-5-410 and 85-2-364, MCA, prior to the grant of beneficial water use permit application as part of a combined application under § 85-2-363, MCA. The Department of Environmental Quality has confirmed that a Montana Ground Water Pollution Control Systems discharge permit is not required. (FOF 34)

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. 41H 30159389 should be **GRANTED**.

The Applicant is authorized to divert water under Statement of Claim 41H 15887-00 from Hyalite Creek at a point in the SENWNW Section 14, T3S, R5E, Gallatin County, which is the location of the Hoy Ditch headgate, at a rate of 282.74 GPM up to 76.44 AF. Between May 14th and July 31st of each year, water at a rate of 200.8 GPM and a volume of 70 AF of water shall be applied to the infiltration gallery located in the SENWSE of Section 2, T3S, R5E, Gallatin County.

The application will be subject to the following conditions, limitations, or restrictions:

IMPORTANT INFORMATION

NOTIFICATION REQUIREMENT: THE APPROPRIATOR SHALL RECORD A DOCUMENT IN THE COURTHOUSE THAT SHALL NOTIFY ALL CURRENT AND FUTURE LANDOWNERS THAT 1) WATER USE MUST BE MEASURED AND RECORDED AS DESCRIBED IN THIS CHANGE AUTHORIZATION; AND 2) THE PORTION OF THIS WATER RIGHT CHANGED TO MITIGATION PURPOSE CANNOT BE OWNED BY A PRIVATE INDIVIDUAL, BUT MUST BE HELD IN THE NAME OF THE HOME OWNERS ASSOCIATION. THE APPROPRIATOR SHALL PROVIDE A COPY OF THE RECORDED DOCUMENT IDENTIFYING THESE RESTRICTIONS, FOR EACH LANDOWNER, TO THE BOZEMAN DNRC WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR.

IMPORTANT INFORMATION

IN ORDER TO PREVENT ADVERSE EFFECTS TO OTHER APPROPRIATORS DUE TO LOSS OF HISTORICAL RETURN FLOWS, THE APPROPRIATOR SHALL DIVERT, OR CAUSE TO BE DIVERTED, 21 AC-FT PER YEAR OF WATER AND SHALL APPLY THIS WATER TO THE INFILTRATION GALLERY DESCRIBED IN THIS DOCUMENT BETWEEN MAY 14 AND JULY 31 OF EACH YEAR.

WATER MEASUREMENT INFORMATION – AQUIFER RECHARGE

THE APPROPRIATOR SHALL INSTALL A MEASURING DEVICE CAPABLE OF RECORDING THE RATE AND VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY

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UNDER CHANGE 41H 30159389. THE APPROPRIATOR MUST RECORD THE VOLUME OF WATER DIVERTED INTO THE INFILTRATION GALLERY. SUCH RECORDS SHALL BE SUBMITTED TO THE BOZEMAN DNRC WATER RESOURCES OFFICE BY NOVEMBER 30 OF EACH YEAR. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING PROPERLY. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

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

DATED this 13th day of December 2023.

/Original signed by Kerri Strasheim/
Kerri Strasheim, Manager
Bozeman Regional Office
Department of Natural Resources
and Conservation

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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 13th day of December 2023, by first class United States mail.

LAZY TJ ENTERPRISES, LLC
C/O BRENT AMUNRUD
6280 JOHNSON RD
BOZEMAN, MT 59718

Regional Office, (406) 586-3136