

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

APPLICATION TO CHANGE WATER RIGHT) NO. 41S 30171580 by James K Steen &) Lacey J Steen)	DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE
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On November 24, 2025, James K Steen and Lacey J Steen (Applicants) submitted Application to Change Water Right No. 41S 30171580 to change Stockwater Permit No. 41S 30043918 to the Lewistown 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 Applicants a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated December 11, 2025. The Applicants responded with information dated December 15, 2025. A preapplication meeting was held between the Department and the Applicants on August 13 2025, in which the Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Meeting Form on August 26, 2025. The Department delivered the Department-completed Technical Analysis on October 17, 2025. The Application was determined to be correct and complete as of January 14, 2026. The Environmental Assessment was completed by the Department on January 28, 2026.

INFORMATION

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

Application as filed:

- Application for Change of Appropriation Water Right, Form 606
- Attachments:
 - *Photos of Reservoir including the outlet pipe (8/13/2025), the outlet pipe from above (8/13/2025), a field view (8/13/2025), and a field view of the reservoir (8/13/2025).*
 - *Pre-Application Meeting Form R 02/2025, dated July 14, 2025*
- Maps:
 - Dam Dims (Undated Imagery)
 - Historical Use (2005 Imagery)

- Proposed Use (2021, 2023 Imagery)
- Department-completed Technical Analyses based on information provided in the Preapplication Meeting Form, dated August 26, 2025. (10/17/2025).

Information Received after Application Filed

- *Deficiency Letter Response from Applicants Re: Water Right Number Clarification, Signature, and Reservoir Fills, received by DNRC on December 15, 2025.*
- *Text Message Thread from Applicants with James K Steen and previous owner Monte Weeden Re: Historical Animal Units, received by DNRC on August 25, 2025.*
- *Letter of Professional Opinion from Montana Fish, Wildlife, & Parks Re: Fishery at Steen Property Reservoir – 41S 30043918, received by DNRC on June 30, 2025.*

Information within the Department's Possession/Knowledge

- 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 Lewistown Regional Office at 406-538-7459 to request copies of the following documents.
 - DNRC Technical Memorandum: *Pond and Wetland Evaporation/Evapotranspiration*, dated June 7, 2023
 - DNRC Standard Practice for Analyzing Area of Potential Adverse Effect
 - DNRC Change Application Manual, last updated February 14, 2025

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; ARM means Administrative Rules of Montana; WRS means Water Resource Survey; MCA means Montana Code Annotated; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AU means animal units; POD means point of diversion; POU means place of use; AF/YR means acre-feet per year. Sec. means Section; TWP means Township; RGE means Range; FWP means Montana Department

of Fish Wildlife & Parks; HCV means historical consumptive volume; and HDV means historical diverted volume.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicants propose a change of Stockwater Permit No. 41S 30043918. The purpose of this water right is stock use. The POU is in the SESESW Sec. 24 of Twp 15N, Rge 18E, in Fergus County using the source of surface water of an Unnamed Tributary of Big Spring Creek. The POD is in the same legal land description of SESESW Sec. 24 of Twp 15N, Rge 18E, in Fergus County. An on-stream reservoir, controlled by dam has been utilized at a depth of 18.00 FT, a surface area of 1.25 AC, and a capacity of 9.00 AF. The maximum volume is 9.00 AF, which is synonymous with diverted volume. The flow rate is undefined. The period of use is year-round (January 1 to December 31). November 5, 2008, is the priority date.

Table 1: Water Right Proposed for Change

Water Right Number	Flow Rate	¹ Maximum Volume	Purpose	Period Of Use	POU	Point(s) Of Diversion	Priority Date
41S 30043918	Undefined	9.00 AF	Stock	1/1- 12/31	SESESW Sec. 24 of Twp 15N, Rge 18E	SESESW Sec. 24 of Twp 15N, Rge 18E	11/05/2008 16:55

¹The Maximum Volume refers to reservoir capacity, which is the historically diverted volume. Because this water right is a Stockwater Permit, total historically consumed volume was not originally quantified.

2. There are no associated or supplemental water rights to Stockwater Permit No. 41S 30043918.

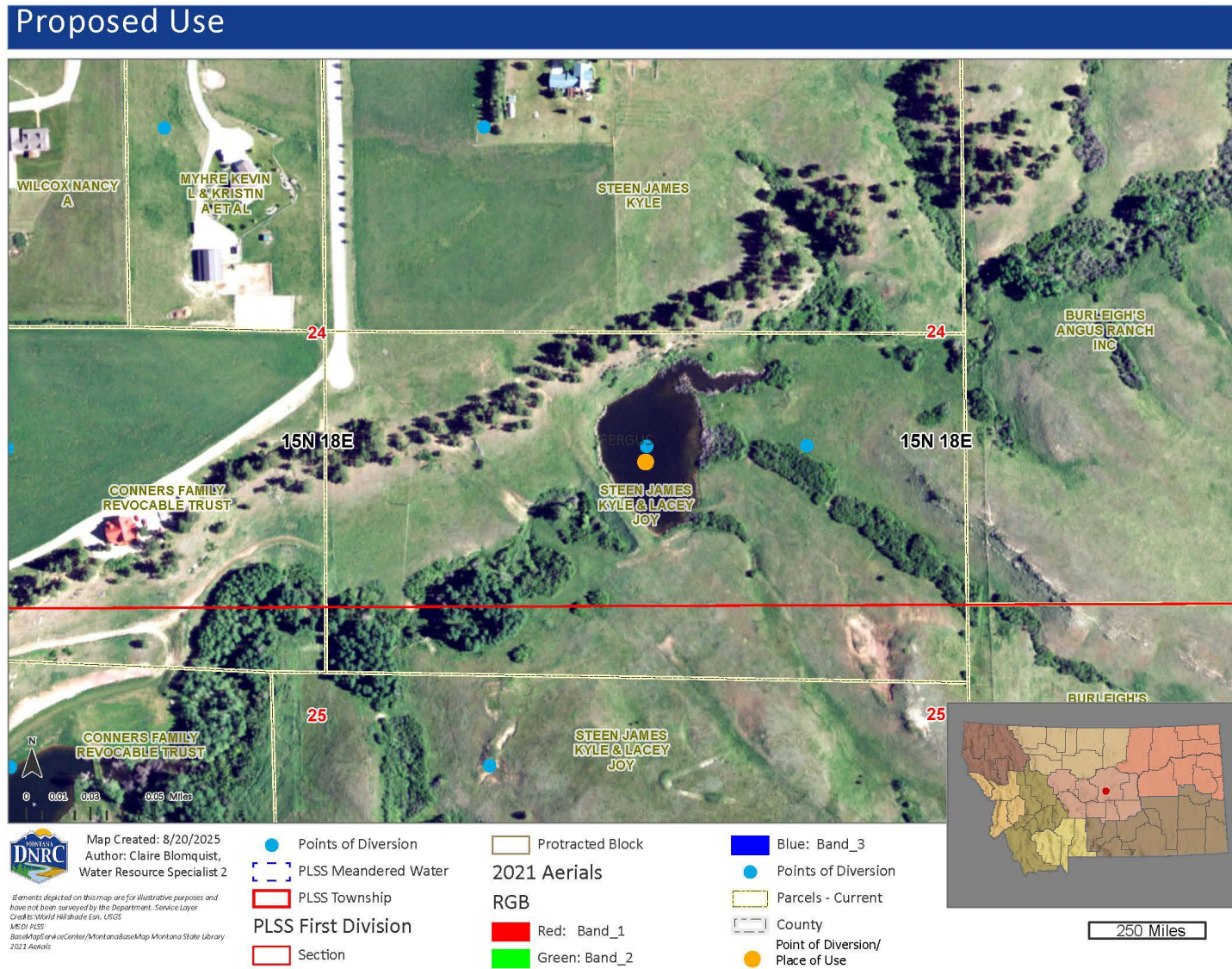
3. There is no previous change authorization on Stockwater Permit No. 41S 30043918.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicants propose to change the purpose of Stockwater Permit No. 41S 30043918. This water right is for stock use from a reservoir. An Unnamed Tributary of Big Spring Creek is the source of the water. The POD and POU will remain unchanged in the SESESW Sec. 24 of Twp 15N, Rge 18E. Following this change, the Applicants will appropriate up to 9.00 AF at a maximum flow rate of 151.52 GPM. The proposed period of use is January 1 to December 31. The Applicants propose to add fishery as a non-consumptive beneficial use. Table 1 shows the elements of the proposed change.

Figure 1: Map of the Applicants' proposed POD, the source, and proposed POU. Historical POD and historical POU are the same as proposed POD and proposed POU.



CHANGE CRITERIA

5. 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.

6. 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

7. The Department has determined that the Stockwater Permit No. 41S 30043918 proposed for change in this application has historically functioned as an onstream stock reservoir in the SESESW Sec. 24 of Twp 15N, Rge 18E, in Fergus County. The dimensions of the stockwater pond on the original Stockwater Permit Authorization are 1.25 AC of surface area and a maximum depth of 18.00 AF, resulting in a capacity of 9.00 AF with one reservoir fill each year. Water is dammed to create said reservoir along an Unnamed Tributary of Big Spring Creek. The only permitted beneficial use is stock.

8. The Stockwater Permit No. 41S 30043918 has a priority date of November 8, 2008, at 16:55, as summarized in Table 1. This water right is an exception to the permitting process and as a result, has not been included in any decree.

9. The historical POU is SESESW Sec. 24 of Twp 15N, Rge 18E. DNRC verified the historic POU using 2005 Aerial Photos in Converge, which hosts Department GIS Layers.

10. The Department used ARM 36.12.115 to quantify the HCV use of AU. On the basis of the written statement provided by the Applicants, dated August 25, 2025, from Monte Weeden (owner at the time of historical use), the historical number of AU was quantified at 20 cow-calf pairs. The written statement is available in the Department file for Change Application No. 41S 30171580. According to the DNRC water calculation guide, one cow-calf pair equals one AU. Based on the aforementioned statement by Monte Weeden, the Department finds the historical number of AU as 20 AU. Per ARM 36.12.115, Number of AU x 0.017 AF/YR /AU (for year-round use) = AF / Year. Therefore, the Department find 20 AU x 0.017 = 0.34 AF / Year of HCV by stock.

11. The Department used methodologies pursuant to ARM 36.12.1902(13)(d) and guidance outlined in *Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration* to calculate historical evaporative loss.

- a. The HCV resulting from evaporative loss from the reservoir is based on net evaporation and surface area. Methodology provides the following equation:

$$\text{Evaporation (AF)} = \text{Surface Area (AC)} \times \frac{\text{Net Evaporation (in)}}{12 \text{ (in)}}$$

Evaporative losses are calculated to be 2.19 AF (rounded from 2.1875 AF). Net Evaporation is informed by DNRC's Gridded Monthly Net Evaporation GIS, layer as provided by the Water Science Bureau. Surface area AC were provided by the

Applicants, as stated in the Stockwater Permit No. 41S 30043918 and corroborated by the Department using 2023 Aerial Photos.

$$2.1875 \text{ AF} = 1.25 \text{ (AC)} \times \frac{21 \text{ (in)}}{12 \text{ (in)}}$$

b. The Department finds the total HCV (including stock consumption and reservoir evaporation) for Stockwater Permit No. 41S 30043918 to be 2.53 AF, as shown in Table 2.

Table 2: Historical Consumptive Volume (HCV) and Historical Diverted Volume (HDV) for the Historical POU:

Water Right No.	Purpose	Historical AU	Historical POU	Historical POD	Flow Rate	HCV (Excluding Evaporative Loss)	HCV (Including Evaporative Loss)	Historical Evaporative Losses	HDV
41S 30043918	Stock	20 AU	SESESW Sec. 24 Twp 15N Rge 18E Fergus County	SESESW Sec. 24 Twp 15N Rge 18E Fergus County	Undefined	0.34 AF	2.53 AF	2.19AF	9.00 AF

12. There are no supplemental water rights historically associated with this water right.

13. The legal land description of the historical POD is SESESW Sec. 24 of Twp 15N, Rge 18E. The historical flow rate was undefined. A historical flow rate was undefined because it was not required to file Stockwater Permit No. 41S 30043918.

14. The historical period of use on Stockwater Permit No. 41S 30043918 is year-round, from January 1 to December 31 of each year. The period of diversion is the same as the period of use for Stockwater Permit No. 41S 30043918, from January 1 to December 31 of each year.

15. There are no historical conveyance losses considered for the historical use of Stockwater Permit No. 41S 30043918 because there is no conveyance structure associated with this water right.

16. Per Department standard practice, the HDV for a stockwater reservoir is the capacity of the reservoir multiplied by the number of fills. The reservoir capacity is 9.00 AF based on the 1.25 AC in surface area and 18.00 feet in depth, as calculated per ARM 36.12.1902(13) methodology. Per ARM 36.12.1902(13) Capacity (AF) = Surface Area (AC) x Maximum Depth (FT) x 0.4, therefore, 9.00 AF = 1.25 AC x 18.00 FT x 0.4. The Department file for Stockwater Permit No. 41S 30043918 shows the historical use of one reservoir fill per year, which the Applicants seek to persist, per the deficiency letter response received December 15, 2025. The Department finds

that the HDV is 9.00 AF. This is guided by the DNRC Technical Memorandum: *Pond and Wetland Evaporation/Evapotranspiration* (Dated June 7, 2023).

Table 3: Historically diverted volume of Stockwater Permit No. 41S 30043918

Water Right Number	Reservoir Surface Area	Reservoir Depth	Reservoir Fills Per Year	Historically Diverted Volume
41S 30043918	1.25 AC	18.00 FT	1 fill	9.00 AF

17. The Department finds the following historical use, as shown in Table 4 below.

Table 4. Summary of historical use findings for Water Right No. 41S 30043918

Water Right Number	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Volume	Place of Use	POD
41S 30043918	11/05/2008 16:55	9.00 AF	Undefined	Stock	2.53 AF	SESESW Sec. 24 of Twp 15N, Rge 18E	SESESW Sec. 24 of Twp 15N, Rge 18E

ADVERSE EFFECT

FINDINGS OF FACT

18. The Applicants are proposing to add a fishery as a non-consumptive beneficial use to Stockwater Permit No. 41S 30043918. A historical flow rate was undefined because it was not required to file Stockwater Permit No. 41S 30043918. Flow rate information was submitted as part of the Change Application 41QJ 30171580. Applicant-submitted measurements from the Unnamed Tributary of Big Spring Creek, received by the department November 24, 2025, show a maximum flow rate of 151.52 GPM during March of 2024. The flow rate information submitted by the Applicants was based on measurements taken using the bucket and stopwatch method over the period of one year from July 2023 through June 2024.

19. The historical consumptive use will be equal to the proposed consumptive use. By proposing to add a non-consumptive fishery as a beneficial use to Stockwater Permit No. 41S 30043918 there will be no increase in the consumptive volume. Because the Applicants' only proposed change to the stockwater pond is adding fish, there is no proposed change in consumptive use.

20. The Department finds that the proposed diverted volume for Stockwater Permit No. 41S 30043918 will be unchanged from the historically diverted volume of 9.00 AF / Year as stock numbers are proposed to remain at 20 AU for year-round use and the reservoir (unchanged from its 9.00 AF capacity) is proposed to continue to be filled once per year.

21. Means of diversion will remain unchanged as a dam along the stream, shown in the *Dam Dims* image attachment (Undated). In the same attachment, *Dam Dims*, an emergency spillway is labeled. A culvert, or outlet pipe, allows for control of the flow of water out of the reservoir as shown in *outlet pipe (8/13/2025)*, and *outlet pipe from above (8/13/2025)* attachments.

22. The Department finds that no adverse effect will occur to other water users as a result of this change application. The nature of the water right is not expected to change in a way that would consume additional water or impede downstream flow. The POD has remained unchanged.

23. There is no proposed change in the historical timing or pattern of diversion.

24. Return flows were not considered for analysis due to standards requiring return flow analysis for irrigation projects, which is not applicable.

25. According to Department records, two additional water rights are sourced from the same Unnamed Tributary of Big Spring Creek as Stockwater Permit No. 30043918. Statement of Claim No. 41S 30131319 is a livestock direct from source right with flow rate and volume unquantified. Because Statement of Claim No. 41S 30131319 is owned by the Applicants, it has not been considered for adverse effect. Provisional Permit No. 41S 30121942, owned by Connors Family Revocable Trust, is junior to Stockwater Permit No. 41S 30043918. Provisional Permit No. 41S 30121942 has irrigation and fishery purposes and includes an on-stream reservoir. Provisional Permit No. 41S 30121942's POD (dam/reservoir) is approximately a quarter-mile downstream of Stockwater Permit No. 41S 30043918's POD (dam/reservoir).

26. Addition of a fishery purpose is a non-consumptive beneficial use. As such, the proposed consumptive volume for Stockwater Permit No. 41S 30043918 will remain the historical 2.53 AF. A Stockwater Permit does not require a quantified flow rate. Operation of the reservoir is proposed to remain unchanged. Therefore, the quantification of the flow rate (maximum of 151.52 GPM) has no significant impact. Additionally, Stockwater Permit No. 41S 30043918's historical reservoir capacity (9.00 AF) and annual fills (1) are not proposed to be changed. Thus, the Department finds that no water rights will be adversely affected by this change.

BENEFICIAL USE

FINDINGS OF FACT

27. The Applicants are proposing to add fishery as a non-consumptive beneficial use to Stockwater Permit No. 41S 30043918. The Applicants seek to protect the historically diverted volume of 9.00 AF and historically consumed volume of 2.53 AF at a flow rate of 151.52 GPM. By supplying 20 AU and having a fishery, the Department concludes the purposes are for beneficial use as identified in § 85-2-102(5)(a), MCA as stock and fishery.

28. A letter provided by Montana FWP Lewistown Area Fisheries Biologist states that the reservoir appears capable of supporting a stocked fishery. According to the letter, the reservoir is an adequate depth and has a quality water source upstream. See Department file No. 41S 30171580.

29. To comply with beneficial use criteria in § 85-2-102(5)(a), MCA this authorization as granted will be subject to the following submission condition:

THE APPROPRIATOR MUST SUBMIT THE APPROPRIATE FISH POND LICENSE ISSUED BY THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS WITH THE PROJECT COMPLETION NOTICE.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The Applicants propose to divert water from an Unnamed Tributary of Big Spring Creek. The proposed method of diversion is a reservoir controlled by a dam and 3 FT outlet pipe, noted as a culvert by the Applicants and labeled in *Dam Dims* (undated imagery). The outlet pipe allows for 151.52 GPM flow rate at maximum, per Applicants' measurement, as provided in the Department file of Water Right No. 41S 30171580. The reservoir capacity is 9.00 AF from the Applicants' measured depth of 18.00 FT and 1.25 AC of surface area as calculated per ARM 36.12.1902(13) within Table 3. Measurement of the reservoir capacity is documented in the subject right, Stockwater Permit No. 41S 30043918, on page 3, with the same dimensions as stated and corroborated by the Department using aerial imagery. The reservoir is permitted for a maximum of one fill per year. A 33-FT emergency spillway is located on the south portion of the reservoir. The POD and POU are in the SESESW Sec. 24 of Twp 15N Rge 18E in Fergus County.

- a. Based on calculations in Historical Use and Adverse Effect section of this document, the means of diversion allows for the 9.00 AF of water to be diverted. Overflow is controlled by the 3-FT outlet pipe and 33-FT spillway in periods where runoff in the source exceeds the capacity of the reservoir, which the Department finds will enable the Applicants to prevent over appropriation

31. The Applicants are proposing to supply fish to the existing stockwater pond on the Unnamed Tributary of Big Spring Creek. The POD and POU are in the SESESW of Section 24 of TWP 15N, RGE 18E in Fergus County. A dam is in place to create a pond with a surface area of 1.25 AC, a maximum depth of 18.00 FT, and a maximum capacity of 9.00 AF. Historical use of the pond is permitted for a maximum of one fill of the reservoir per year, which will remain unchanged.

32. The Department finds the diversion works to be adequate to serve the proposed uses.

POSSESSORY INTEREST

FINDINGS OF FACT

33. The Applicants signed the affidavit on the application form affirming the Applicants have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See Department file No. 41S 30171580.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

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

35. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11, 103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.²

36. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.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

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

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. Section 85-2-234, MCA

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).⁴

37. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g.*, *Hohenlohe*, ¶¶ 44; *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *Popham v. Holloran*, 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);

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.)

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).⁵

38. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. *Royston*, 249 Mont. at 431, 816 P.2d at 1059-60; *Hohenlohe*, at ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

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

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

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

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

past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

40. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

41. Based upon the Applicants' evidence of historic use, the Applicants have proven by a preponderance of the evidence the historic use of Stockwater Permit No. 41S 30043918 to be a diverted volume of 9.00 AF, a historically consumed volume of 2.53 AF, and undefined flow rate (FOF Nos. 7—17)

42. Based upon the Applicants' comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicants have 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. 18—26)

BENEFICIAL USE

43. 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).

44. Applicants propose to use water for stock and fishery which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence stock and a fishery are beneficial uses and that 9.00 AF of diverted volume and 151.52 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. Section 85-2-402(2)(c), MCA (FOF Nos. 27—29).

ADEQUATE MEANS OF DIVERSION

45. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. *Crowley v. 6th Judicial District Court*, 108 Mont. 89, 88 P.2d 23 (1939); *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002) (information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

46. Pursuant to § 85-2-402 (2)(b), MCA, Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 30—32)

POSSESSORY INTEREST

47. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

48. The Applicants have proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 33).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 30171580 should be GRANTED subject to the following.

a. The Applicants are authorized to add a non-consumptive fishery as a beneficial use to an existing stockwater pond in the SESESW Sec. 24 of Twp 15N, Rge 18E, in Fergus County. The reservoir will continue to supply stock water for 20 animal units. Water will continue to be diverted from an Unnamed Tributary of Big Spring Creek that runs through the Applicants' property. There are no changes proposed for the reservoir dimensions, capacity or number of reservoir fills per year. The historical diverted volume and historical consumptive volume are not proposed for change in this application.

b. Subject to beneficial use condition, the Appropriators must submit the appropriate fish pond license issued by the Montana Fish, Wildlife and Parks with the project completion notice.

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 2 day of March, 2026.

Steven B. Hamilton, Manager
Lewistown Regional Office
Montana Department of Natural Resources and Conservation



Steven B. Hamilton, Manager
Lewistown Regional Office
Montana Department of Natural Resources and Conservation

COPY

DRAFT

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 2 day of March, 2026, by first class United States mail.

JAMES K STEEN & LACEY J STEEN
493 STENDAL ROAD
LEWISTOWN, MT 59457

LEWISTOWN Regional Office, (406) 538-7459

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Clara Brown

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