

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

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<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 41H 30163442 by GREAT NORTHERN ) GOLF CO. OF MONTANA )</b>	<b>UPDATED DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On January 8, 2025, Great Northern Golf Co. of Montana (Applicant) submitted Application to Change Water Right No. 41H 30163442 to change Statement of Claim 41H 115640-00 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 Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 28, 2025. The Applicant responded with information dated January 30, 2025. A preapplication meeting was held between the Department and the Applicant's consultant (WGM Group) on April 3, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on June 17, 2024. The Department delivered the Department-completed Technical Analyses on August 1, 2024. The Department met with the Applicant's consultant (Cole Peebles and Julie Merritt, WGM Group) on August 7, 2024. The Application was determined to be correct and complete as of February 28, 2025. An Environmental Assessment for this application was completed on April 21, 2025.

The Draft Preliminary Determination to Deny was sent to the Applicant on April 23, 2025. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on May 13, 2025, to which the Department granted 180 days to submit additional information. The Applicant submitted additional information on June 11, 2025.

**INFORMATION**

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

**Application as filed:**

- Application for Change of Appropriation Water Right, Form 606
- Addenda:
  - Mitigation Purpose Addendum, Form 600/606-MIT
  - Technical Analysis Addendum, Form 606-TAA
- Attachments:

- Technical Analysis Addendum (TAA) – Attachment A, dated January 6, 2025
- TAA – Attachment B, dated June 5, 2024
- Question No. 13 – Sage Grouse Letter, dated November 6, 2024
- Maps:
  - 606-TAA Question No. 25 & 111: Historical Use map, base map Bureau of Reclamation 1/5/1947 imagery, produced by Lyra Reynolds, edited by Cole Peebles, dated June 21, 2024
  - 606-TAA Question No. 25: 41H 30163442 – Proposed Use map, base map ESRI World Imagery, produced by Lyra Reynolds, edited by Cole Peebles, dated June 21, 2024
  - TAA-Attachment A: 41H 30163442 - Area of Potential Impact map, base map ESRI World Imagery, produced by Lyra Reynolds, edited by Cole Peebles, dated August 1, 2024
  - Follow-Up Map: Marketing for Mitigation Reach, base map Google Earth Imagery, produced by Cole Peebles, dated June 5, 2024
  - Question No. 18: 41H 30163442 – Historical Use map, base map Bureau of Reclamation 1/5/1947 imagery, produced by Lyra Reynolds, edited by Cole Peebles, dated June 21, 2024
  - Question No. 19: 41H 30163442 – Proposed Use map, base map ESRI World Imagery, produced by Lyra Reynolds, edited by Cole Peebles, dated June 21, 2024
- Department-completed Technical Analyses based on information provided in the Preapplication Meeting Form, dated August 1, 2024

#### Information Received after Application Filed

- Email chain between Consultant (Cole Peebles) and Department (Lyra Reynolds) dated January 30, 2025, RE: Deficiency Response – Change Application 41H 30163442 by Great Northern Golf Co
- Email chain between Consultant (Cole Peebles) and Department (Kerri Strasheim and Lyra Reynolds) dated May 13, 2025, RE: Draft Preliminary Determination for Water Right Change Application No. 41H 30163442
- Email chain between Consultant (Cole Peebles) and Department (Lyra Reynolds) dated June 11, 2025, RE: Submittal of Additional Information
- Additional Information for Change Application No. 41H 30163342, dated June 11, 2025

#### Information within the Department's Possession/Knowledge

- DNRC Surface Water Change Technical Analyses Report – Parts A and B, dated August 1, 2024
- DNRC Surface Water Change Analyses Report – Mitigation Reach Review, dated March, 25, 2025
- Water Resources Survey, Gallatin County, 1961
- Statement of Claim 41H 115640-00 file
- Change Authorization 41H 30044526 file
- Final Order of the Board of Natural Resources and Conservation Establishing Water Reservations Above Fort Peck Dam, dated July 1, 1992
- 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” (2012)
  - “Technical Memorandum - Assessment of new consumptive use and irrecoverable losses associated with change applications” (2013)
  - “Technical Memorandum: Calculating Return Flows” (2019)
  - “Technical Memorandum: Physical Availability of Surface Water with Gage Data” (2019)

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; Claim means Statement of Claim; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet.

## **WATER RIGHTS TO BE CHANGED**

### **FINDINGS OF FACT**

1. The Applicant seeks to change the point of diversion (POD), place of use (POU), and purpose of Statement of Claim 41H 115640-00 to marketing for mitigation use. Claim 41H 115640-00 is diverted and used from Bridger Creek at a flow rate of 1.38 CFS from January 1 to December 31 for irrigation of 28.54 acres. The Claim is diverted from Bridger Creek through a headgate in the SWNESW Section 33, T1S, R6E, Gallatin County. Claim 41H 115640-00 is

conveyed to the POU in the SWSE and S2SW Section 32, T1S, R6E, Gallatin County via the Vogel Ditch<sup>1</sup>. The historical elements for the water right proposed for change can be seen in Table 1 below.

**Table 1.** Water right proposed for change

Water Right No.	Purpose (Acres)	Volume (AF)	Flow Rate (CFS)	Period of Use	Point of Diversion	Place of Use	Priority Date	Acres
41H 115640-00	Irrigation	Historical Use Statement	1.38	1/1-12/31	SWNESW Section 33, T1S, R6E, Gallatin County	SWSE, S2SW Section 32, T1S, R6E, Gallatin County	4/30/1869	28.54

2. No other water rights historically irrigated the historical POU of Claim 41H 115640-00. Claim 41H 115640-00 is not supplemental to any other water rights.

3. The water right is owned solely by the Applicant and is not part of a bigger water right. The Applicant severed Claim 41H 115640-00 from the historical POU. Ownership is clear, and this water right is not part of a divided interest.

4. Claim 41H 115640-00 was previously changed to temporary instream fishery use in 2011 in Change Authorization 41H 30044526. Change Authorization 41H 30044526 was not renewed and expired in 2021. The Department will use the historical use findings established in the previous change to examine the historical use of Claim 41H 115640-00.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

5. The Applicant proposes to change the POD, POU, and purpose of Statement of Claim 41H 115640-00 to marketing for mitigation use. The project is in Gallatin County, and the source is Bridger Creek. The Applicant is proposing to retire 28.54 acres of irrigation and the historical conveyance ditch (Vogel Ditch), seen on the map provided as Figure 1, as part of this change application. The proposed PODs are at the start and end of the proposed marketing for mitigation reach in SWNESW Section 33, T1S, R6E, and NWNWSW Section 9, T2N, R2E, all within Gallatin County. The protected reach is approximately 50 miles, all within Gallatin County, as seen on the map provided as Figure 2.

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<sup>1</sup> Claim 41H 115640-00 was originally claimed with the Tullock Ditch as the name for its conveyance system. The ditch name has been changed to be the Vogel Ditch to match the Water Resources Survey for Gallatin County.

6. The proposed place of use for the mitigation water would extend along a reach from the historical Vogel Ditch diversion in Bridger Creek in the SWNESW Section 33, T1S, R6E, Gallatin County along Bridger Creek to its confluence with the East Gallatin River, along the East Gallatin River to its confluence with the Gallatin River, and then along the Gallatin River to its confluence with the Missouri River in the NWNWSW Section 9, T2N, R2E, Gallatin County. The entire reach is located within the Upper Missouri Basin.

7. As a result of the Upper Missouri Basin closure, which was legislatively closed to new appropriations of water with an effective date of April 16, 1993, a need to mitigate the adverse effects of new consumptive uses exists in basins 41H (Gallatin River) and 41I (Missouri River above Holter Dam). The sale or lease of water for surface water mitigation will aid in the development of future water projects in the Upper Missouri Basin by allowing the historically consumed volumes to remain in the Gallatin and Missouri Rivers, mitigating adverse effects to other water users.

8. The proposal is to change the full amount of the water right to a marketing for mitigation purpose. The Applicant sold the physical property but severed and retained the water right. The historical POD has been rendered unusable and the historical POU has been subdivided and sold to multiple owners. No irrigation can occur under this water right. Since no historical use is remaining under this water right, no measurement of historical use is required for this water right at the historical point of diversion. Claim 41H 115640-00 will not be diverted into the Vogel Ditch and will remain instream in Bridger Creek. As water is leased or sold for the proposed marketing for mitigation use, measurement reporting will be required. The Applicant must notify the Department within 30 days each time a portion of the change is completed, pursuant to § 85-2-420(4)(b), MCA.

9. The Applicant requested a period of 20 years to complete this change.

10. Pursuant to § 85-2-420, MCA, the appropriator must notify the Department within 30 days each time a portion of the change is completed, as well as a progress report submission requirement every five years. As a result, if the Application were to be granted the following conditions would be added to the Authorization:

**IMPORTANT INFORMATION**

PURSUANT TO § 85-2-420, MCA, THE APPROPRIATOR SHALL HAVE A 20-YEAR PERIOD FOR COMPLETION OF THIS CHANGE AUTHORIZATION. IF THE FULL AMOUNT OF WATER AUTHORIZED FOR CHANGE TO MARKETING FOR MITIGATION IS NOT SOLD OR LEASED FOR THESE PURPOSES PRIOR TO THE 20-YEAR COMPLETION DATE, THE WATER RIGHT RETAINS THE BENEFICIAL USE IN

PROPORTIONATE AMOUNTS NOT PERFECTED FOR MARKETING FOR MITIGATION AND AS AUTHORIZED PRIOR TO THIS CHANGE AUTHORIZATION. IF THE CHANGE IS NOT FULLY PERFECTED BY THE COMPLETION DEADLINE AND NO EXTENSION IS REQUESTED THE APPROPRIATOR SHALL FILE A PROJECT COMPLETION FORM FOR THE AMOUNT COMPLETED. THE REMAINING WATER NOT CHANGED REVERTS TO ITS HISTORICAL USE ON A PRO RATA BASIS AS AUTHORIZED BY THE DEPARTMENT AND CAN BE USED AS SUCH IF PRACTICAL.

**IMPORTANT INFORMATION**

**WATER MARKET REPORT:** THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF A PORTION OF THE WATER RIGHT FOR MITIGATION/AQUIFER RECHARGE PURPOSE.

**PROGRESS REPORT REQUIRED**

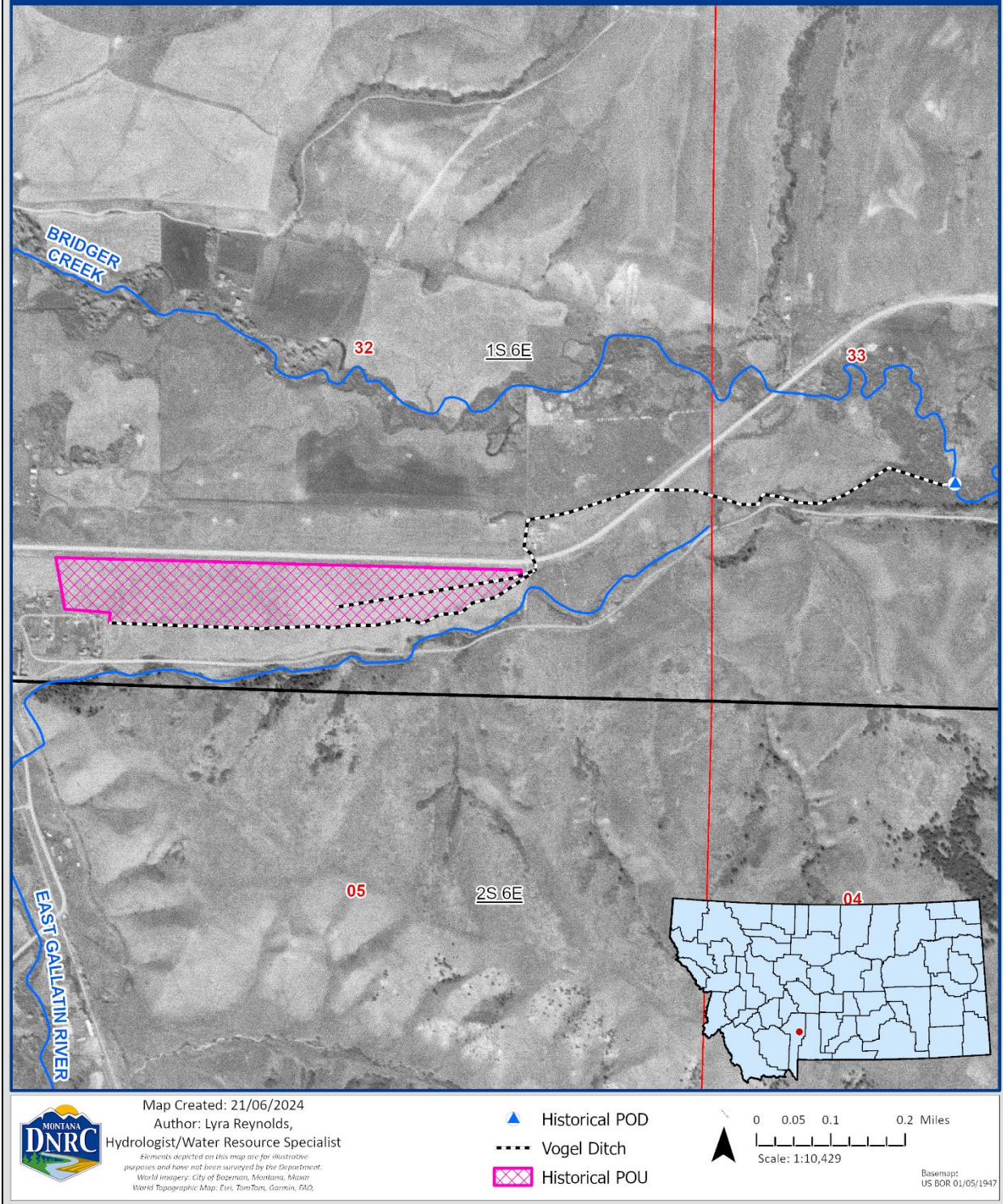
**PROGRESS REPORT ON MARKETING:** THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

**WATER MEASUREMENT INFORMATION**

AS WATER IS LEASED OR SOLD FOR THE PURPOSE OF MITIGATION, MEASUREMENTS WILL BE TAKEN ON THE SOURCE NEAR THE START OF THE MITIGATION REACH TO ENSURE THAT WATER SOLD OR LEASED FOR THE PURPOSE OF MITIGATION WILL REACH THE GALLATIN RIVER. THE APPROPRIATOR SHALL MAINTAIN ALL MEASURING DEVICES SO THAT THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES ACCURATELY. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A MONTHLY WRITTEN RECORD OF FLOW RATES AND VOLUMES OF WATER DELIVERED. RECORDS SHALL BE SUBMITTED TO THE DEPARTMENT BY NOVEMBER 30TH OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR.

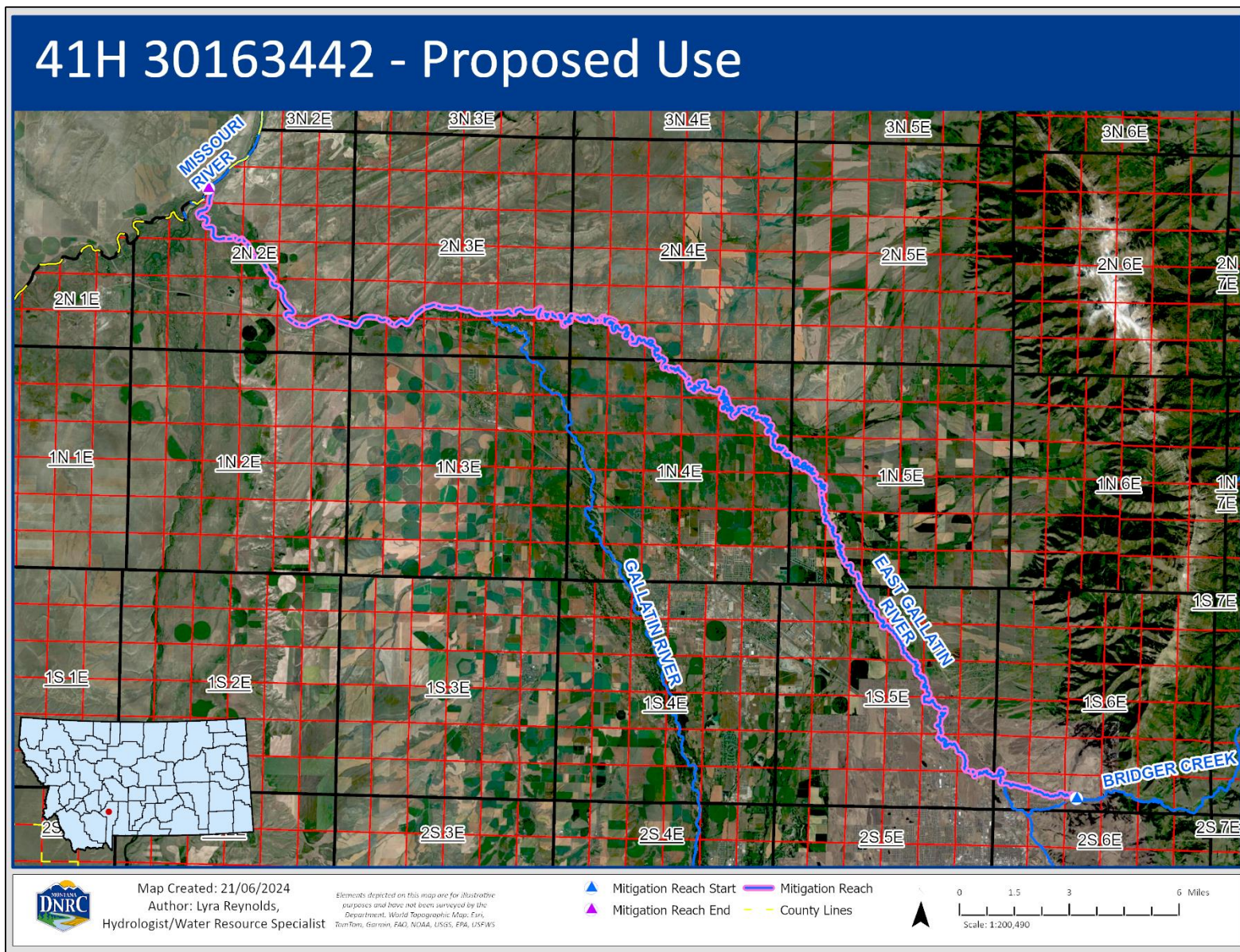


# 41H 30163442 - Historical Use



**Figure 1.** Historic use of Claim 41H 115564-00





**Figure 2.** Proposed use of Claim 41H 115564-00



## **CHANGE CRITERIA**

11. 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.

12. 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**

13. Statement of Claim 41H 115640-00 is a decreed right with a priority date of April 30, 1869. Claim 41H 115640-00 was part of the Temporary Preliminary Decree and Preliminary Decree for Basin 41H.

14. Claim 41H 115640-00 was previously changed to temporary instream fishery use in 2011 in Change Authorization 41H 30044526. Change Authorization 41H 30044526 was not renewed and expired in 2021. Historical use of Claim 41H 115640-00 was found pursuant to ARM 36.12.1902 in the previous change. The Applicant has elected to use information from previous historical use analysis found in Change Authorization 41H 30044526 for the historical use analysis for this change application. Per the Department's standard, historical use was not recalculated and the analysis from the previous change was used.

15. Claim 41H 115640-00 has a claimed flow rate of 1.38 CFS. Claim 41H 115640-00 was historically diverted from Bridger Creek via a headgate at the Vogel Ditch in the SWNESW Section 33, T1S, R6E, Gallatin County for irrigation use. The Vogel Ditch conveyed two water rights along with Claim 41H 115640-00: Claims 41H 30013294 and 41H 30023113. Claim 41H 30013294 is an irrigation water right for 0.46 CFS<sup>2</sup> and Claim 41H 30023113 is a stock water right with no specific flow rate. The total flow rate that was historically conveyed through the headgate and Vogel Ditch system was 1.84 CFS. Ditch measurements were taken as part of Change Authorization 41H 30044526, and the Applicant requested the Department use previously provided information to assess the capacity of the ditch. The capacity of the ditch was found to be 24.86 CFS based on ditch measurements taken down-ditch of the headgate. The Department finds the capacity of the ditch, 24.86 CFS, is sufficient to carry the maximum 1.84 CFS flow rate. The Department finds the maximum flow rate of Claim 41H 115640-00 is 1.38 CFS.

16. Claim 41H 115640-00 was originally claimed for the diversion of Bridger Creek water to flood irrigate 28.54 acres in SWSE and S2SW Section 32, T1S, R6E, Gallatin County. In Change Authorization 41H 30044526, the Department reviewed provided evidence from the Applicant and aerial imagery from 1954 and 1979 to determine the maximum irrigated acres of 28.54 acres. Irrigation of 28.54 acres is supported by the Gallatin County Water Resources Survey, Bureau of Reclamation Photo 2109500010089 dated May 1, 1947, and Photo 179-177L. The Department finds the maximum number of acres irrigated by Claim 41H 115640-00 is 28.54 acres. Claim 41H 115640-00 has been severed from its historical POU.

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<sup>2</sup> The flow rate of Claim 41H 30013294 is listed as 206.45 GPM on its abstract and was converted to CFS for this document.

17. Claim 41H 115640-00 was claimed with a period of use of January 1 to December 31. The Department found this period of use to be outside the standard found in ARM 36.12.112 for irrigation use in Climatic Area IV. The Department used the standard April 20 to October 10 period of diversion and use for the historical use of Claim 41H 115640-00 in Change Authorization 41H 30044526. The Applicant further stated the period of diversion and use for the claim should be from April 20 to October 10 as part of the preapplication for this change application (Application No. 41H 30163442). The Department finds the historical period of diversion and use for Claim 41H 115640-00 is April 20 to October 10.

18. The previous historical use analysis from Change Authorization 41H 30044526 will be used for establishing historical use of Claim 41H 115640-00 for this change application. The total consumptive volume for irrigation use was calculated in Change Authorization 41H 30044526 using the Department's standard methodology pursuant to ARM 36.12.1902. The water right proposed for change is a Statement of Claim, and the historical use was evaluated as the right existed prior to July 1, 1973. The Applicant asserts that Claim 41H 115640-00 was historically diverted from April 20 to October 10 into the Vogel Ditch to irrigate 28.54 acres in the historical POU. The historical consumptive use for irrigation is based on the Gallatin County Management factor of 73.5% and evapotranspiration of 16.85<sup>3</sup> inches.

19. The historical consumed and field applied volumes were calculated with the inputs shown in Table 2. The historical use found in Change Authorization 41H 30044526 did not account for irrecoverable losses in the total consumed volume, and the Department is utilizing the previous historical use from the previous change. The historical consumed volume for Claim 41H 115640-00 is equal to the crop consumption of 29.5 AF.

**Table 2.** Historical consumed volume of Statement of Claim 41H 115640-00.

<b>Irrigation Method</b>	<b>Acres</b>	<b>IWR (in)*</b>	<b>Mgmt. Factor<sup>^</sup></b>	<b>Field Efficiency</b>	<b>Crop Consumption (AF)</b>	<b>Field Applied Volume (AF)</b>	<b>IL (AF)</b>	<b>Total Consumed Volume (AF)</b>
Flood	28.54	16.85	0.735	0.45	29.5	65.5	N/A <sup>^^</sup>	29.5

\* Bozeman Montana State University IWR Weather Station

<sup>^</sup> Gallatin County Historical Use Management Factor (1964-1973)

<sup>^^</sup> Irrecoverable losses – not calculated as part of previous Change Authorization 41H 30044526

20. Historical diverted volume (HDV) is typically the sum of the historical field applied volume and the seasonal conveyance losses attributed to a water right. The historical diverted volume of

<sup>3</sup> ARM 36.12.1902 currently lists ET for Flood, Wheeline, Handline irrigation in Gallatin County at the Bozeman Montana State University weather station as 16.84 inches but Change Authorization 41H 30044526 utilized 16.85 inches for the historical use analysis. The 16.85 inches was found in the previous change using the weather station's net irrigation requirement monthly breakdown from May to September (April and October were zero values) and summing the total requirement for the period of use.

Claim 41H 115640-00 was not found using this method in previous Change Authorization 41H 30044526. The HDV of Claim 41H 115640-00 was found using an overall efficiency of the irrigation system. The previous change authorization found a conveyance efficiency (ec) equal to 70% to assess the average ditch conveyance loss. This value was multiplied by the field efficiency (ea), 45%, to find an overall efficiency of the irrigation system from POD to field application. The overall efficiency was found to be about 30%. The historical diverted volume was found by dividing the historical consumptive volume by the overall efficiency value. The Department utilized this historical diverted volume for this change application (Application No. 41H 30163442). The HDV is equal to the historical consumptive volume (29.5 AF) divided by the overall efficiency (30%). The Department found the HDV of Claim 41H 115640-00 is 98.2 AF, seen in Table 3.

21. In the previous change authorization, the Department did not calculate historical conveyance losses per the Department's memorandum "Distributing Conveyance Losses on Multiple User Ditches" (Heffner, 2020), as the previous change pre-dated the memorandum. To find the portion of HDV attributed to conveyance losses, the Department subtracted the field applied volume from the historical diverted volume. The conveyance loss volume in the Vogel Ditch attributed to Claim 41H 115640-00 is 32.7 AF, found using the below equations and seen in Table 3.

$$E = (ec * ea)$$

$$HDV = \text{Historical Consumptive Volume} \div E$$

$$\text{Field Applied Volume} = \text{Historical Consumptive Volume} \div \text{Field Efficiency}$$

$$\text{Historical Conveyance Losses} = HDV - \text{Field Applied Volume}$$

**Table 3.** Historical diverted volume of Claim 41H 115640-00

Water Right No.	Field Efficiency	Field Applied Volume (AF)	Conveyance Efficiency	Conveyance Losses (AF)	Overall Efficiency	Historical Diverted Volume (AF)
41H 115640-00	0.45	65.5	0.7	32.7	0.3	98.2

22. The Department finds the following historical use for Claim 41H 115640-00, as shown in Table 4.

**Table 4.** Summary of historical use of Claim 41H 115640-00

Water Right No.	Historical Purpose	Maximum Historical Acres	Historical Place of Use	Historical Point of Diversion	Maximum Historical Flow Rate	Historically Consumed Volume	Historically Diverted Volume
41H 115640-00	Irrigation	28.54	SWSE, S2SW Section 32, T1S, R6E, Gallatin County	SWNESW Section 33, T1S, R6E, Gallatin County	1.38 CFS	29.5 AF	98.2 AF



## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

23. The Applicant proposes to change the POD, POU, and purpose of Claim 41H 115640-00. The Applicant proposes to leave water instream in Bridger Creek beginning in the SWNESW Section 33, T1S, R6E, Gallatin County for marketing for mitigation purpose under Claim 41H 115640-00. The source of the water will remain Bridger Creek, and the period of use and diversion will be April 20 to October 10. This water right does not have a storage element.

24. Through the proposed change, the Applicant will be able to leave the historically diverted volume instream at the upstream POD location and protect the historically consumed volume between the two proposed PODs. The maximum protectable diverted volume at the upstream POD will be 98.2 AF. The maximum consumed volume for Claim 41H 115640-00 is 29.5 AF. The full historical flow rate of the water right, 1.38 CFS, will be available for the marketing for mitigation use in the reach. The Applicant will no longer irrigate the historical POU, and the historical conveyance ditch will be retired. Water will remain instream in Bridger Creek and the East Gallatin River from the upstream POD to the end of reach POD at the confluence of the Gallatin River and the Missouri River in the NWNWSW Section 9, T2N, R2E, Gallatin County, as seen on the map provided as Figure 2. The Applicant will be responsible for the sale or leasing of the water for mitigation, and the water will be available for mitigation for up to 20 years. The proposed use of Claim 41H 115640-00 is shown in Table 5.

**Table 5.** Summary of the proposed use of Claim 41H 115640-00

<b>Water Right No.</b>	<b>Proposed Purpose</b>	<b>Proposed Place of Use<sup>4</sup></b>	<b>Proposed Point of Diversion</b>	<b>Proposed Flow Rate</b>	<b>Proposed Consumptive Volume</b>	<b>Proposed Diverted Volume</b>
41H 115640-00	Marketing for Mitigation	SWNESW Section 33, T1S, R6E, Gallatin County NWNWSW Section 9, T2N, R2E, Gallatin County <sup>4</sup>	SWNESW Section 33, T1S, R6E, Gallatin County NWNWSW Section 9, T2N, R2E, Gallatin County	1.38 CFS	29.5 AF	98.2 AF

25. The proposed consumed volume is equal to the historical consumed volume, and the proposed diverted volume is equal to the historical diverted volume. The Department finds the proposed change will not increase the consumed or diverted volumes of Claim 41H 115640-00.

26. Claim 41H 115640-00 was diverted and used for temporary instream fishery use from 2011 to 2021, but the previous change expired. Claim 41H 115640-00 was not returned to

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<sup>4</sup> The proposed POU is located instream along the approximately 50 mile long protected reach from the upstream POD in the SWNESW Section 33, T1S, R6E, Gallatin County to the end of the reach POD in the NWNWSW Section 9, T2N, R2E, Gallatin County.

irrigation use following the expiration of the temporary change, as the historical diversion structure and conveyance system were plowed in and have been unusable for at least 20 years. Water has not been used for irrigation for approximately 3 years because the water right remained instream following the expiration of the previous change. Since this period is less than 10 years, non-use is not evaluated.

27. The Department has considered an area of potential adverse effect on the source of supply. This reach was determined by accounting for the location of the proposed and historical points of diversion as well as the extent of the proposed mitigation reach. The proposed marketing for mitigation reach extends from the SWNESW Section 33, T1S, R6E, Gallatin County downstream to the NWNWSW Section 9, T2N, R2E, Gallatin County, seen in Figure 2. A total 155 water rights exist within the area of potential adverse effect, as illustrated in Appendix A of the Surface Water Change Technical Analyses Report – Part A, dated August 1, 2024. Water will be left instream in Bridger Creek, the East Gallatin River, and the Gallatin River so that users in the area of potential adverse effect will have equal or greater access to water during the period of diversion as compared to historical conditions. The Applicant will not increase the diverted or consumed volume nor change the timing of diversions for the water right proposed for change. No history of calls on the source exists. No complaints were received, and no adverse effect was identified on the source as part of previous Change Authorization 41H 30044526. A condition will be placed on the water right if this Preliminary Determination is granted that will require measurements on the source once water is leased or sold for purposes of mitigation.

#### Return Flows

28. The proposed change to Claim 41H 115640-00 will result in a change in return flow locations and volumes. The Department modeled return flows for the proposed change in the Surface Water Change Technical Analysis Report – Part B, dated August 1, 2024. Historically, 24.2 AF of non-consumed volume returned to Bridger Creek downstream of the NENESW Section 32, T1S, R6E, and 11.9 AF accrued to the East Gallatin River downstream of the NENENE Section 6, T2S, R6E, all in Gallatin County. Under the proposed change, the entire diverted volume associated with the historically irrigated acres will be left instream at the historical POD in the SWNESW Section 33, T1S, R6E, Gallatin County.

29. The Applicant proposes to leave Claim 41H 115640-00 instream at the historical POD for the marketing for mitigation use. The historical consumed volume, 29.5 AF, will be left instream in Bridger Creek below the historical POD. The volume left instream in Bridger Creek will also be left instream in the East Gallatin River downstream of the confluence of Bridger Creek and the

East Gallatin River. No water will be left in the East Gallatin River at the historical location of return flows, which lies upstream of the confluence with Bridger Creek, and 11.9 AF of non-consumed volume will no longer return to this location. As a loss of return flows is projected to occur from the proposed change and water rights were identified to be impacted by the change in return flows, the Department conducted a monthly analysis of rate and timing of return flows.

30. In the additional information submitted on June 11, 2025, the Applicant challenges DNRC return flow policy. The Department reviewed the submitted information. The Department is following the current policy with return flow analysis for this application review and preliminary determination document.

31. The timing of return flows for both Bridger Creek and the East Gallatin River is seen in Table 6 below.

**Table 6.** Return flow associated with the 28.5-acre historical POU

Months	Net Irrigation Requirement (NIR) (inches)	Applied at Field (AF)	Consumed at Field (AF)	Non-Consumed (AF)	Return Flows	
					Bridger Creek	East Gallatin River (AF)
January	0	0	0	0	1	0.9
February	0	0	0	0	0.6	0.7
March	0	0	0	0	0.4	0.7
April	0	0	0	0	0.3	0.6
May	1	3.9	1.8	2.2	0.3	0.6
June	3.5	13.5	6.1	7.4	1.1	0.6
July	5.5	21.2	9.6	11.7	2.8	1
August	4.6	17.9	8.1	9.8	4.5	1.4
September	2.3	9	4	4.9	4.8	1.5
October	0	0	0	0	4.1	1.5
November	0	0	0	0	2.6	1.2
December	0	0	0	0	1.7	1.1
<b>TOTAL</b>	16.8	65.5	29.5	36	24.2	11.9

#### Area of Potential Impact Analysis

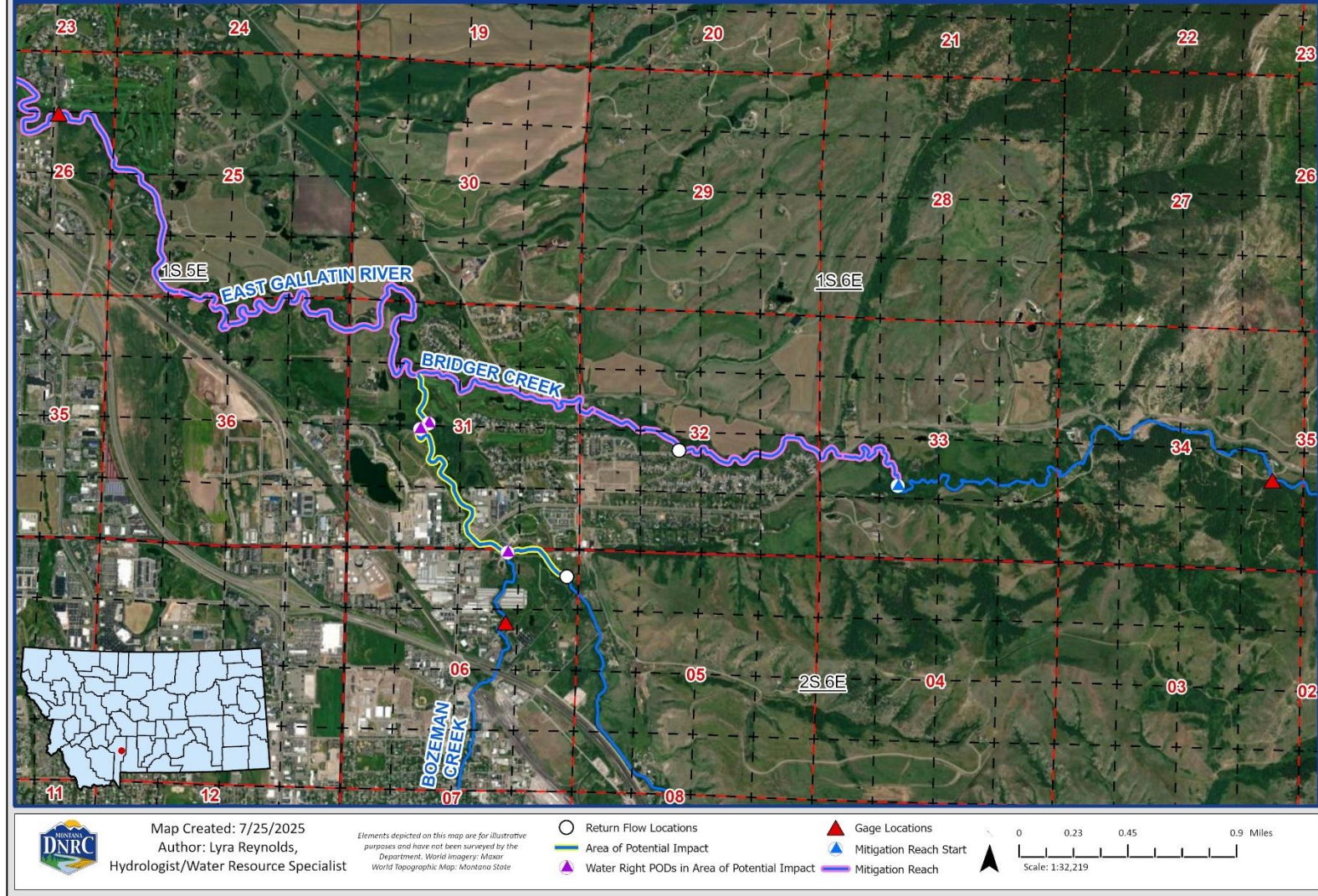
32. The Department identified an area of potential impact (AOPI) on the East Gallatin River, beginning at the location of historical return flows on the East Gallatin River in the NENENE Section 6, T2S, R6E, Gallatin County and ending at the confluence of the East Gallatin and Bridger Creek in the NWSENE Section 31, T1S, R6E, Gallatin County, seen in Figure 3. A total of three surface water rights exist within this reach, seen in Table 7. These water rights include one Fish, Wildlife, and Parks (FWP) Water Reservation for instream fisheries use (Reservation No. 41H 30008910) and two privately owned Statements of Claim for irrigation use (Claims 41H 110362-00 & 41H 211637-00).

**Table 7.** Water rights in the AOPI

<b>Water Right No.</b>	<b>Owner Names</b>	<b>Purpose</b>	<b>Source</b>	<b>Priority Date</b>
41H 30008910	Montana, State of Dept of Fish Wildlife & Parks	FISHERY	EAST GALLATIN RIVER	01/07/1985
41H 110362-00	Christian Hoffman; Donna Hoffman; Janis Hoffman; William J Hoffman	IRRIGATION	EAST GALLATIN RIVER	31/12/1878
41H 211637-00	Aqua LLC	IRRIGATION	EAST GALLATIN RIVER	15/06/1966



# 41H 30163442 - Area of Potential Impact



**Figure 3.** Area of potential impact. Map updated to depict the “POD” of FWP Reservation No. 41H 30008910 within the AOPI as the start of the instream flow reach, which begins at the confluence of Bozeman Creek and the East Gallatin River. Basemap imagery was also updated.

33. As water rights exist on the affected source, the Department conducted an extended analysis of physical availability and compared legal demands within the AOPI to analyze the adverse effect of the proposed change to Claim 41H 115640-00. The Department used the following gages for the analysis:

USGS 06048650 E Gallatin R ab Water Reclamation Fa nr Bozeman MT

DNRC 41H 08990 Bozeman Creek at Bozeman, MT

USGS 06048500 Bridger Creek nr Bozeman MT

34. To estimate physical availability on sources with gage data where the location of historical return flows is upstream of a gage, the flow rates and volumes of water rights<sup>5</sup> between the gage and the return flow location are added to the stream gage data to provide an estimate of physical availability at the location of historical return flows. The location of historical return flows on the East Gallatin River is in the NENENE Section 6, T2S, R6E, Gallatin County. The stream gage data from the East Gallatin River above the Water Reclamation Facility includes water contributed by Bozeman Creek and Bridger Creek, as the gage lies downstream of the confluence with these major tributaries. Table 8 below shows the median of the mean monthly flow rate and volume for the three gages. The contributions from Bozeman and Bridger Creeks were subtracted from the East Gallatin River stream data. The methodology is described in further detail in the Surface Water Change Technical Analyses Report – Part A, dated August 1, 2024. Table 9 below shows the median monthly flow rate identified from the East Gallatin River stream gage and Table 10 shows the physical availability in the affected source.

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<sup>5</sup> The flow rate and volume for each water right was taken from the face value on the abstract. Water rights that have not been assigned a flow rate or volume required further analysis. The adjudication standard of 30 gallons per day per animal unit was used for stock water right volumes. Irrigation rights were assigned a volume of 2.06 acre-feet per acre, which is the low range of the Department's standard for diverted volume at 60% efficiency in Climatic Area IV: Moderately Low Consumptive Use, per ARM 36.12.115. A flow rate was not assigned for stock purpose multiple use water rights, as the irrigation claim is assumed to reflect the total flow rate of the appropriation.

**Table 8.** Summary of estimated median mean monthly flows in Bridger Creek

Month	<u>USGS 06048500 Bridger Creek nr Bozeman, MT</u>		<u>Water Rights Gage to Confluence</u>		<u>Bridger Creek Water Quantity</u>	
	Median Mean Monthly Flow Rate (CFS)	Volume (AF)	Median Mean Monthly Flow Rate (CFS)	Volume (AF)	Median Mean Monthly Flow Rate (CFS)	Volume (AF)
JAN	5.64	346.18	0.62	2.18	5.02	344.00
FEB	7.49	430.08	0.62	2.04	6.87	428.04
MAR	11.05	678.25	0.62	2.18	10.43	676.07
APR	57.75	3430.35	4.37	177.48	53.38	3252.87
MAY	138.3	8488.85	6.34	210.69	131.96	8278.16
JUNE	75.5	4484.70	6.42	204.88	69.08	4279.82
JULY	28.3	1737.05	6.42	211.71	21.88	1525.35
AUG	12.25	751.91	6.42	211.71	5.83	540.20
SEPT	9.28	551.23	5.67	193.90	3.61	357.33
OCT	9	552.42	0.77	10.08	8.23	542.34
NOV	9.2	546.48	0.62	2.11	8.58	544.37
DEC	6.98	428.43	0.62	2.18	6.36	426.25

**Table 9.** Summary of estimated median mean monthly flows and volumes

Month	<u>USGS 06048650 E Gallatin River above Water Reclamation Facility</u>		<u>DNRC 41H 08990 Bozeman Creek at Bozeman, MT</u>		<u>Bridger Creek Water Quantity</u>		<u>E Gallatin River after accounting for Bozeman &amp; Bridger Creeks</u>	
	Median Mean Monthly Flow Rate (CFS)	Volume (AF)	Median Mean Monthly Flow Rate (CFS)	Volume (AF)	Median Mean Monthly Flow Rate (CFS)	Volume (AF)	Flow Rate (CFS)	Volume (AF)
JAN	48.45	2973.861	14.23	873.18	5.02	344.00	29.21	1756.68
FEB	51.1	2934.162	14.61	838.68	6.87	428.04	29.63	1667.44
MAR	88.2	5413.716	16.73	1026.91	10.43	676.07	61.04	3710.73
APR	234.95	13956.03	25.94	1540.83	53.38	3252.87	155.63	9162.33
MAY	406.55	24954.04	65.15	3998.74	131.96	8278.16	209.45	12677.14
JUNE	270.1	16043.94	64.02	3802.92	69.08	4279.82	137.00	7961.20
JULY	96.1	5898.618	21.23	1303.12	21.88	1525.35	52.99	3070.15
AUG	43.4	2663.892	15.70	963.62	5.83	540.20	21.87	1160.07
SEPT	55.1	3272.94	15.75	935.38	3.61	357.33	35.75	1980.23
OCT	59.8	3670.524	18.57	1139.61	8.23	542.34	33.01	1988.57
NOV	55.75	3311.55	20.13	1195.80	8.58	544.37	27.04	1571.38
DEC	44.15	2709.927	14.83	910.21	6.36	426.25	22.96	1373.47

**Table 10.** Estimated physical availability of the East Gallatin River

Month	<u>E Gallatin River after accounting for Bozeman &amp; Bridger Creeks</u>		<u>Water Rights Historical Return Flow Location to Gage</u>		<u>Physical Availability at Return Flow Location</u>	
	Flow Rate (CFS)	Volume (AF)	Flow Rate (CFS)	Volume (AF)	Flow Rate (CFS)	Volume (AF)
JAN	29.21	1756.68	0.23	0.88	29.44	1757.56
FEB	29.63	1667.44	0.23	0.82	29.86	1668.27
MAR	61.04	3710.73	0.23	0.88	61.28	3711.61
APR	155.63	9162.33	0.23	0.85	155.87	9163.18
MAY	209.45	12677.14	6.66	143.64	216.11	12820.78
JUNE	137.00	7961.20	28.80	974.56	165.81	8935.76
JULY	52.99	3070.15	28.80	1007.04	81.80	4077.20
AUG	21.87	1160.07	28.80	993.18	50.68	2153.26
SEPT	35.75	1980.23	27.09	948.57	62.84	2928.80
OCT	33.01	1988.57	26.12	206.04	59.13	2194.61
NOV	27.04	1571.38	0.23	0.85	27.28	1572.23
DEC	22.96	1373.47	0.23	0.88	23.20	1374.35

35. The physical availability at the location of return flows was then compared to downstream legal demands in an area of potential impact (AOPI) to find the legal availability on the source. A portion of the proposed marketing for mitigation reach overlaps with the location of historical return flows on Bridger Creek. The water protected at this point is equal to the historical consumptive volume, 29.5 AF.

36. The Department quantified the flow rate and volume of the surface water rights in the AOPI to find legal demands. The flow rate and volume for each water right was taken from the face value on the abstract. Water rights without an assigned volume were quantified using further analysis; irrigation rights were assigned a volume of 2.06 AF per acre, which is the low range of the Department's standard for diverted volume at 60% efficiency in Climatic Area IV, per ARM 36.12.115. The legal demands are seen in Table 11 below; water rights requiring a volume quantification are denoted with an asterisk.

**Table 11.** Legal demands within AOPI

<b>Water Right No.</b>	<b>Flow Rate</b>	<b>Volume (AF)</b>
41H 30008910	42.4 CFS	30,694.11
41H 110362-00*	1.71 CFS	92.7
41H 211637-00	8.5 GPM	1.7

37. The Applicant provided additional information following the initial issuance of a Draft Preliminary Decision to Deny Change Application No. 41H 30163442. The Applicant stated the flow rate and volume used as the legal demand for FWP Reservation No. 41H 30008910 is an overestimate of the reservation in the AOPI, as the full amount of the reservation was compared to the physical availability of water for the extended return flow analysis. Instead, the Applicant suggested the flow rate and volume of the reservation should be estimated for the portion that lies within the AOPI. The additional information submitted contains a document prepared by FWP dated June 30, 1994, that describes methods to determine the extent of the instream flow along the reach proportional to the monitoring site. The methodologies allow for a flow rate to be estimated above or below a monitoring site for instream flow reservations that were established using the wetted perimeter, as described in the Order Establishing Water Reservations in the Missouri River Basin Above Fort Peck Dam (Final Order). Reservation No. 41H 30008910 was established using the wetted perimeter method in the Final Order. The Applicant states "Method 2 – Non-Field Method for Streams where a Wetted Perimeter Flow was Granted by the Board" could be applied to Reservation No. 41H 30008910 within the AOPI.

38. The Department reviewed the additional information and deemed the proposed methodology credible. The Department determined Method 2 can be used to estimate the flow



rate of Reservation No. 41H 30008910 within the AOPI, which lies upstream of the monitoring site for the reservation. The approved method utilizes the mean annual flow (MAF) of point on a source, which was determined by the USGS. The applicable flow rate at any point on the stream (subject site) can be estimated by calculating the ratio of the granted flow at the monitoring site to the calculated MAF at that same site and then applying that ratio to the MAF at the subject site. The FWP document states Method 2 may over or underestimate the flow rate at the subject site, but the Department finds the method to be suitable for this extended return flow analysis. The Applicant determined the MAF at the East Gallatin return flow location in the additional information submitted on June 11, 2025. The Department chose to find the MAF at the beginning of the instream flow reach for Reservation No. 41H 30008910, as the reservation does not extend upstream to the return flow location. The start of the reservation on the East Gallatin River is at the confluence of Bozeman Creek and the East Gallatin River.

39. Using the USGS StreamStats program, the MAF for the monitoring site is 133.8 CFS. The flow granted at the monitoring site is 42.4 CFS. The ratio at the monitoring site is 0.32. The MAF at the start of the reach for Reservation No. 41H 30008910 (subject site), seen in Figure 3, is 44.7 CFS. The flow estimated at the reservation POD is 14.3 CFS ( $44.7 \text{ CFS} \times 0.32$ ). The Department will use the estimated flow of 14.3 CFS for the legal demand of Reservation No. 41H 30008910 for the extended return flow analysis.

40. The volume of Reservation No. 41H 30008910 was also proportioned based on the estimated flow rate. The volume was estimated based on the estimated flow rate diverted over the full period of diversion. A volume of 10352.73 AF will be used for the legal demand of Reservation No. 41H 30008910 for the extended return flow analysis. The updated legal demands within the AOPI are seen in Table 12.

**Table 12.** Updated legal demands in the AOPI

<b>Water Right No.</b>	<b>Flow Rate</b>	<b>Volume (AF)</b>
41H 30008910	14.3 CFS	10352.73
41H 110362-00*	1.71 CFS	92.7
41H 211637-00	8.5 GPM	1.7

41. As all the water rights in the AOPI have PODs at or downstream of the confluence of Bozeman Creek and the East Gallatin River, the Department added the median mean monthly flow rate and volume at the Bozeman Creek gage to the physical availability at the return flow location. The updated downstream legal demands and historical return flows were then subtracted from these values to compare legal demands and physical availability. The comparison of physical availability, legal demands, and loss of historical return flows can be seen in Table 13 below;

values in red show months in which the legal demands and loss of return flow volume are greater than the physical availability.

**Table 13.** Comparison of physical availability and legal demand

Month	<u>Physical Availability at Return Flow Location</u>			<u>DNRC 41H 08990 Bozeman Creek at Bozeman, MT</u>			<u>Legal Demands in AOPI</u>			<u>Historical Return Flows</u>			<u>Legal Availability in AOPI</u>	
	Median Mean Monthly Flow Rate (CFS)	Volume (AF)		Median Mean Monthly Flow Rate (CFS)	Volume (AF)		Flow (CFS)	Volume (AF)		Flow (CFS)	Volume (AF)		Flow (CFS)	Volume (AF)
JAN	29.44	1757.56		14.23	873.18		14.30	876.87		0.01	0.90		29.35	1752.96
FEB	29.86	1668.27		14.61	838.68		14.30	820.30		0.01	0.70		30.16	1685.95
MAR	61.28	3711.61		16.73	1026.91		14.30	876.87		0.01	0.70		63.70	3860.95
APR	155.87	9163.18		25.94	1540.83		14.30	848.58		0.01	0.60		167.50	9854.83
MAY	216.11	12820.78	+	65.15	3998.74	-	16.02	904.07	-	0.01	0.60	=	265.23	15914.84
JUNE	165.81	8935.76		64.02	3802.92		16.02	874.91		0.01	0.60		213.80	11863.17
JULY	81.80	4077.20		21.23	1303.12		16.02	904.07		0.02	1.00		86.99	4475.24
AUG	50.68	2153.26		15.70	963.62		16.02	890.21		0.02	1.40		50.34	2225.27
SEPT	62.84	2928.80		15.75	935.38		14.31	848.92		0.03	1.50		64.25	3013.76
OCT	59.13	2194.61		18.57	1139.61		14.30	876.88		0.02	1.50		63.37	2455.85
NOV	27.28	1572.23		20.13	1195.80		14.30	848.58		0.02	1.20		33.09	1918.24
DEC	23.20	1374.35		14.83	910.21		14.30	876.87		0.02	1.10		23.71	1406.58

42. Using the updated legal demands, seen in Table 12, the physical availability of water exceeds the legal demands and loss of return flows in the AOPI for all months. The Department finds the change in return flows will not limit existing water right users.

43. The Department finds the proposed change to Claim 41H 115640-00 will not create an adverse effect.

44. If this Preliminary Determination is granted, Claim 41H 115640-00 will be subject to the following conditions:

#### **WATER MEASUREMENT INFORMATION**

AS WATER IS LEASED OR SOLD FOR THE PURPOSE OF MITIGATION, MEASUREMENTS WILL BE TAKEN ON THE SOURCE NEAR THE START OF THE MITIGATION REACH TO ENSURE THAT WATER SOLD OR LEASED FOR THE PURPOSE OF MITIGATION WILL REACH THE GALLATIN RIVER. THE APPROPRIATOR SHALL MAINTAIN ALL MEASURING DEVICES SO THAT THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES ACCURATELY. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A MONTHLY WRITTEN RECORD OF FLOW RATES AND VOLUMES OF WATER DELIVERED. RECORDS SHALL BE SUBMITTED TO THE

DEPARTMENT BY NOVEMBER 30TH OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR.

**BENEFICIAL USE**

**FINDINGS OF FACT**

45. The Applicant proposes to use water for marketing for mitigation. Marketing for mitigation is a beneficial use of water in the state of Montana. No irrigation use under Claim 41H 115640-00 will continue following the proposed change.

46. The Applicant is able to protect historically diverted volume, equal to 98.2 AF, at the historical POD in the SWNESW Section 33, T1S, R6E, Gallatin County. The historically consumed volume, equal to 29.5 AF, will be available for marketing for mitigation use in the proposed reach below the historical POD. The full historical flow rate, 1.38 CFS, will also be changed for marketing for mitigation use. The water right proposed for change is located in the Upper Missouri Basin Closure, which was legislatively closed to new appropriations of water with an effective date of April 16, 1993. Any new consumptive uses in basin 41H (Gallatin River) are required to mitigate adverse effects to other appropriators. The sale or lease of water will aid in the development of future water projects in the Upper Missouri Basin by providing mitigation for the future uses. The proposed reach lies within the Gallatin Valley, a rapidly growing area for development. Enactment of § 85-2-420, MCA, providing for marketing for mitigation reflects public policy benefitting the State. The availability of this marketing for mitigation water may provide a source of mitigation for new uses within the basin.

47. The proposed marketing for mitigation reach is approximately 50 miles long and spans from the upstream POD to the end of reach POD at the confluence of the Gallatin River and the Missouri River in the NWNWSW Section 9, T2N, R2E, Gallatin County. Water will be available for marketing for mitigation use in Bridger Creek, the East Gallatin River, and the Gallatin River during the historical period of diversion from April 20 to October 10. The Applicant submitted information in the application materials supporting the proposed reach and use of Claim 41H 115640-00 for future mitigation (TAA – Attachment B). The quantity of water available for appropriation in the Bridger Creek, the East Gallatin River, and the Gallatin River through this change will be increased throughout the proposed place of use for marketing beginning in the SWNESW Section 33, T1S, R6E, Gallatin County.

48. The proposed reach and beneficial use of Claim 41H 115640-00 for future mitigation was reviewed by the Department (Surface Water Change Analyses Report – Mitigation Reach Review, dated March, 25, 2025). Bridger Creek, the East Gallatin, and Gallatin Rivers are identified as

perennial sources in the USGS National Hydrography Dataset. A potentiometric surface in Gallatin, Lower Madison, Lower Jefferson, and Upper Missouri River Valleys map shows the general direction of groundwater flow parallel and toward the Gallatin River, East Gallatin River and Bridger Creek. The NRCS Soil Survey Geographic Database (SSURGO) indicates hydric conditions and shallow water tables along the floodplain of the proposed mitigation reach and supports that the reach is gaining water. No surface water connectivity issues exist in the proposed reach, so the length of the reach is reasonable. The proposed mitigation reach is hydraulically connected to groundwater, and the volume requested could reasonably mitigate a net depletion on the reach. The Department finds the proposed project can provide effective mitigation.

49. The Applicant has not found a purchaser for the water right but requested up to 20 years for completion of the proposed change. This timeline will allow the Applicant to find a user for mitigation use. The Applicant will be required to report to the Department within 30 days of leasing or selling any portion of the water, as well as submit progress reports every 5 years to show diligence in marketing the water. If this Preliminary Determination is granted, Claim 41H 115640-00 will be subject to the following conditions:

**IMPORTANT INFORMATION**

PURSUANT TO § 85-2-420, MCA, THE APPROPRIATOR SHALL HAVE A 20-YEAR PERIOD FOR COMPLETION OF THIS CHANGE AUTHORIZATION. IF THE FULL AMOUNT OF WATER AUTHORIZED FOR CHANGE TO MARKETING FOR MITIGATION IS NOT SOLD OR LEASED FOR THESE PURPOSES PRIOR TO THE 20-YEAR COMPLETION DATE, THE WATER RIGHT RETAINS THE BENEFICIAL USE IN PROPORTIONATE AMOUNTS NOT PERFECTED FOR MARKETING FOR MITIGATION AND AS AUTHORIZED PRIOR TO THIS CHANGE AUTHORIZATION. IF THE CHANGE IS NOT FULLY PERFECTED BY THE COMPLETION DEADLINE AND NO EXTENSION IS REQUESTED THE APPROPRIATOR SHALL FILE A PROJECT COMPLETION FORM FOR THE AMOUNT COMPLETED. THE REMAINING WATER NOT CHANGED REVERTS TO ITS HISTORICAL USE ON A PRO RATA BASIS AS AUTHORIZED BY THE DEPARTMENT AND CAN BE USED AS SUCH IF PRACTICAL.

**IMPORTANT INFORMATION**

WATER MARKET REPORT: THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF A PORTION OF THE WATER RIGHT FOR MITIGATION/AQUIFER RECHARGE PURPOSE.

**PROGRESS REPORT REQUIRED**

PROGRESS REPORT ON MARKETING: THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN



MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

50. The Department finds changing Claim 41H 115640-00 to marketing for mitigation use is a beneficial use of water.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

51. The proposed change of Claim 41H 115640-00 does not require a means of diversion or conveyance. Per § 85-2-402(2)(b)(iii), MCA, a change to marketing for mitigation pursuant to § 85-2-420, MCA, is exempt from the adequacy of diversion criterion.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

52. Pursuant to § 85-2-402(2)(d)(iii), MCA, the Applicant is not required to prove they have the possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to a beneficial use because this application involves marketing for mitigation per § 85-2-420, MCA.

### **CONCLUSIONS OF LAW**

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

53. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (beneficial use constitutes the basis, measure, and limit of a water right); *Featherman v. Hennessy*, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911) (increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940) (appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924) ("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a

reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); *Town of Manhattan*, ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied).<sup>6</sup>

54. 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.<sup>7</sup>

55. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>8</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is

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<sup>6</sup> DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

<sup>7</sup> See also *Holmstrom Land Co., Inc., v. Newlan Creek Water District*, 185 Mont. 409, 605 P.2d 1060 (1979); *Lokowich v. Helena*, 46 Mont. 575, 129 P. 1063 (1913); *Thompson v. Harvey*, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896) (change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

<sup>8</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under § 85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. Section 85-2-234, MCA

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).<sup>9</sup>

56. 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

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<sup>9</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 55 -57 (Colo., 1999); *Farmers Reservoir and Irr. Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); *Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); *Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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).<sup>10</sup>

57. 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.

58. In *Royston*, the Montana Supreme Court confirmed that an Applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each

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<sup>10</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. *Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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).

59. 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.

60. 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).

61. 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).

62. 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).

63. 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. 18).

64. 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").

65. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 41H 115640-00 to be a diverted volume

of 98.2 AF, a historically consumed volume of 29.5 AF, and flow rate of 1.38 CFS. (FOF Nos. 13 – 22)

66. 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. 23 – 44)

### BENEFICIAL USE

67. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, *Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review, Cause No. BDV-2002-519 (Mont. 1st Jud. Dist. Ct.) (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); *Worden v. Alexander*, 108 Mont. 208, 90 P.2d 160 (1939); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924); *Sitz Ranch v. DNRC*, DV-10-13390,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900) ("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

68. Applicant proposes to use water for marketing for mitigation use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence marketing for mitigation is a beneficial use and that 98.2 acre-feet of diverted volume

and 1.38 CFS flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 45 – 50)

#### **ADEQUATE MEANS OF DIVERSION**

69. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves a change in appropriation right pursuant to § 85-2-420 for mitigation or marketing for mitigation. (FOF No. 51)

#### **POSSESSORY INTEREST**

70. Pursuant to § 85-2-402(2)(d), MCA, the Applicant is not required to prove 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 because this application involves a change in appropriation right pursuant to § 85-2-420 MCA for mitigation or marketing for mitigation. (FOF No. 52)

#### **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 30163442 should be granted subject to the following.

The Applicant is authorized to change the point of diversion, place of use, and purpose of Statement of Claim 41H 115640-00. The Applicant is authorized to use Claim 41H 115640-00 for marketing for mitigation use. The authorized points of diversion are at the beginning and end of the marketing for mitigation reach in the SWNESW Section 33, T1S, R6E and NWNWSW Section 9, T2N, R2E, all within Gallatin County. The authorized place of use is instream in Bridger Creek, the East Gallatin River, and the Gallatin River. The place of use is an approximately 50-mile stretch from the SWNESW Section 33, T1S, R6E and NWNWSW Section 9, T2N, R2E, all within Gallatin County. Under Claim 41H 115640-00, the Applicant may protect a maximum volume of 98.2 AF at the upstream POD. A maximum 29.5 AF between the authorized PODs will be available for future mitigation use from April 20 to October 10. The maximum flow rate is 1.38 CFS. The Applicant will no longer irrigate 28.54 acres.

This authorization is subject to the following conditions:

#### **IMPORTANT INFORMATION**

PURSUANT TO § 85-2-420, MCA, THE APPROPRIATOR SHALL HAVE A 20-YEAR PERIOD FOR COMPLETION OF THIS CHANGE AUTHORIZATION. IF THE FULL AMOUNT OF WATER AUTHORIZED FOR CHANGE TO MARKETING FOR

MITIGATION IS NOT SOLD OR LEASED FOR THESE PURPOSES PRIOR TO THE 20-YEAR COMPLETION DATE, THE WATER RIGHT RETAINS THE BENEFICIAL USE IN PROPORTIONATE AMOUNTS NOT PERFECTED FOR MARKETING FOR MITIGATION AND AS AUTHORIZED PRIOR TO THIS CHANGE AUTHORIZATION. IF THE CHANGE IS NOT FULLY PERFECTED BY THE COMPLETION DEADLINE AND NO EXTENSION IS REQUESTED THE APPROPRIATOR SHALL FILE A PROJECT COMPLETION FORM FOR THE AMOUNT COMPLETED. THE REMAINING WATER NOT CHANGED REVERTS TO ITS HISTORICAL USE ON A PRO RATA BASIS AS AUTHORIZED BY THE DEPARTMENT AND CAN BE USED AS SUCH IF PRACTICAL.

**IMPORTANT INFORMATION**

**WATER MARKET REPORT:** THE APPROPRIATOR SHALL SUBMIT TO THE DEPARTMENT FORM WM09 WITHIN 30 DAYS OF LEASING OR SELLING ANY PORTION OF WATER UNDER THIS AUTHORIZATION. THE FORM SHALL BE ACCOMPANIED BY A COPY OF THE WATER LEASE AGREEMENT OR DEED EVIDENCING THE SALE OF A PORTION OF THE WATER RIGHT FOR MITIGATION/AQUIFER RECHARGE PURPOSE.

**PROGRESS REPORT REQUIRED**

**PROGRESS REPORT ON MARKETING:** THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT EVERY 5 YEARS FROM THE DATE OF ISSUANCE OF THIS AUTHORIZATION OF THE ACTIVITIES TO DATE TOWARDS DILIGENCE IN MARKETING THE WATER. THE REPORTS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

**WATER MEASUREMENT INFORMATION**

AS WATER IS LEASED OR SOLD FOR THE PURPOSE OF MITIGATION, MEASUREMENTS WILL BE TAKEN ON THE SOURCE NEAR THE START OF THE MITIGATION REACH TO ENSURE THAT WATER SOLD OR LEASED FOR THE PURPOSE OF MITIGATION WILL REACH THE GALLATIN RIVER. THE APPROPRIATOR SHALL MAINTAIN ALL MEASURING DEVICES SO THAT THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATES AND VOLUMES ACCURATELY. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A MONTHLY WRITTEN RECORD OF FLOW RATES AND VOLUMES OF WATER DELIVERED. RECORDS SHALL BE SUBMITTED TO THE DEPARTMENT BY NOVEMBER 30TH OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR.

## **NOTICE**

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

Dated this 6<sup>th</sup> day of August 2025.

/Original signed by Kerri Strasheim/

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

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 6<sup>th</sup> day of August, 2025, by first class United States mail.

GREAT NORTHERN GOLF CO  
DBA BRIDGER CREEK GOLF COURSE  
C/O MARK HOLIDAY  
2710 MCILHATTAN RD  
BOZEMAN, MT 59715

AND

COLE PEEBLES, WGM GROUP (CONSULTANT)  
VIA EMAIL: CPEEBLES@WGMGROUP.COM

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Bozeman Regional Office, (406) 586-3136