

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

APPLICATION TO CHANGE WATER RIGHT NO. 41 QJ 30144845 BY CHEVALLIER RANCH CO.)))	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On October 23, 2019, Chevallier Ranch Co. (Applicant) submitted Application to Change Water Right No. 41 QJ 30144845 to change Statement of Claim No. 41 QJ 21053-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). This Application was sent to the Havre Regional Office for continued processing. 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 March 23, 2020. The Applicant responded with information dated April 17, 2020. The Application was determined to be correct and complete as of May 17, 2020. An Environmental Assessment for this Application was completed September 6, 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, Form 606-IR
- Copy of Department Hearings Order titled: In the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division
- Supporting maps depicting historical and proposed uses

Information Received after Application Filed

- Deficiency Letter response from Applicant to DNRC dated April 17, 2020

Information within the Department's Possession/Knowledge

- Department file for Statement of Claim No. 41 QJ 21053-00

- Water right records for surrounding area
- Department’s Technical Report

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. The Applicant Chevallier Ranch Co. proposes to change the place of use (POU) and point of diversion (POD) for Statement of Claim (SOC) 41 QJ 21053-00-00. The existing POU is 80 acres of irrigation located in Sections 11 and 14 of Twp 12N, Rge 5W.
2. Statement of Claim 41 QJ 21053-00-00 is a decreed water right. Lewis and Clark County, Case Number 3193 dated May 11, 1896.
3. This application is part of a broader project that includes changes to Statement of Claims 41 QJ 21052-00-00 and 41 QJ 21054-00, which are supplemental to 41 QJ 21053-00. A change to 41 QJ 21054-00 has already been authorized by the Department through Change Application number 41 QJ-30051168, which was issued on 02/20/2014.

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
41 QJ 21053-00	5.00 CFS	The amount put to historical and beneficial use; no decreed volume	80.0 Acres Irrigation	April 25 to October 1	W2SE, Sec.11 & N2N2 Sec. 14 Twp. 12N, Rge 5W Lewis and Clark County	SENESEW, Sec. 23, Twp. 12N, Rge 5W Lewis and Clark County	May 11, 1896

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant, Chevallier Ranch Co., proposes to change the place of use (POU) and point of diversion (POD) for Statement of Claim 41 QJ 21053-00 (SOC). The existing POD diverts water from Willow Creek into the Justisson Ditch via a headgate located in the SENESW of Section 23 of T12N, R5W. The proposed POD will divert water from Willow Creek via a pump located in the NESWNW of Sec.14 of Twp. 12N, Rge. 5W and convey water to the place of use via a pipeline.

5. The proposed POU is 125 acres of irrigation generally located in Sections 14 and 23 of T12N, R5W. The place of use is 125 acres more specifically described as follows:

13 Acres SENW Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

26 Acres SWNE Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

34 Acres NWSE Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

38 Acres SWSE Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

5 Acres SESE Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

6 Acres NESW Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

3 Acres NWNE Sec.23, Twp.12N, Twp. 5W, Lewis & Clark County

125 Acres Total

6. The historical POD of 41 QJ 21053-00 which is in the SENESW of Section 23 of T12N, R5W, is proposed to be retired.

The historical supplemental irrigation of the 80 acre place of use in the following locations is proposed to be retired:

40 Acres W2 Sec.11, Twp.12N, Twp. 5W, Lewis & Clark County

40 Acres N2 Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

80 Acres Total

7. Historically, this SOC and SOC 41 QJ 21054-00 had overlapping POUs and were supplemental to one another. Of the water applied to the overlapping POUs, 90% came from Willow Creek (41 QJ 21053-00) and 10% came from Canyon Creek. In 2014, DNRC authorized a change to the POU of 41QJ 21054-00 (Change Application No. 41 QJ-30051168). That change

authorization required the discontinuation of use of 41 QJ 21054-00 on the 80 acres identified in this application as the existing POU for 41 QJ 21053-00.

8. SOC 41 QJ 21054-00 will be used in combination with SOC 41 QJ 21053-00 proposed to be changed in this Application to irrigate 125 acres.

9. The Department's Hearings Order titled: In the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division is referenced as a part of this Application.

10. This change application is referenced because it includes findings of fact and conclusions of law regarding historical use and adverse effect by the Department relating to the proposed changes to 41 QJ 21053-00 and 41 QJ 21052-00 and are carried forward and incorporated in the findings of fact in this document. 41 QJ 21052-00 is included in Change Application 41 QJ 30144858, which is being processed concurrently by the Department.

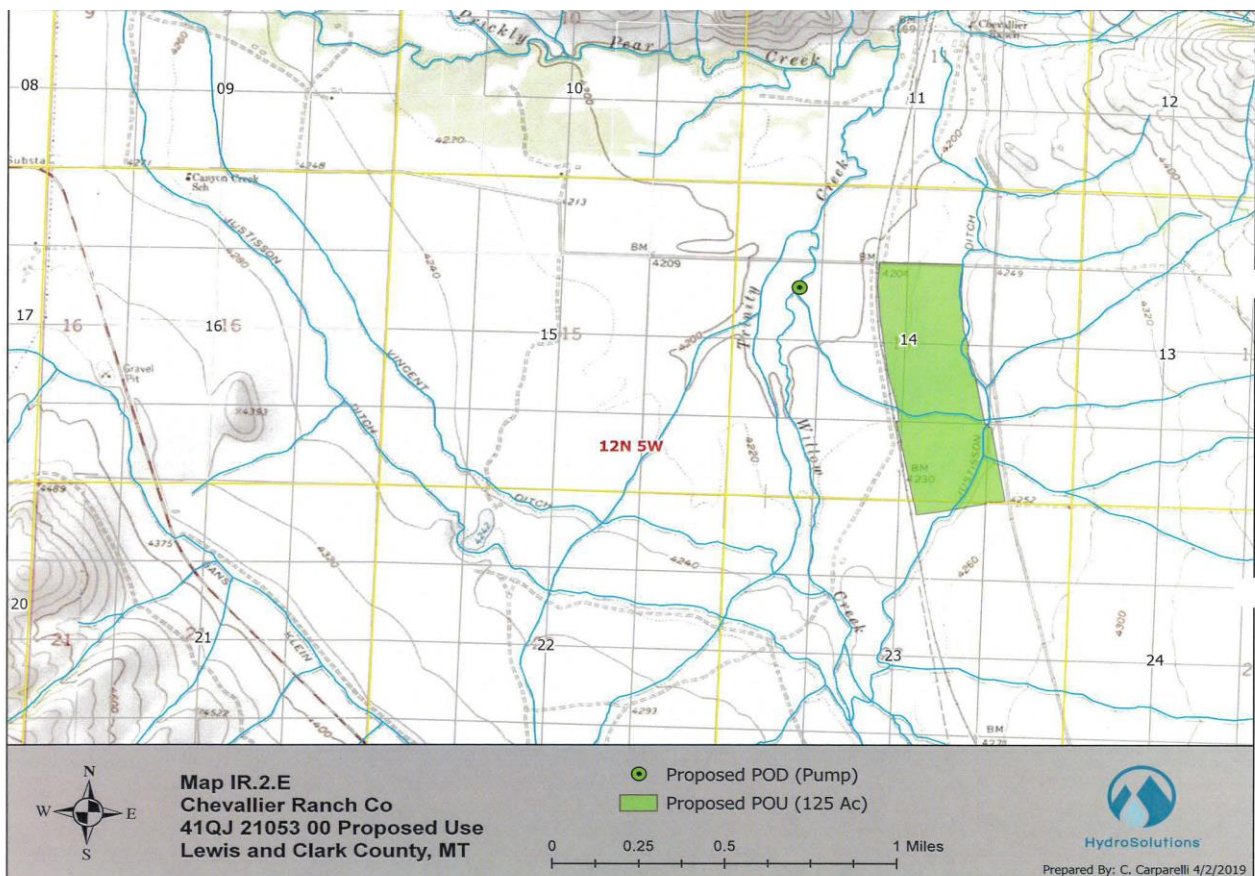


Figure 1: Proposed Change in POD and POU Locations

CHANGE CRITERIA

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

12. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department’s change process only addresses the water right holder’s ability to make

a different use of that existing right. E.g., Hohenlohe, 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*

Historical Decree:

13. SOC 41 QJ 21053-00-00 is a decreed water right. Lewis and Clark County Case Number 3193 dated May 11, 1896, decreed that this water right is entitled to the entire flow of Willow Creek. The Chevallier family homesteaded the place of use in 1871. As decreed in District Court Cases 242 and 6263, the ranch has been flood irrigated since “a date long prior to July 18, 1904”. The priority date for SOC 41 QJ 21054-00 was more recently decreed by the Montana Water Court in the Basin 41 QJ Temporary Preliminary Decree as May 11, 1896.

Supplemental Water Rights:

14. Historically, SOC 41 QJ 21053-00 along with SOC 41 QJ 21052-00 and SOC 41 QJ 21054-00 had overlapping POU's and were partially supplemental to one another. The Department previously found that of the water applied to the overlapping POU's, 90% came from Willow Creek (41 QJ 21053-00) and 10% came from Canyon Creek (41 QJ 21054-00; Change Authorization 41 QJ-30051168, issued in 2014). In 2014, DNRC authorized a change to the POU of 41 QJ 21054-00 (Change Authorization 41 QJ-30051168). That change authorization required the discontinuation of use of both for 41 QJ 21053-00 and 41 QJ 21054-00 on the 80 supplemental acres identified in this Application.

15. For conducting the historical use analysis presented in this application, the Department is assuming that 80 acres of 21053 are historically supplemental with 41 QJ 21054-00, because the Department is applying the historic use findings from Change Authorization 41QJ-30051168 in this Application.

Historical Flow Rate:

16. The flow rate decreed to SOC 41 QJ 21053-00 is 5.0 CFS. The historic POD for this claim is in the SENESW of Section 23, Twp.12N, Rge. 5W, where Willow Creek intersects the Justisson

Ditch. Water is diverted from Willow Creek directly into the Justisson Ditch and not through a headgate as stated on the Department’s abstract.

17. The 5.0 CFS is part of the total 15.7 CFS flow rate that may be historically diverted into the Justisson Ditch. The Applicant explains there has never been a measurement device used to measure the diverted flow into the ditch and that there has been sufficient flow to meet the irrigation needs. The historic headgate for this water right was measured by the Applicant’s consultant, HydroSolutions water resources engineer, Luke Osborne, P.E., during a site visit on March 11 , 2011. The capacity of the reach of the Justisson Ditch that conveys water from the POD to the POU was estimated to be 91 CFS using Manning's equation. The following Table 2. represents the calculations used by the Applicant’s consultant.

Avg Width (ft)	Avg Depth (ft)	Area (ft ²)	Avg Slope (ft/ft)	Roughness Coefficient, n	Wetted Perimeter (ft)	Hydraulic Radius, R (ft)	Velocity, V (ft/s)	Discharge, Q (cfs)
10	2.25	22.5	0.0027	0.025	15	1.5	4.1	91

Table 2.

18. The Department, through previous proceedings in In the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division, determined a flow rate for the Justisson Ditch of 63 CFS. This estimate is based on modeling using Manning’s equation which the Department has found to be credible. Further, the Applicant’s January 29, 2013, submission under of Change Application No. 41 QJ-30051168 included actual measurements of flow in the Justisson Ditch. Those measurements show that at normal bankful levels the ditch carries approximately 15 CFS at the head of the ditch diminishing to approximately 12 CFS at the pivot take-out point and further diminishing to approximately 4 to 6 CFS down gradient of the pivot take-out location. The Department previously found that that the primary length of the Justisson Ditch is sized appropriately to convey the flow rates of combined water rights that use the ditch.

19. At the intersection of Willow Creek and the Justisson Ditch, Willow Creek water diverted under SOC 41 QJ 21053 was combined with Canyon Creek water conveyed by the Justisson Ditch (SOC 41 QJ 21054) and from there, the Justisson Ditch conveyed water to the historical place of

use. The following Figure 2 depicts the historical point of diversion, conveyance system and place of use for SOC 41 QJ 21053-00.

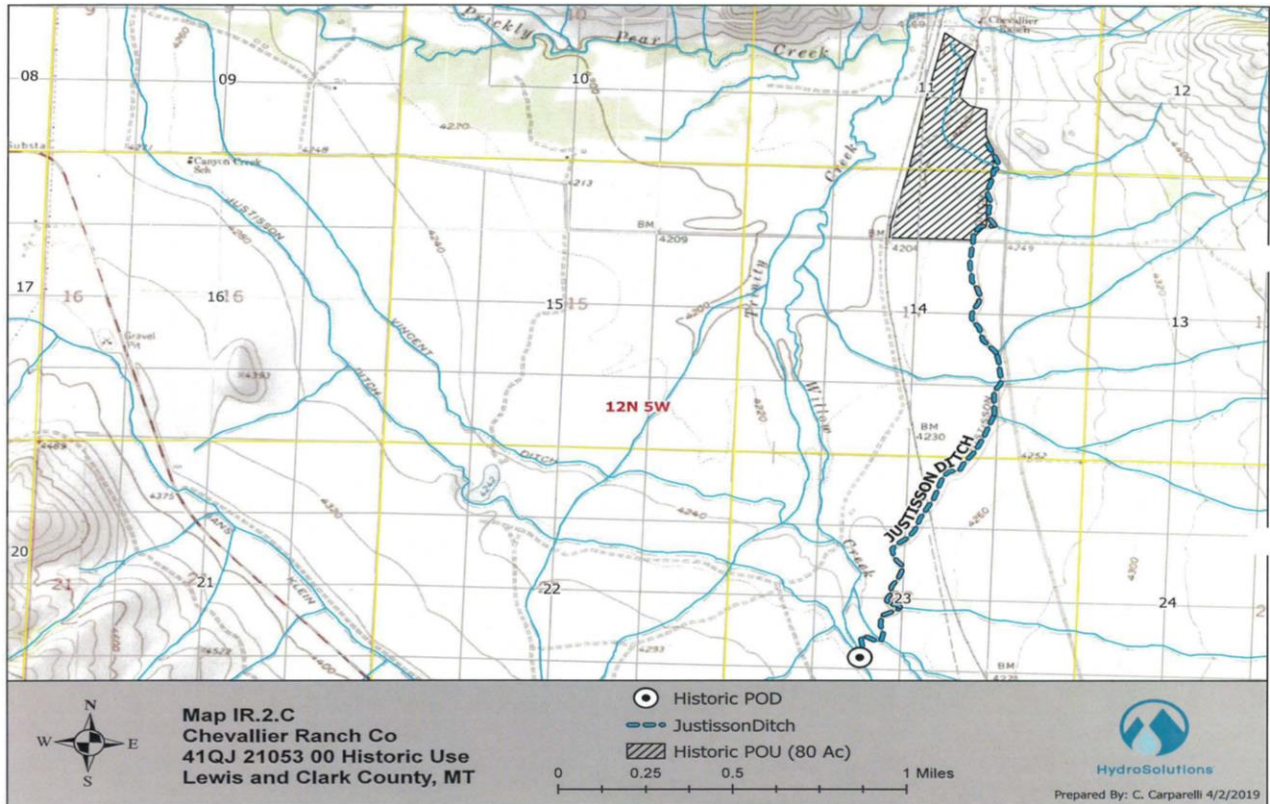


Figure 2: Historical POD and POU Locations

20. The Department no reason in this Application to disturb the previous findings it made regarding the historical flow rate of 5.0 CFS applied in the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division.

Period of Diversion/Use:

21. The period of diversion and period of use as listed on the Department’s abstract for SOC 41 QJ 21053-00 is from April 25 to October 01 of each year. The Department’s Hearings Examiner in the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division reviewed an Affidavit by Applicant Phillip Chevallier which states the irrigation system used in conjunction with the Justisson Ditch in totality was sufficient to meet the irrigation requirements throughout the historic

period of diversion. SOC 41 QJ 21053-00 historically used this ditch system to convey irrigation water diverted from Willow Creek to the designated place of use. The Department also previously found the claimed period of diversion and use to be reasonable since sufficient flows are available from the source and this period of use conforms to practices typical of the area.

Place of Use:

22. The 80 acre place of use described under SOC 41 QJ 21053-00 was a part of 925 irrigated acres served by the Justisson Ditch system, generally located in Sections 11, 14, 15, 16 and 23, all in T12N, R5W, Lewis and Clark County. Affidavit from Phillip Chevallier states that primarily alfalfa hay and wild hay was historically grown on the place of use, areas with alfalfa hay typically produce 2 to 3 tons per acre and wild hay areas produce 1.5 to 2 tons per acre.

23. An analysis conducted by the Department in 2014 of aerial photo AZM-7P-121 dated July 15, 1955, found water being applied to the 925 total acres evaluated at the time. The 925 acres included the supplemental water rights (SOC 41 QJ 21052-00 and (SOC 41 QJ 21053-00) The Department is carrying forward the findings made in 2014 as a part of this Application. The Department found as a part of the analysis conducted in 2014, that 80 acres of irrigation were served supplementally by SOC 41 QJ 21053-00.

Diverted and Consumed Volume:

24. The Department's Hearings Examiner in the Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. And State of Montana Board of Land Commissioners, Trust Land Management Division found the volume of water historically diverted for flood irrigation by 41 QJ 21053 was 258.8 AF, of which 55.6 AF was consumptive use and 203.3 AF was return flow to Willow Creek and Little Prickly Pear Creek (the sources return flows historically returned to).

25. The historic water balance calculations carried forward in this Application from Change Application No. 41 QJ-30051168 utilize the Department's historical consumptive use methodology (ARM 36.12.1902(16)), based on the Austin weather station and Lewis and Clark County management factor. This equates to a total consumptive rate of 0.77 AF per acre. The water

balance calculations included in the Applicants' January 29, 2013 submission also provide an accounting for monthly return flow volumes by accounting for water storage in the soil profile.

26. The Department finds the following historic use for SOC 41 QJ 21053-00.

W.R. NO.	FLOW	VOLUME	PURPOSE	PERIOD OF USE	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
41 QJ 21053-00	5.00 CFS	258.8 AF	80.0 Acres Irrigation	April 25 to October 1	W2SE, Sec.11 & N2 Sec. 14 Twp. 12N, Rge 5W Lewis and Clark County	SENESEW, Sec. 23, Twp. 12N, Rge 5W Lewis and Clark County	May 11, 1896

FINDINGS OF FACT – Adverse Effect

27. The Applicant’s initial approach in Matter of Change Application No. 41 QJ-30051168 By Chevallier Ranch Co. and State of Montana Board of Land Commissioners, Trust Land Management Division was to change water right SOC’s 41 QJ 21054-00, 41 QJ 21053-00, and 41 QJ 21052-00 simultaneously to offset additional consumptive use from the proposed center pivot. This pivot has since been authorized by the Department to change SOC 41 QJ 21054-00.

28. However, the Department directed the Applicants while processing Change Application No. 41 QJ-30051168 to submit separate applications for 41 QJ 21053-00 and 41 QJ 21052-00 (Change Application No. 41 QJ 30144858) which are now before the Department and being processed concurrently. The adverse effect evaluation under Change Application No. 41 QJ 30051168 and the subsequent action requires that water from the supplemental water rights 41 QJ 21052-00 and 41 QJ 21053-00 are not utilized in the historical place of use. The Department’s

Hearing Examiner at the time found that the Applicants' overall approach in Change Application No. 41 QJ 30051168 to be sound and that the only way to properly evaluate the individual needed changes is in the way that the Applicants had provided. Change Authorization No. 41 QJ 30051168 was granted by the Department and conditioned such that water from SOC Nos. 41 QJ 21054-00, 41 QJ 21053-00, and 41 QJ 21052-00 will not be used in the areas identified as being retired from irrigation.

29. The proposed water use calculations provided by the Applicant were analyzed by the Department in Change Application No. 41 QJ 30051168 which describe how this water is applied across the three supplemental water rights, consumed and flows returning to the source. The proposed water use is broken out for five separate areas within the entire historic irrigated area identified as Areas 1 - 5 in the map contained in the following Figure 3 identified as Historical and Proposed Changed Water Use Summary. SOC 41 QJ 21053 is to be retired from Area 2 and is proposed to be used in Area 4 as supplemental irrigation with SOC 41 QJ 21054. In summary, SOC 41 QJ 21054 will be used in combination with SOC 41 QJ 21052 to irrigate 48 acres in Area 3; in combination with Water Right Claim No. 41 QJ 21053 to sprinkler irrigate 125 acres in Area 4; by itself to irrigate 310 acres under a pivot; and by itself to flood irrigate 294 acres.

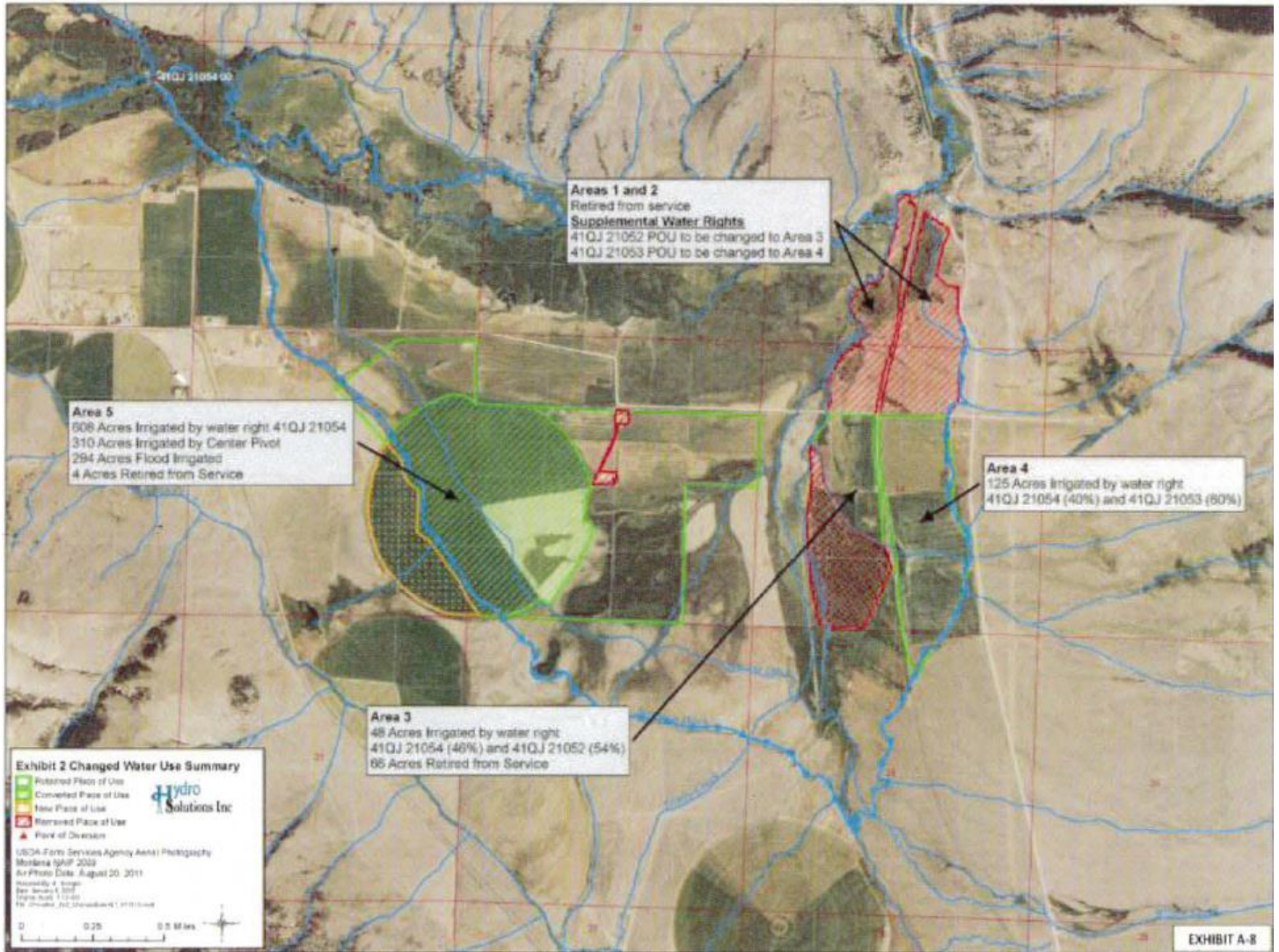


Figure 3. Historical and Proposed Changed Water Use Summary (Red shading indicates irrigated acres to be retired. Green shading indicates acres proposed to be irrigated)

30. The Department’s Hearing Examiner found that Willow Creek water diverted into the Justisson Ditch at the 41 QJ 21053-00-00 point of diversion mixed with Canyon Creek water and assisted in irrigating all acres downstream from this point of diversion.

31. Table 3 is a summary of the proposed water balance confirmed by the Department under Change Authorization 41 QJ 30051168.

Area-Water Right No.	Acres Irrigated	Volume Irrigated (ac-ft)	Consumptive Use (ac-ft)	Return Flow (ac-ft)
1-21054	0	0	0	0
2-21054	0	0	0	0
3-21054	48	40.2	17.0	23.2
3-21052	48	153.4	20.1	133.4
3-Total	48	193.6	37.0	156.6
4-21054	125	96.6	40.9	56.0
4-21053	125	258.8	55.6	203.3
4 Total	125	355.7	96.5	259.9
5Flood-21054	294	537.4	226.9	310.5
5Pivot	310	528.8	342.4	186.4

Table 3 (Note for clarity; Volume Irrigated means Diverted Volume).

32. The irrigated (which includes wheel line) acres in Area 4 would be irrigated at 79% of full service under SOC 41 QJ 21054-00 or 100% of full service when the supplemental SOC 41 QJ 21053-00 is included. As shown in the figure above, supplemental water right 41 QJ 21052-00 is moved to Area 3 and water right 41 QJ 21053-00-00 is moved to Area 4 to reflect the water right changes proposed for those rights.

33. The Applicant proposes to use up to 258.8 AF of diverted volume and up to 1,042 GPM (2.32 CFS) of flow rate in combination with SOC 41 QJ 21054-00. The Applicants proposed change converts 80.0 acres of supplemental flood adds 125.0 acres of sprinkler irrigation that is supplemental with 41 QJ 21054-00 as previously authorized by the Department.

34. The Department's Hearing Examiner found that the volume diverted remains the same and consumptive use remains the same thus return flows will not be affected. Nothing in this Application would disturb the Department's previous findings regarding the comparison of historical use to the proposed use or changes to return. The Department is carrying forward the return flow analysis carried out under Change Authorization 41 QJ 30051168, which applied to all changes in place of use on Statements of Claim 41 QJ 21052, 41 QJ 21053, and 41 QJ 21054 and found no changes to historic return flows.

35. The wheel lines irrigating the POU's for 41 QJ 21052 and 41 QJ 21053 are supplied by a single pump with a capacity of 1,042 gallons per minute (GPM). The capacity of the existing pump will ensure that diversions from Willow Creek do not exceed the combined historical diverted flow rate for 41 QJ 21052-00 and 41 QJ 21053-00-00, which is 1,042 GPM (2.32 CFS).

36. The proposed change is not expected to cause adverse impacts to any existing water rights because there will be no increase in flow rate or diverted volume above historic levels, or any impact to return flows. The proposed diverted volume is 258.8 AF, and the consumed volume is 55.6 AF for SOC 41 QJ 21053-00-00.

37. Department records obtained from the water rights query system indicates that there are only two water rights in Sections 11, 14, and 23 of T12N, R5W that are owned by anyone other than the Applicant. SOC 41 QJ 10364-00 is owned by Settle Ranch Co for livestock drinking directly from a spring known as Spring Creek which is tributary to Willow Creek. The priority date for this claim is February 7, 1963, and POD and POU are in the N2E2W2 of Section 23 of T12N, R5W, which is downstream from the existing POD for 41 QJ 21053, but upstream of the POD proposed in this application. This claim may benefit from the proposed change because the flow of Willow Creek will not be diverted into the Justisson Ditch and will instead be free to continue flowing through Settle Ranch Co's POD and POU before reaching the proposed POD.

38. 41QJ 30118920 (livestock direct from Willow Creek) is owned by the Applicant. Even though that is owned by the Applicant. The proposed change will not adversely affect this water right because it will not alter the timing or amount of historical return flows to Willow Creek.

39. 41QJ 30017496 which is a water reservation downstream in Little Prickly Pear Creek owned by the Montana Department of Fish, Wildlife, & Parks for instream fishery purposes. The priority date of this reservation is July 1, 1985. The proposed change will not adversely affect this reservation because it will not alter the timing or amount of historical return flows to Little Prickly Pear Creek.

40. This Department finds that the measurement of water use is necessary to ensure that no adverse effect will occur to other water users as a result of the change in use being proposed in this Application.

41. Therefore, the Applicant shall measure water use in accordance with the following condition:

WATER MEASUREMENT RECORDS REQUIRED AT DIVERSION

42. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASUREMENT DEVICE ON THE POINT OF DIVERSION. THE APPROPRIATOR SHALL NOT DIVERT MORE THAN THEY HAVE A RIGHT TO AND NOT EXCEED THE AVAILABILITY FROM WILLOW CREEK. THE APPROPRIATOR SHALL KEEP A WRITTEN WEEKLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME DIVERSION TAKES PLACE. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS AUTHORIZATION. THE RECORDS MUST BE SENT TO THE DNRC HELENA REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY. SUBMIT RECORDS TO: HELENA WATER RESOURCES REGIONAL OFFICE, 1424 9TH AVENUE, PO BOX 201601, HELENA, MT 59620-1601

BENEFICIAL USE

FINDINGS OF FACT

43. Applicant proposes to use water to supplementally irrigate 125.0 acres under a sprinkler and flood system previously authorized by the Department. Irrigation is identified as a beneficial use of water pursuant to §85-2-102(5)(a), MCA.

44. Applicant proposes to use up to 258.8 AF of diverted volume and up to 1,042 GPM (2.32 CFS) of flow rate. The Applicants proposed change converts 80.0 acres of supplemental flood adds 125.0 acres of sprinkler irrigation that is supplemental with 41 QJ 21054-00 previously authorized by the Department.

ADEQUATE DIVERSION

FINDINGS OF FACT

45. The wheel lines irrigating the POU's for 41 QJ 21052-00 and 41 QJ 21053-00-00 are supplied by a single pump with a capacity of 1,042 GPM (2.32 CFS). The pump house is equipped with a Cornell Pump model 5RB and a General Electric Motor model 5K 404JL252 with 100 horsepower. The pump is capable of 1,042 GPM at 240 feet of head. The pump is powered by a 4-cylinder John Deere diesel powered engine, Model # 4045TF150B (4.5 liter 75 kilowatts at 2500 RPM, Family No. 1JDXL06.8014). Conveyance from the pump to the wheel lines is through a 7-inch pipe.

46. The Applicant has provided documentation that the pump is adequate to support the flow rate. The pump, pipe, and sprinklers are all capable of delivering the requested volume at the requested flow rate. This change proposal is subject to a condition to measure water usage as prescribed in FOF 42 of the adverse effect section of this document.

POSSESSORY INTEREST

FINDINGS OF FACT

47. 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

48. 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

49. 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

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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

50. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum

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

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

51. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change

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.)

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-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

52. 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).

53. 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

54. 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

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).

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).

55. 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.

56. 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).

57. 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).

58. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

59. If an applicant seeks more than the historic consumptive use as calculated by Admin.R.M .36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case.

E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

60. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. Admin. R. M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under Admin. R.M. 36.12.1902. (FOF Nos. 24-26).

61. 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. 41 QJ 21053 of 258.8 AF of diverted volume and 5.0 CFS flow rate with a consumptive use of 55.6 AF. (FOF Nos. 13-26)

62. Based upon the Applicant’s comparative analysis of historic water use, and 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. 27-42)

BENEFICIAL USE

63. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is

limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 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).

64. Applicant proposes to use water for sprinkler irrigation which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 258.8 AF of diverted volume and 1,042 GPM (2.32 CFS). 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. 43-44)

ADEQUATE MEANS OF DIVERSION

65. 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).

66. 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. 45-46)

POSSESSORY INTEREST

67. 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

68. 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. 46)

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. 41 QJ 30144845 should be GRANTED subject to the following:

69. The Applicant is authorized to retire the point of diversion location at SENESW of Section 23 of T12N, R5W, Lewis and Clark County. The applicant's new point of diversion on Statement of Claim 41 QJ 21053-00 will be in Willow Creek. Water will be diverted via a pump located in the NESWNW of Sec.14 of Twp 12N, Rge 5W., Lewis and Clark County up to 258.8 AF of diverted volume and a maximum flow rate of 1,042 GPM (2.32 CFS) and conveyed through a pipeline to the POU. Irrigation will occur supplementally with SOC 41 QJ 21054-00. The proposed POU is 125 acres of sprinkler irrigation in Sections 14 and 23 of Twp. 12N, Rge.5W, Lewis and Clark County. The place of use is 125 acres more specifically described as follows:

13 Acres SENW Sec.14, Twp.12N, Twp. 5W Lewis & Clark County

26 Acres SWNE Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County

34 Acres NWSE Sec.14, Twp.12N, Twp. 5W Lewis & Clark County
38 Acres SWSE Sec.14, Twp.12N, Twp. 5W Lewis & Clark County
5 Acres SESE Sec.14, Twp.12N, Twp. 5W Lewis & Clark County
6 Acres NESW Sec.14, Twp.12N, Twp. 5W Lewis & Clark County
3 Acres NWN Sec.23, Twp.12N, Twp. 5W Lewis & Clark County
125 Total Acres

70. The historical POD of 41 QJ 21053-00 which is in the SENESW of Section 23 of T12N, R5W, that is to be retired.

The irrigation of the 80 acre place of use in the following locations that shall be retired:

40 Acres W2 Sec.11, Twp.12N, Twp. 5W Lewis & Clark County
40 Acres N2 Sec.14, Twp.12N, Twp. 5W, Lewis & Clark County
80 Acres Total

This Application is being granted subject to the following condition:

WATER MEASUREMENT RECORDS REQUIRED AT DIVERSION

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASUREMENT DEVICE ON THE POINT OF DIVERSION. THE APPROPRIATOR SHALL NOT DIVERT MORE THAN THEY HAVE A RIGHT TO AND NOT EXCEED THE AVAILABILITY FROM WILLOW CREEK. THE APPROPRIATOR SHALL KEEP A WRITTEN WEEKLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME DIVERSION TAKES PLACE. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS AUTHORIZATION. THE RECORDS MUST BE SENT TO THE DNRC HELENA REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY. SUBMIT RECORDS TO: HELENA WATER RESOURCES REGIONAL OFFICE, 1424 9TH AVENUE, PO BOX 201601, HELENA, MT 59620-1601

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 9th day of September 2022.

/S/ Matt Miles

Matt Miles, Manager

Havre 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 9th day of September 2022, by first class United States mail.

CHEVALLIER RANCH CO.

PO BOX 5719

HELENA MT 59604-5719

HYDROSOLUTION INC.

303 CLARKE ST.

HELENA MT 59601

VIA EMAIL: LukeO@hydrosi.com

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