

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

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| APPLICATION TO CHANGE WATER RIGHT) NO. 41G 30154377 BY RAFANELLI) PARTNERS LLLP) | PRELIMINARY DETERMINATION TO GRANT CHANGE |
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On December 6, 2021, Rafanelli Partners LLLP (Applicant) submitted Application to Change Water Right No. 41G 30154377 to change Water Right Claim No. 41G 23623-00 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of May 11, 2022. An Environmental Assessment for this Application was completed on September 7, 2022.

INFORMATION

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

Application as Filed:

- Application to Change Water Right, Additional Stock Tanks (Form 606 Stock Tank)
- Attachments
- Maps: Two maps included with current aerial photo and locations for the following: dam, intake, stock direct from source, pipeline, stock tank, and property boundaries.

Information Received After Application Filed:

- Email between Shannon Baumgardner (DNRC) and Bina Peters (Attorney), re: confirmation of grazing rights on Bureau of Land Management Land, on September 7, 2022.
- Emails between Shannon Baumgardner (DNRC) and Bina Peters (Attorney), re: proposed place of use, on September 1, 2022.
- Emails between Shannon Baumgardner (DNRC) and Kyle Mace (Consultant), re: stock tank flow rate, on August 26, 2022.

Information within the Department's Possession/Knowledge

- Water Right file for Statement of Claim 41G 23623-00
- Non-Irrigation Change Application Technical Report, dated May 11, 2022

- Change Application Manual, updated 12/18/2020

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

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Water Right Claim No. 41G 23623 00, a livestock direct from source claim from Mill Creek with a priority date of May 1, 1868. The historic number of animal units is 456. The period of use is year-round. The point of diversion includes three livestock direct from source locations along Mill Creek and livestock direct from an on-stream reservoir. The points of diversion include: 1) livestock direct from source in N2 Section 5, Township 2 South, Range 4 West, Madison County, 2) livestock direct from source in N2NE Section 6, Township 2 South, Range 4 West, Madison County, 3) livestock direct from source in S2 Section 31, Township 1 South, Range 4 West, Madison County, and 4) dam in NWNENE Section 6, Township 2 South, Range 4 West, Madison County. The place of use includes: 1) N2 Section 5, Township 2 South, Range 4 West, Madison County, 2) N2NE Section 6, Township 2 South, Range 4 West, Madison County, and 3) S2 Section 31, Township 1 South, Range 4 West, Madison County. The place of use is approximately three miles southeast of the Town of Waterloo, Montana.

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

| W.R. NO. | FLOW | VOLUME | PURPOSE | PERIOD OF USE | PLACE OF USE | POINT(S) OF DIVERSION | PRIORITY DATE |
|---------------|--|--|---------|---------------|---------------------------------|---------------------------------|---------------|
| 41G 23623 -00 | Minimum amount historically necessary to sustain purpose | Amount consumptively used for stock watering at rate of 30 gallons per day (“GPD”) | Stock | 1/1 – 12/31 | N2 Sec 5, T2S, R4W, Madison Co. | N2 Sec 5, T2S, R4W, Madison Co. | 5/1/1868 |
| | | | | | N2NE Sec 6, T2S, R4W, | N2NE Sec 6, T2S, R4W, | |

| | | | | | | | |
|--|--|-----------------|--|--|----------------------------------|---------------------------------|--|
| | | per animal unit | | | Madison Co. | Madison Co. | |
| | | | | | S2 Sec 31, T1S, R4W, Madison Co. | S2 Sec 31 T1S, R4W, Madison Co. | |
| | | | | | | NWNENE Sec 6, T2S, R4W | |

2. Water Right No. 41G 23623-00 has a multiple use relationship with Water Right No. 41G 23621-00, which is a flood irrigation right from Mill Creek for 2.5 CFS and 471.7 acres.

3. The NENE of Section 6, Township 2 South, Range 4 West (which corresponds to POD and POU 2 and the dam), is property owned by the Bureau of Land Management (“BLM”). The reservoir and livestock direct from source place of use and point of diversion in the NENE of Section 6, Township 2 South, Range 4 West are on BLM land. Applicant has grazing rights for the property in the place of use that is owned by BLM.

4. The place of use overlaps with two livestock direct from source claims on Wyckham Creek, a tributary of Mill Creek, which are owned by the Applicant: 41G 211196-00 and 41G 23631-00. The place of use also overlaps with a livestock direct from source claim on Mill Creek, which is owned by BLM: 41G 30141650. Water Right No. 41G 30141650 is not likely to be a duplicate filing because it is only for six animal units compared to the 456 animal units watered with Water Right No. 41G 23623-00. The stock rights that share an overlapping place of use are either from Wyckham Creek or are owned by BLM.

5. Water Right No. 41G 23623-00 has no previous change authorizations.

CHANGE PROPOSAL

FINDINGS OF FACT

6. Change application 41G 30154377 proposes to change the point of diversion and place of use to add a stock tank to Water Right Claim No. 41G 23623-00 in the SESWSE Section 31,

Township 1 South, Range 4 West, Madison County. This stock tank will provide water to 456 animal units (450 cattle and 4 horses) from January 1 to December 31. The Applicant will install a small instream diversion, a gravity-fed pipeline, in Mill Creek at NENWNE Section 6, Township 2 South, and Range 4 West, Madison County. The diversion will allow water to flow over a wedge wire screen into a 1¼-inch poly pipe at a flow rate of 18 gallons per minute (“GPM”). The Applicant originally proposed 35 GPM, but the Department and Applicant found 18 GPM to be a more accurate estimate given the pipe diameter, pipe material, elevation drop, and pipe length (emails between DNRC and Applicant’s consultant on 8/26/2022). Gravity carries the water through the pipe for approximately 600 feet to a 12-foot tire stock tank. A shutoff valve on the diversion will ensure excess water is not diverted and instead stays instream. The shutoff valve should prevent excess water from being diverted, but if any overflow water makes it to the stock tank, it will be immediately returned directly to Mill Creek.

7. The proposed intake and the proposed stock tank are on property owned by the Applicant. The proposed use map included with the Application does not show livestock direct from source along Mill Creek on BLM land. The Applicant does not intend to change the place of use (emails between the DNRC and the Applicant’s attorney on 9/1/2022). Consequently, the proposed changes will not eliminate stock water use from occurring on BLM land moving forward (Figure 1).

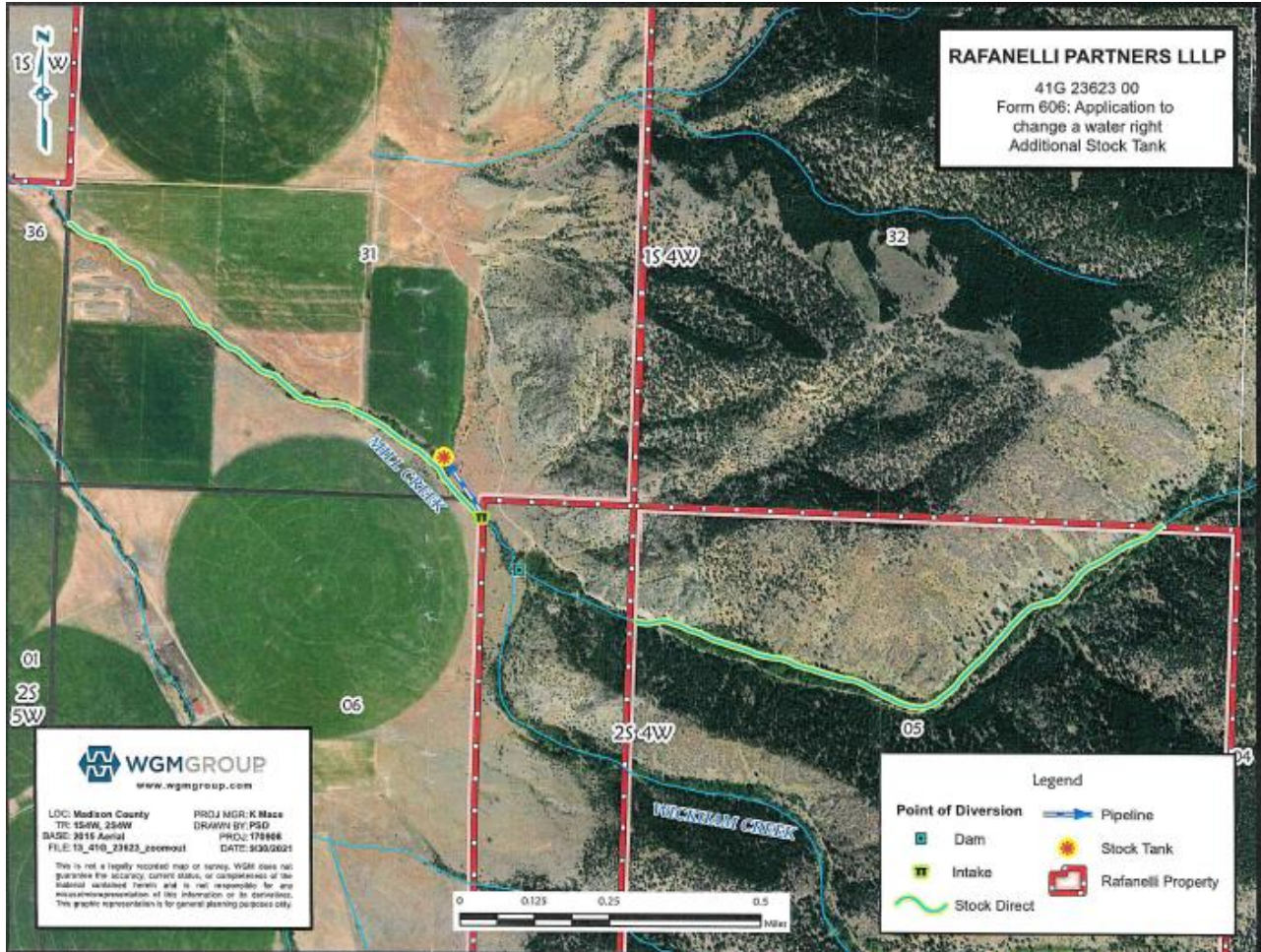


Figure 1. Proposed Use Map (Application, p. 5)

8. Proposed stock tank does not change the purpose, period of use, or pattern of use for 41G 23623-00. No change in the size of herd or animal units will occur. Livestock will still be able to access Mill Creek, but the addition of the proposed stock tank will help minimize damage to sensitive riparian areas on Mill Creek.

CHANGE CRITERIA

9. 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 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.

10. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g.*, Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

11. Whiterock Ranch Company, Inc., the original claimant, filed for a stock water Statement of Claim from Mill Creek, tributary of the Jefferson River, in SWNE Section 6, Township 2 South, Range 4 West, Madison County for 450 cattle and 4 horses. The priority date for this claim is May 1, 1868, and this claim has been decreed twice through the Water Court. The original

claim, received on May 19, 1981, was for a direct diversion of 6750 gallons per day (“GPD”), with a flow rate of 100 miner’s inches and volume of 1.2712 acre-feet (“AF”). An amended Statement of Claim for 41G 23623-00, received on March 10, 1988, was for 50 GPM and 15.5 AF per year. Water Right No. 41G 23623-00 does not have an assigned flow rate because the purpose is livestock drinking directly from the source. Rather, the flow rate is limited to the minimum amount historically necessary to sustain the purpose. The Department assigned a volume of 35 GPM per Department policy for changes to livestock direct from source claims (Change Manual, page. 43-44).

12. The volume assigned is the amount of water consumptively used for stock watering purposes at the rate of 30 GPD per animal unit. The Department calculated the volume at 13,680 GPD (15.33 AF) using the Department’s standard for stock use perfected prior to July 1, 1973, of 30 GPD per animal unit (30 GPD * 456 animal units * 365 days / 325,851 gallons per AF). The Department calculated historic consumptive use with this standard. The Department treats stock use as 100% consumptive.

13. Water Right No. 41G 23623-00 has a multiple use relationship with Water Right No. 41G 23621-00, which is a flood irrigation right from Mill Creek for 2.5 CFS and 471.7 acres. The use of this right for multiple purposes does not increase the extent of the water right. Rather it decrees the right to alternate and exchange the use (purpose) of the water in accord with historical practices.

14. The Department finds the following :

| WR Claim # | Priority Date | Diverted Volume | Flow Rate | Purpose | Consumptive Use | Place of Use | Point of Diversion |
|--------------|---------------|-----------------|-----------|--------------------------|-----------------|---|---|
| 41G 23623-00 | 5/1/1868 | 15.33 AF | 35 GPM | Stock (456 animal units) | 15.33 AF | N2 Sec 5 Twp 2S Rge 4W, N2NE Sec 6 Twp 2S Rge 4W, S2 Sec 31 Twp 1S Rge 4W, Madison County | N2 Sec 5 Twp 2S Rge 4W, N2NE Sec 6 Twp 2S Rge 4W, S2 Sec 31 Twp 1S Rge 4W, NWNENE Sec 6 Twp 2S Rge 4W, Madison County |

FINDINGS OF FACT – Adverse Effect

15. Applicant proposes to add a stock tank to SESWSE Section 31, Township 1 South, Range 4 West by installing a small instream diversion with a maximum flow rate of 18 GPM on Mill Creek in NENWNE Section 6, Township 2 South, Range 4 West. The purpose, source, period of diversion, and period of use all remain the same. (Application, “Narrative Describing the Project”, p.4).

16. The Applicant originally stated the flow rate diverted into the stock tank will be 35 GPM. The Applicant determined the diverted flow rate based on the pipe size and slope, assuming gravity flow. (Application, p.2). The Department calculated a flow rate closer to 18 GPM and the Applicant agreed with the updated estimate (emails between DNRC and Consultant on 8/26/2022). The updated estimated flow rate of 18 GPM was calculated given the following assumptions: 1.25-inch pipe diameter, plastic pipe material, roughness coefficient of 150, pipe length of 600 feet, and elevation drop of 40 feet. The Department applies a maximum allowable flow rate for this type of change to be 35 GPM. The stock tank diversion and livestock direct from source use will not exceed a flow rate of 35 GPM.

17. The proposed consumptive use is equal to the historic consumptive use. The number of animal units remains the same as the original Statement of Claim. (Application, p.1).

18. Stock use is 100% consumptive, leaving no return flows to analyze. No effect on return flows will cause adverse effect to other appropriators.

19. A shutoff valve on the diversion will ensure excess water is not diverted and instead stays instream. The shutoff valve should prevent excess water from being diverted, but if any overflow water does make it to the stock tank, it will be immediately returned directly to Mill Creek. There are no intervening water users on Mill Creek between where water is diverted into the pipe and where any overflow water that makes it to the stock tank is returned to Mill Creek. The addition of a stock tank will not affect other appropriators, senior or junior. (Application, “Narrative Describing the Project”, p.4).

20. Proposed changes to 41G 23623-00 will not impact the continued use of multiple use right 41G 23621-00. The consumptive and diverted volumes remain the same as historic values, so water will be available at the source for irrigation purposes that align with historic practices.

BENEFICIAL USE

FINDINGS OF FACT

21. Applicant proposes to use water for stock, which is a recognized beneficial use. (§ 85-2-102(5), MCA).

22. Applicant proposes to use the water for the purpose of filling a stock tank to provide water for 450 cattle and 4 horses, which converts to 456 animal units. The Applicant calculated a diverted flow rate of 35 GPM. The Department and Applicant calculated an updated estimate of the diverted flow rate to be 18 GPM. The diverted flow rate is for the stock tank only, livestock will still be able to drink direct from the source. The Department calculated a diverted and consumed volume of 15.33 AF for the proposed use in the May 11, 2022, Technical Report. The Department calculated the consumed and diverted volume using the standard of 30 GPD per animal unit multiplied by the historical number of animal units served.

ADEQUATE DIVERSION

FINDINGS OF FACT

23. The proposed diversion, a gravity fed pipeline, will allow water to flow over a wedge wire screen into a 1¼-inch poly pipe. Gravity carries the water through the pipe for approximately 600 feet to a 12-foot tire stock tank. The Applicant originally estimated the flow rate of the proposed diversion to be 35 GPM. Department calculated a flow rate closer to 18 GPM and the Applicant agreed with the updated estimate (emails between DNRC and Consultant on 8/26/2022). The updated estimated flow rate of 18 GPM was calculated given the following assumptions: 1.25-inch pipe diameter, plastic pipe material, roughness coefficient of 150, pipe length of 600 feet, and elevation drop of 40 feet. A shut off valve on the diversion will ensure excess water is not diverted and instead stays instream. The shutoff valve should prevent excess water from making it to stock tank, but in the case that any overflow water makes it to the stock tank, it will be immediately returned directly to Mill Creek.

24. The Applicant states 14 GPM is the minimum flow rate necessary to operate the system. Given the reliability of Mill Creek, the minimum flow is likely to be met. The Department finds that the system can provide the necessary quantity of water to the stock tank.

POSSESSORY INTEREST

FINDINGS OF FACT

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

26. The Applicant has a grazing permit for the land owned by Bureau of Land Management. Water Right No. 41G 23623-00 has been through the Decree process, with no objections based on possessory interest.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

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

28. 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

29. 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

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

proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶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

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.)

30. An Applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶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. 41l 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

31. 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).

32. 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

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).

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 past beneficial use.

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

33. 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.

34. 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).

35. 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).

36. 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. 41G 23623-00 of 15.33 acre-feet diverted volume and a flow rate of 35 gallons per minute with a consumptive use of 15.33 acre-feet. (FOF Nos. 11—14)

37. 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. 15—20)

BENEFICIAL USE

38. 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).

39. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 15.33 acre-feet of diverted volume and 18 gallons per minute flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF Nos. 21—22)

ADEQUATE MEANS OF DIVERSION

40. 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).

41. 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. 23—24)

POSSESSORY INTEREST

42. 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

43. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 25-26)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41G 30154377 should be GRANTED subject to the following.

The Applicant is authorized to change the point of diversion and the place of use to add a stock tank to livestock direct from source Statement of Claim 41G 23623-00.

| PLACE OF USE | POINT OF DIVERSION |
|--|--|
| N2 Sec 5, T2S, R4W, Madison Co. | N2 Sec 5, T2S, R4W, Madison Co. |
| N2NE Sec 6, T2S, R4W, Madison Co. | N2NE Sec 6, T2S, R4W, Madison Co. |
| S2 Sec 31 T1S, R4W, Madison Co. | S2 Sec 31, T1S, R4W, Madison Co. |
| SESWSE Sec 31, T1S, R4W, Madison Co. (stock tank) | NWNENE Sec 6, T2S, R4W, Madison Co. (on-stream reservoir) |
| | NENWNE Sec 6, T2S, R4W, Madison Co. (pipeline for stock tank diversion) |

The stock tank will be in SESWSE Section 31, Township 1 South, Range 4 West, Madison County. This stock tank will provide water to 456 animal units (450 cattle and 4 horses) from January 1 to December 31. The diversion for the stock tank will be a gravity-fed pipeline in Mill Creek at NENWNE Section 6, Township 2 South, and Range 4 West, Madison County, and will operate at a flow rate of 18 GPM. Water that is not stored in the stock tank will be returned immediately to the source. The livestock will still be authorized to drink water directly from the source in the historic places of use, year-round and a volume of 15.33 acre-feet per year.

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 7th day of September 2022.

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

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 7th day of September 2022, by first class United States mail.

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