

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

* * * * *

APPLICATION TO CHANGE WATER RIGHT NO. 42M 30162772 by Ronald Whited	}	PRELIMINARY DETERMINATION TO GRANT CHANGE
--	---	--

* * * * *

On December 29, 2023, Ronald F. Whited (Applicant) submitted Application to Change a Water Right, Additional Stock Tank, No. 42M 30162772 to change Groundwater Certificate 42M 21473-00 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated February 2, 2024. The Applicant responded with information dated February 29, 2024. A memo to the file was also added on February 26, 2024, regarding a phone call with the Applicant discussing deficiency responses. The Application was determined to be correct and complete as of March 11, 2024. An Environmental Assessment for this Application was completed on March 27, 2024.

INFORMATION

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

Application as filed:

- Application to Change a Water Right, Additional Stock Tanks, Form 606-ST
- Attachments: Answers to criteria Questions
- Maps: 2021 aerial imagery showing the point of diversion, pipeline, existing stock tank and proposed stock tank location.
- Well Log Report for GWIC ID 34367

Information Received after Application Filed

- Deficiency response from Ronald White received from the Department on February 29, 2024.

Information within the Department's Possession/Knowledge

- Environmental Assessment dated March 27, 2024.
- Information contained in the active Groundwater Certificate 42M 21473-00

Revised 04-2021

- DNRC Memo to File – Prepared on February 26, 2024, by DNRC Water Resource Specialist Ashley Kemmis

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

NOTE: The following abbreviations will be used throughout this document

- Department or DNRC represents the Department of Natural Resources & Conservation
- AF represents acre-feet
- GPM represents gallons per minute
- AU represents animal units
- AF/YR represents acre-feet per year
- POD represents Point of Diversion
- POU represents Place of Use
- FOF represents Finding of Fact

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to add one stock tank to Groundwater Certificate No. 42M 21473-00. Groundwater Certificate 42M 21473-00 is for 12 GPM and 5.33 AF diverted volume from a well for domestic and stock use with a priority date of January 3, 1979. The period of use and period of diversion are January 1 through December 31. Per Department standards, the water right appropriates 1.5 AF for one household and 3.83 AF for up to 225 animal units (AU). The point of diversion, house, and one stock tank are located in the NENESE of Section 28, T20N, R60E, Richland County. The place of use is approximately 17 miles southeast of Sidney, MT.

Revised 04-2021

Table 1: Water Right Proposed for Change



W.R. NO.	FLOW	PERIOD OF USE	PURPOSE	VOLUME	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
42M 21473- 00	12 GPM	1/1- 12/31	Domestic	1.5 AF	NENESE	NENESE	1/3/1979
			Stock	3.83 AF	Sec.28	Sec.28	
			225 AU	Total 5.33 AF	T20N R60E	T20N R60E	

2. The Applicant is the sole owner of Groundwater Certificate 42M 21473-00. Groundwater Certificate 42M 21473-00 does not have supplemental rights and has not had previous change authorization.



Whited Change Application 42M 30162772



-  Section
-  Township & Range
-  Well and Historic Tank
-  Proposed Stock Tank

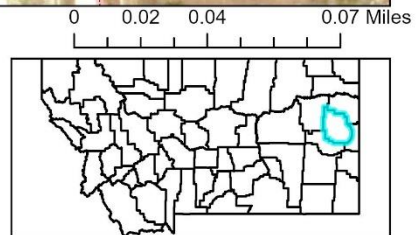


Figure 1) Historic and Proposed Stock Use

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change the place of use by adding one stock tank to Groundwater Certificate 42M 21473-00. A total of one house and two stock tanks will be supplied by the appropriation. The source well will continue to be the historic point of diversion in NENESE Sec. 28, T20N, R60E, Richland County. The Applicant proposes to continue operating the well at 12 GPM and 5.33 AF year-round.

4. Under the proposed change authorization, one additional stock tank will be added in the NWNWSW Sec. 27, T20N, 60E, Richland County. The Applicant's objective of adding a stock tank is to separate a small number of bulls (under 10) from the cows as needed. The total number of stock, 225 AU, will not increase.

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

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

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

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

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

(d) The applicant has a possessory interest, or the written consent of the person

Revised 04-2021

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*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

7. Per Arm 36.12.1902(1)(c), historic information for a certificate of water right must be described as it was used at the filing date of the completion notice (January 3, 1979). As of January 3, 1979, the well historically diverted 12 GPM, which has sufficiently supplied 5.33 AF to one household and 225 animal units on one stock tank. The period of use and period of diversion have historically been January 1 through December 31. The well, stock tank, and household are located in the NENESE Section 28, T20N, R60E. An underground, $1\frac{1}{4}$ inch pipe runs from the well to the stock tank and household. There are no supplemental water rights for historical use.

8. According to DNRC standards, the consumptive rate assigned to a household with an individual drainfield for wastewater disposal is 10% of diverted volume. Therefore, the historic consumptive volume of the household is 0.15 AF per year. ARM 36.12.115(2)(c) also sets stock consumptive use for 1 animal unit (AU) at 0.017 AF per year. The Department has determined that stock use is 100% consumptive; therefore, historic diverted volume also equals historic consumptive volume of 3.83 AF ($0.017 \text{ AF/AU} * 225 \text{ AU} = 3.83 \text{ AF}$). The Department finds the total historic consumptive volume for Groundwater Certificate 42M 21473-00 is 3.98 AF ($3.83 \text{ AF} + 0.15 \text{ AF} = 3.98 \text{ AF}$). The Department finds the total historic diverted volume for Groundwater

Revised 04-2021

Certificate 42M 21473-00 is 5.33 AF (3.83 AF + 1.5 AF = 5.33 AF). Table 2 summarizes the Department's findings of historical use for Groundwater Certificate 42M 21473-00:

Table 2: Historic Water Usage

WR Claim #	Priority Date	Flow Rate	Purpose	Diverted Volume	Consumed Volume	Place of Use	Point of Diversion
42M 21473-00	1/3/1979	12 GPM	Domestic	1.5 AF	0.15 AF	NENESE Sec.28	NENESE Sec.28
			Stock	3.83 AF	3.83 AF	T20N R60E	T20N R60E
				Total 5.33 AF	Total 3.98 AF		

FINDINGS OF FACT – Adverse Effect

9. Groundwater Certificate 42M 21473-00 was filed for domestic use of one household and one stock tank serving 225 AU from January 1, to December 31 using a flow rate of 12 GPM up to 5.33 AF. The Applicant proposes to add one additional stock tank for better herd management. Water will be conveyed to the additional stock tank through a pipeline so there will be no conveyance losses. The additional stock tank will be equipped with a float and underground shut off valve to control flow. No additional animal units will be grazed under the proposed change, nor will there be any change to domestic usage. Only the place of use will change due to the addition of the stock tank. The diverted volume of 5.33 AF is within the DNRC standards for these beneficial uses. Therefore, the proposed application will not exceed the historic consumptive volume of 3.98 AF and historic diverted volume of 5.33 AF.

Table 3: SUMMARY OF PROPOSED CHANGES

WR Claim #	Priority Date	Flow Rate	Purpose	Diverted Volume	Consumed Volume	Place of Use	Point of Diversion
42M 21473-00	1/3/1979	12 GPM	Domestic	1.5 AF	0.15 AF	NENESE Sec.28 T20N R60E	NENESE Sec.28 T20N R60E
			Stock	3.83 AF	3.83 AF	NENESE Sec.28 T20N R60E	
				Total 5.33 AF	Total 3.98 AF	NWNWSW Sec.27 T20N R60E	

Revised 04-2021

10. The applicant is the sole owner of this water right and the place of use.

11. In the event of a call being made, the Applicant's plan to prevent adverse effect is to turn off the system with an underground shut off valve and cease pumping to the additional tank. Based on this information, the Department finds there will be no adverse effect as a result of this change.

BENEFICIAL USE

FINDINGS OF FACT

12. The Applicant proposes to use water for domestic and live-stock purposes, which are recognized as beneficial uses under the Montana Water Use Act. §85-2-102 (5)(a), MCA.

13. By utilizing two stock tanks, the Applicant will be able to separate bulls from the rest of their herd and manage their cattle operation more effectively.

14. The Applicant will continue to divert from the historic well at 12 GPM for up to 5.33 AF year-round. This beneficial use is supported by DNRC standards and will not be exceeded by the proposed change.

ADEQUATE DIVERSION

FINDINGS OF FACT

15. The point of diversion consists of a well completed in 1979. The well, household, and original stock tank are located in NENESE of Section 28, T20N, R60E. The Applicant uses a 1-HP submersible pump that has historically pumped water to the house and original stock tank via an underground 1.25" pipeline. The historical stock tank has a float and underground shut off valve. The proposed frost-free stock tank includes a float valve and will be located 600 feet to the east in the NWNWSW Section 27, T20N, R60E. It will be connected via an underground, 1.5" PVC pipeline that is buried 6-feet deep and contains an underground shut off valve. 12 GPM adequately serves the pipeline system, which has operated efficiently using this flow rate. The Applicant has confirmed that the well and conveyance system are sufficient for the additional tank. The Department finds that the proposed means of diversion is adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

Revised 04-2021

16. The Applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

17. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer

Revised 04-2021

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

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

19. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is

¹ DNRC decisions are available at:

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

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

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Revised 04-2021

necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶144-45; 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

20. 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.

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.)

Revised 04-2021

The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

21. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

22. 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-

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

Revised 04-2021

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 past beneficial use.

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

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

24. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 42M 21473-00 of 5.33 AF diverted volume and 12 GPM flow rate with a consumptive use of 3.98 AF (FOF No. 8).

Revised 04-2021

25. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 9-11)

BENEFICIAL USE

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

27. Applicant proposes to use water for stock and domestic which are recognized beneficial uses. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that stock

Revised 04-2021

and domestic are beneficial uses and that 5.33 AF of diverted volume and 12 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule/other standard. §85-2-402(2)(c), MCA (FOF Nos. 12-14)

ADEQUATE MEANS OF DIVERSION

28. 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).

29. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 15)

POSSESSORY INTEREST

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

31. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 16)

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. 42M 21473-00 should be granted subject to the following.

The Department has determined that the Applicant may add one stock tank located in NWNWSW of Section 27, T20N, 60E, Richland County. The point of diversion and original place

Revised 04-2021

of use on Water Right No. 42M 21473-00 will remain in the NENESE of Section 28, T20N, R60E, Richland County. The period of use and period of diversion are January 1 to December 31. The flow rate will remain 12 GPM and the diversion volume will remain 5.33 AF per year: 1.5 AF for domestic use and 3.83 AF for stock use.

NOTICE

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

DATED this _____ day of _____ 20__.

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

Revised 04-2021

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this ____ day of _____ 20__, by first class United States mail.

RONALD WHITED
10745 COUNTY RD 355
SIDNEY, MT 59270

Glasgow Regional Office, (406) 228-2561