

Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6615
DNRCOAH@mt.gov

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

IN THE MATTER OF CHANGE

APPLICATIONS NOS. 41J-30116553 BAR Z)
RANCH INC./HANSON, JOHN & TERRI)
41J-30116554 BAR Z RANCH INC.)
41J-30116556 THORSON RANCH LLC)
41J-30116557 THORSON RANCH LLC)
41J-30116558 THORSON RANCH LLC)
41J-30116559 THORSON RANCH LLC)

FINAL ORDER

Each of the above-captioned Change Applications (Applications) received valid objections from Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers (Conservation Objectors), Objector Montana Fish Wildlife and Parks (MFWP), and the Meagher County Newlan Creek Water District (District).¹ On September 16, 2020, Objector District and applicants Bar Z Ranch, Inc. (Applicant Bar Z) and Thorson Ranch LLC (Applicant Thorson) (collectively Applicants) filed a stipulation purporting to resolve all of the District's objections to the Applications so long as I include particular conditions on specific water rights as part of any final order granting the Applications. On July 11, 2022, Conservation Objectors and Applicant Thorson filed a stipulation purporting to resolve Conservation Objectors' objections to all four of Applicant Thorson's change applications. On August 5, 2022, Conservation Objectors and Applicant Bar Z filed a stipulation purporting to resolve Conservation Objectors' objections to both of Applicant Bar Z's change application. And on August 15, 2022, Objector MFWP withdrew its objections to each of the Applications.

1. Objector MFWP objected to Applications 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559. Objector District objected to each of the Applications except for Application 41J-30116559.

Consequently, this matter is ready for final disposition.

In short, I hereby GRANT each application subject to the conditions negotiated among Applicants and the respective objectors, as further explained below. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PDG) each application, all of which PDGs were issued by the Department of Natural Resources and Conservation (DNRC) on March 13, 2020. Those PDGs are incorporated herein by reference.

BACKGROUND

The Applications are part of a suite of permit and change applications filed in connection with the efforts of Tintina Montana, Inc. to develop the Black Butte Project (Project) in Meagher County. The Project is a proposed underground copper mine generally located about 15 miles north of White Sulphur Springs in the Sheep Creek drainage of Basin 41J (Smith River), in Sections 19, 29, 30, 31 and 32, T12N R7E, and Sections 24, 25 and 36 in T12N, R6E, Meagher County. Preliminary Determination to Grant (PDG) Application 41J-30116553 at 4. In Application 41J-30116553, Applicant Bar Z “seek[s] to change Statement of Claim No. 41J 198908 by adding two purposes of use, two places of use, a point of diversion and a place of storage.” *Id.* at 5. In Application 41J-30116554, Applicant Bar Z “seeks to change Statement of Claim No. 41J 198907 by adding a purpose of use and a place of use.” PDG Application 41J-30116554 at 5. In Application 41J-30116556, Applicant Thorson “seeks to change Statement of Claim No. 41J 29449 by adding two purposes and a place of use for each additional purpose.” PDG Application 41J-30116556 at 5. In Application 41J-30116557, Applicant Thorson “seeks to change Statement of Claim No. 41J 29452 by adding two purposes and a place of use for each additional purpose.” PDG Application 41J-30116557 at 5. In Application 41J-30116558, Applicant Thorson “seeks to change Statement of Claim No, 41J 29451 by adding two purposes and a place of use for each additional purpose.” PDG Application 41J-30116558 at 5. And in Application 41J-30116559, Applicant Thorson “seeks to change Statement of Claim No, 41J 29450 by adding two purposes and a place of use for each additional purpose.” PDG Application 41J-30116559 at 5.² The purposes sought to be added to each of the changed rights is marketing for mitigation and aquifer recharge, with the exception of change

2. Additional information about the specifics of each of the Applications is available in the respective PDGs.

application 41J-30116554, for which the purpose change sought is only for marketing for mitigation.

LEGAL STANDARD

Under Montana law, an applicant for a change in use authorization always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-402(2), MCA, are satisfied before DNRC may issue the applicant a change authorization. *In re Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991).³ Pursuant to § 85-2-307(2)(a)(ii), MCA, the PDGs reflect DNRC's preliminary determination that Applicants have proven those criteria by the requisite standards. The issuance of the PDGs proposing to grant the Applications, however, does not relieve Applicants of their obligation to prove that the applicable criteria are satisfied.

DISCUSSION

The various stipulations that have been filed by the parties to this case are generally built around an identification of modifications to the terms of the Applications in order to address the issues raised by Objectors' valid objections. Specifically, in the respective Notices of Filing of Stipulation filed September 16, 2020, Objector District and Applicant Bar Z and Objector District and Applicant Thorson recite that they have reached agreements regarding where the changed water rights in various of the applications will be administered for priority purposes. Notice of Filing of Stipulation (District/Bar Z) at 2; Notice of Filing of Stipulation (District/Thorson) at 2. In those notices, Objector District represents that its objections to the two change applications filed by Applicant Bar Z and its objections to Applications 41J-30116556 and 41J-30116558 filed by Applicant Thorson would be satisfactorily resolved by my inclusion of the following condition as part of a grant of each of those four applications:

WHEN USED FOR MARKETING FOR MITIGATION, ADMINISTRATION OF THE PRIORITY OF WATER RIGHT NO. [Original Water Right No.] IS AT THE LOWERMOST HISTORICAL POINT OF DIVERSION, ALSO KNOWN AS THE "POINT OF SALE," DESCRIBED AS [Legal Description of Lowermost POD on the original, tributary source] ON [the original tributary source].

3. A change applicant need only demonstrate that the criteria of § 85-2-402(2)(f)-(g), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-402(3), MCA. No such valid objections were filed in connection with the Change Applications.

As for Application 41J-30116557, their Notice of Filing of Stipulation (District/Thorson) recites that they have entered into a private agreement (District/Thorson Stipulation and Exhibit 1) regarding a mitigation plan to fully address Objector District's objections to that application. Notice of Filing of Stipulation (District/Thorson) at 2. Consequently, Objector District represents that its objections to this application would be satisfactorily resolved by my inclusion of both the above-referenced condition as well the following informational remark as part of a grant of that application:

“WHEN USED FOR MARKETING FOR MITIGATION, UTILIZATION OF WATER RIGHT NO. 41J 29452-00 IS SUBJECT TO A SEPARATE AGREEMENT BETWEEN THE OWNER AND MEAGHER COUNTY NEWLAN CREEK WATER DISTRICT.”

In their Stipulation and Agreement filed on July 11, 2022, Conservation Objectors and Applicant Thorson recite that they have come to an agreement regarding Applicant Thorson's exercise of the water rights to be changed pursuant to the Applications in a manner that satisfactorily resolves the Conservation Objectors' objections to the four Thorson applications. Stipulation and Agreement (Conservation Objectors/Thorson) at 3-4. The parties to that Stipulation and Agreement do not ask me to append any formal conditions to any of the change authorizations, so I construe their Stipulation and Agreement as a private party agreement.

In the Stipulation and Agreement between Conservation Objectors and Applicant Bar Z filed on August 5, 2022, the parties identify specific modifications to the PDG issued for application 41J-30116553 that they consider necessary and appropriate to resolve Conservation Objectors' objections to both of Applicant Bar Z's change applications. Specifically, those parties agree that the PDG for Application 41J-30116553 “should be amended to reduce the number of acre-feet of water available for marketing for mitigation purposes by 8.3 acre-feet from 41.8 acre-feet to 33.5 acre-feet to account for the wetland maintenance that is within the historical place of use for claim 41J 198908-00.” Stipulation and Agreement (Conservation Objectors/Bar Z) at 3. The parties also agree that the period of use of the changed water right for wetland mitigation use in Application 41J-30116553 should be from May 11 to June 11 of each year. *Id.* They recite that those changes are sufficient to resolve Conservation Objectors' objections to both the Bar Z change applications.

Pursuant to ARM 36.12.207(1), the terms of a settlement agreement or stipulation are not binding on DNRC. I may, however, include the terms of a stipulation of settlement agreement if I

conclude that any such conditions are “consistent with and necessary to satisfy the statutory criteria.” ARM 36.12.207(2). Because of the good faith dispute between the Objector District and Applicants over the question of adverse effect, and because the location of water measurement for priority enforcement purposes is directly related to Applicants’ efforts to prove that criterion, I find that the proposed settlement conditions for Applications 41J-30116553, 41J-30116554, 41J-30116556, 41J-30116557, and 41J-30116558 comport with the requirements of ARM 36.12.207(2). I also find it appropriate to include an informational remark on Application 41J-30116557 to the effect that Applicant Thorson’s exercise of that water right is subject to a private party agreement with Objector District. Pursuant to the terms of the Settlement Agreement, I therefore deem Objector District’s objections to each of the Applications WITHDRAWN. And I will direct DNRC to include the District/Thorson stipulation and Exhibit 1, which is attached to this Final Order as Attachment 1, in its file for Application 41J-30116557.

In a similar vein, I construe the modifications to Application 41J-30116553 agreed to by Applicant Bar Z and Conservation Objectors as being directly related to Applicant Bar Z’s ability to prove the lack of adverse effect criterion. Consequently, I hereby modify the PDG proposing to grant that application to align the terms of the grant of that application with the modifications agreed to by Applicant Bar Z and Conservation Objectors. And, pursuant to the terms of the Stipulation and Agreement entered into by those parties, I therefore deem Conservation Objectors objections to Applications 41J-30116553 and 41J-30116554 WITHDRAWN.

I also find it appropriate to include an informational remark on Applications 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 to the effect that Applicant Thorson’s exercise of those water right is subject to a private party agreement with Conservation Objectors. Consequently, I hereby add that condition to the grant of those Applications. And, pursuant to the terms of the Stipulation and Agreement entered into by Applicant Thorson and Conservation Objectors, which is attached to this Final Order as Attachment 2, I therefore deem Conservation Objectors objections to the four Thorson Applications WITHDRAWN. I will direct DNRC to include a copy of Attachment 2 in its file for Applications 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559.

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CONCLUSION

With the objections withdrawn and the substantive modifications to Application 41J-30116553 identified above made to the terms and conditions included in the PDG for Applications 41J-30116553, Applicant Bar Z has met its burden of proof to show by a preponderance of the evidence that it has satisfied all applicable criteria under § 85-2-402, MCA, necessary to warrant a grant of both Bar-Z Applications. Similarly, with the objections withdrawn and the conditions discussed above added to the terms and conditions included in the PDGs for Applications 41J-30116556, 41J-30116557, and 41J-30116558, and the above-referenced informational remark added to each of its four applications, Applicant Thorson has met its burden of proof to show by a preponderance of the evidence that it has satisfied all applicable criteria necessary to warrant a grant of all the Thorson Applications. Accordingly, I hereby GRANT each of the Applications as set forth in this Final Order.

FINAL ORDER

Change Application 41J-30116553 filed by Bar Z Ranch Inc. and John M. and Terri K. Hanson is GRANTED as proposed in DNRC's PDG of March 13, 2020, and as modified by the following:

- 1) The volume of water available for marketing for mitigation is 33.5 acre-feet;
- 2) The period of use of the changed water right for wetland mitigation use is from May 11 to June 11 of each year;
- 3) When used for marketing for mitigation, administration of the priority of Water Right No. 41J 198908-00 is at the lowermost historical point of diversion, also known as the "point of sale," described as SESENW Section 30, Township 12N Range 7E, Meagher County, on Little Sheep Creek.

Change Application 41J-30116554 filed by Bar Z Ranch Inc. is GRANTED as proposed in DNRC's PDG of March 13, 2020, with the addition of the following condition:

When used for marketing for mitigation, administration of the priority of Water Right No. 41J 18907 is at the lowermost historical point of diversion, also known as the "point of sale," described as SENENE Section 25,

Township 12N, Range 6E, Meagher County, on Coon Creek.

Change Application 41J-30116556 filed by Thorson Ranch LLC is GRANTED as proposed in DNRC's PDG of March 13, 2020, with the addition of the following condition and informational remark:

- 1) When used for marketing for mitigation, administration of the priority of Water Right No. 41J 29449-00 is at the lowermost historical point of diversion, also known as the "point of sale," described as SESESE Section 25, Township 12N Range 7E, Meagher County, on Jumping Creek;
- 2) This change authorization is subject to a private party agreement entered into by Applicant and Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers, and filed with DNRC on July 11, 2022. This private party agreement is attached as Attachment 2 to this Final Order. DNRC is directed to include a copy of Attachment 2 in Statement of Claim File No. 41J 29449-00.

Change Application 41J-30116557 filed by Thorson Ranch LLC is GRANTED as proposed in DNRC's PDG of March 13, 2020, with the addition of the following condition and informational remarks:

- 1) When used for marketing for mitigation, administration of the priority of Water Right No. 41J 29452-00 is at the lowermost historical point of diversion, also known as the "point of sale," described as NWSENE Section 26, Township 12N, Range 7E on Adams Creek;
- 2) When used for marketing for mitigation, utilization of Water Right No. 41J 29452-00 is subject to a separate agreement between the Owner and Meagher County Newlan Creek Water District, and filed with DNRC on September 16, 2020. This private party agreement is attached as Attachment 1 to this Final Order. DNRC is directed to include a copy of Attachment 1 in Statement of Claim File No. 41J 29452-00;
- 3) This change authorization is subject to a private party agreement entered into by Applicant and Objectors Montana Trout Unlimited, Trout

Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers, and filed with DNRC on July 11, 2022. This private party agreement is attached as Attachment 2 to this Final Order. DNRC is directed to include a copy of Attachment 2 in Statement of Claim File No. 41J 29449-00.

Change Application 41J-30116558 filed by Thorson Ranch LLC is GRANTED as proposed in DNRC’s PDG of March 13, 2020, with the addition of the following condition and informational remark:

- 1) When used for marketing for mitigation, administration of the priority of Water Right No. 41J 29451-00 is at the lowermost historical point of diversion, also known as the “point of sale,” described as SENWNE Section 27, Township 12N, Range 7E, Meagher County, on Wolsey Creek.
- 2) This change authorization is subject to a private party agreement entered into by Applicant and Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers, and filed with DNRC on July 11, 2022. This private party agreement is attached as Attachment 2 to this Final Order. DNRC is directed to include a copy of Attachment 2 in Statement of Claim File No. 41J 29451-00.

Change Application 41J-30116559 filed by Thorson Ranch LLC is GRANTED as proposed in DNRC’s PDG of March 13, 2020, with the addition of the following informational remark:

This change authorization is subject to a private party agreement entered into by Applicant and Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers, and filed with DNRC on July 11, 2022. This private party agreement is attached as Attachment 2 to this Final Order. DNRC is directed to include a copy of Attachment 2 in Statement of Claim File No. 41J 29450-00.

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NOTICE

This Final Order is the Department's final decision in this matter. A final order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 13th day of October 2022.

*/Original signed by Jay D. Weiner/
Jay D. Weiner, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-1510*

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 13th day of October 2022 by first class United States mail and/or by electronic mail (e-mail).

JOHN W TIETZ - ATTORNEY
BROWNING KALECZYC BERRY &
HOVEN PC
PO BOX 1697
HELENA, MT 59624-1697
john@bkbh.com
Bethany@bkbh.com

PATRICK BYORTH
MEG CASEY
TROUT UNLIMITED INC, MONTANA
WATER PROJECT
321 E MAIN ST STE 411
BOZEMAN, MT 59715-4797
patrick.byorth@tu.org
megan.casey@tu.org

KEVIN RECHKOFF - ATTORNEY
AGENCY LEGAL COUNSEL
MT DEPT OF FISH WILDLIFE &
PARKS
PO BOX 200701
HELENA, MT 59620-0701
Kevin.Rechkoff@mt.gov

JENNY HARBINE – ATTORNEY
BENJAMIN SCRIMSHAW-
ATTORNEY
EARTHJUSTICE
313 E MAIN ST
PO BOX 4743
BOZEMAN, MT 59715-4743
jharbine@earthjustice.org
bscrimshaw@earthjustice.org

JOHN E BLOOMQUIST –
ATTORNEY
BETSY R STORY - ATTORNEY
BLOOMQUIST LAW FIRM PC
3355 COLTON DR STE A
HELENA, MT 59602-0252
jbloomquist@helenalaw.com
blf@helenalaw.com

Cc:
ATTILA FOLNAGY
DNRC, WATER RESOURCES DIVISION
afolnagy@mt.gov

STEVEN HAMILTON, REGIONAL MANAGER
DNRC, LEWISTOWN REGIONAL OFFICE
Steven.Hamilton@mt.gov

*/Original signed by Jamie Price/
Jamie Price, OAH Hearings Assistant
(406) 444-6615; jsprice@mt.gov*

John E. Bloomquist
Betsy R. Story
BLOOMQUIST LAW FIRM, P.C.
3355 Colton Drive, Suite A
Helena, MT 59602
Telephone: (406) 502-1244
Email: blf@helenalaw.com

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SEP 16 2020

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
HEARINGS UNIT

Attorneys for Meagher County Newlan Creek Water District

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

**IN THE MATTER OF CHANGE
APPLICATION NO. 41J 30116557 BY
THORSON RANCH LLC**

**STIPULATION AND CONSENT
AGREEMENT**

This Stipulation and Consent Agreement is for the purpose of settling all issues raised by the outstanding objection of Meagher County Newlan Creek Water District (hereinafter referred to as the “District”) in the above-captioned matter and is entered into by and between Applicant Thorson Ranch, LLC (hereinafter referred to as “Applicant”), and the District, (collectively the “Parties”).

RECITALS

WHEREAS, on September 7, 2018, Applicant submitted Change Application No. 41J 30116557 to change Statement of Claim No. 41J 29452-00 for the purpose of offsetting depletions to surface water resulting from the Groundwater Application for Beneficial Water Use Permit No. 41J 30116562 by Tintina Montana, Inc, as part of a bundle of eight water right applications related to the Black Butte Copper Project in the Sheep Creek drainage.

WHEREAS, historically, 41J 29452-00 was diverted from Adams Creek for irrigation purposes and put to beneficial use upgradient of Sheep Creek. Change Application No. 41J 30116557 proposed to change 41J 29452-00 so that it can be used for the additional purposes of Marketing for Mitigation and Aquifer Recharge on a rotational basis with five other changed rights. When used for the additional purposes of Marketing for Mitigation, 41J 29452-00 would be left instream for the irrigation season in order to offset depletions in Sheep Creek, or, to be diverted from Sheep Creek in the SWNENW Section 30, T12N, R7E for storage and later release into Sheep Creek, Coon Creek, or Black Butte Creek to offset depletions in those sources as needed.

WHEREAS, on March 13, 2020, the Department of Natural Resources (“DNRC”) issued a Preliminary Determination to Grant Application to Change Water Right No. 41J 30116557.

WHEREAS, the District owns Water Right Nos. 41J 207443-00 and 41J 207444-00, which have a common Point of Diversion on Sheep Creek in the SWSESW of Section 26, T12N., R7E. The District's Point of Diversion is downstream of the confluence with Adams Creek.

WHEREAS, 41J 29452-00 historically had two points of diversion on Adams Creek. The uppermost diversion diverted Adams Creek water into a ditch flowing east, and the lowermost diversion diverted Adams Creek water into a ditch flowing west. The east-flowing ditch flood irrigated approximately 104 acres, while the west-flowing ditch flood irrigated 118 acres. All of the return flow from this flood irrigation returned to Sheep Creek, and historically, the return flow from the 104-acre eastern field returned to Sheep Creek upstream of the confluence of Adams Creek and Sheep Creek, and upstream of the District's Point of Diversion on Sheep Creek.

WHEREAS, the District timely filed an objection to Change Application No. 41J 30116557 on the basis that leaving 41J 29452-00 instream during the irrigation season could adversely affect the District, because the District would no longer see any Adams Creek water via return flows from the 104-acre eastern field during the irrigation season when the right is being used for Marketing for Mitigation purposes.

WHEREAS, the District has had discussions with counsel and representatives for Tintina Montana, Inc. regarding the District's concerns. Through those discussions, a Mitigation Plan was presented to the District, which would replicate return flows during the irrigation season for the eastern Adams Creek place of use (hereinafter, "Irrigation Season Mitigation Plan for Eastern Adams Creek Place of Use").

WHEREAS, the Parties desire to resolve the District's objections in the above-captioned matter without the need for a hearing before the DNRC.

AGREEMENT

THEREFORE, in consideration of the mutual covenants and conditions listed below, the parties hereby stipulate and agree as follows:

1. Applicant hereby agrees that when 41J 29452-00 is used for Marketing for Mitigation, as proposed under Change Application No. 41J 30116557, the Irrigation Season Mitigation Plan for Eastern Adams Creek Place of Use, as set forth under Exhibit 1, attached hereto and incorporated herein, shall govern use of the water. In order to determine when the mitigation Plan would govern water use under the change, the Applicant, or Applicant's designee, will contact the District no later than April 1 of any year when Water Right No. 41J 29452-00 will be used for the purposes of Marketing for Mitigation.
2. The Parties consent to DNRC issuance of a final administrative order granting Change Application No. 41J 30116557, provided that said change authorization and subsequent modified abstract for Statements of Claim No. 41J 29452-00 contains the following remark:

WHEN USED FOR MARKETING FOR MITIGATION, UTILIZATION OF WATER RIGHT NO. 41J 29452-00 IS SUBJECT TO A SEPARATE AGREEMENT BETWEEN THE OWNER AND MEAGHER COUNTY NEWLAN CREEK WATER DISTRICT.

3. The District and Applicant agree that so long as the above condition is made a part of the final change authorization granted to Applicant, the provisions of Mont. Code Ann. § 85-2-402 are satisfied and the District's objection in the above-captioned matter is deemed withdrawn. Further, the District and Applicant agree to jointly submit this Stipulation and Consent Agreement to DNRC under the terms of Mont. Code Ann. § 85-2-402(19), and request that it be approved according to its terms.
4. The District and Applicant agree the terms of this Stipulation and Consent Agreement is enforceable according to its terms. The District and Applicant agree should either party be required to enforce this agreement, the District and Applicant agree jurisdiction and venue are proper in the Fourteenth Judicial District, Meagher County, Montana. The District and Applicant further agree should either party be required to seek judicial relief to enforce the terms of their agreement the remedy of specific performance shall be available. The District and Applicant further agree, the prevailing party in any action to enforce this agreement shall be entitled to reasonable attorney's fees and costs.
5. The terms of this agreement shall be governed by Montana law.
6. This Stipulation and Consent Agreement is binding upon successors, assigns, representatives, and agents of the Parties hereto.
7. Each undersigned party represents that this Stipulation and Consent Agreement has been properly approved according to its internal bylaws and operating procedures.
8. Each undersigned party enters into and executes this Stipulation and Consent Agreement voluntarily and in good faith and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence. Further, each undersigned party has had the opportunity to confer with legal counsel prior to the execution of this Stipulation and Consent Agreement.
9. The parties agree this agreement may only be modified in writing, executed by each party or their successors or assigns.

APPLICANT THORSON RANCH, LLC

BY: Barbara Russell

ITS: Member

DATE: 8-24-20

3. The District and Applicant agree that so long as the above condition is made a part of the final change authorization granted to Applicant, the provisions of Mont. Code Ann. § 85-2-402 are satisfied and the District's objection in the above-captioned matter is deemed withdrawn. Further, the District and Applicant agree to jointly submit this Stipulation and Consent Agreement to DNRC under the terms of Mont. Code Ann. § 85-2-402(19), and request that it be approved according to its terms.
4. The District and Applicant agree the terms of this Stipulation and Consent Agreement is enforceable according to its terms. The District and Applicant agree should either party be required to enforce this agreement, the District and Applicant agree jurisdiction and venue are proper in the Fourteenth Judicial District, Meagher County, Montana. The District and Applicant further agree should either party be required to seek judicial relief to enforce the terms of their agreement the remedy of specific performance shall be available. The District and Applicant further agree, the prevailing party in any action to enforce this agreement shall be entitled to reasonable attorney's fees and costs.
5. The terms of this agreement shall be governed by Montana law.
6. This Stipulation and Consent Agreement is binding upon successors, assigns, representatives, and agents of the Parties hereto.
7. Each undersigned party represents that this Stipulation and Consent Agreement has been properly approved according to its internal bylaws and operating procedures.
8. Each undersigned party enters into and executes this Stipulation and Consent Agreement voluntarily and in good faith and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence. Further, each undersigned party has had the opportunity to confer with legal counsel prior to the execution of this Stipulation and Consent Agreement.
9. The parties agree this agreement may only be modified in writing, executed by each party or their successors or assigns.

APPLICANT THORSON RANCH, LLC

BY: _____

ITS: _____

DATE: _____

OBJECTOR MEAGHER COUNTY NEWLAN CREEK WATER DISTRICT

BY: *Steve Buckingham*

ITS: *President - N.C.W.D.*

DATE: 8-27-20



TECHNICAL MEMORANDUM

DATE: June 10, 2020

TO: John Tietz; BKBH, P.C.

FROM: Greg Bryce; Hydrometrics, Inc.

SUBJECT: DRAFT - Irrigation Season Return Flow – Statement of Claim No. 41J 29452

Change application 41J 30116557, submitted for Statement of Claim No. 41J 29452, addressed the potential adverse effect of irrigation season return flows resulting from the intermittent cessation of irrigation. The application included a proposed plan to divert water at the point of diversion (POD) for Upper Adams Creek Ditch (POD 1) and discharge to the ephemeral drainage immediately east of the place of use (POU) (Figure 1). However, throughout the application process there were changes made to the calculated historic diverted volume (HDV), POU and Historic Consumptive Use (HCU). The Preliminary Determination (PD) for Change Application 41J 30116557 summarized the revised HCU, HDV, and POU acreage for Statement of Claim No. 41J 29452, which supersedes the information provided in the application.

Historic Diverted Volume and Historic Consumptive Use

The HDV for change application 41J-30116557 was evaluated on a monthly basis by review of statistical flow data and historical irrigation practices (Hydrometrics, 2019a). The historic consumptive use (HCU) was determined in accordance to ARM 36.12.1920(16). The monthly HDV and HCU for Statement of Claim 41J 29452 is provided in Table 1.

Irrigation Season Return Flow

A large volume of return flow from Adams Creek diversions occur during the irrigation season, resulting from overland flow, as documented by Hydrometrics on July 3rd 2019 (Hydrometrics, 2019b). Overland flow from field application is partitioned based on topographic controls. The eastern POU for Statement of Claim No. 41J 29452 is 104 acres. This POU was compared to topography to determine a relationship between overland flow, slope, and aspect. Based on these relationships within the POU, overland flow reporting to Sheep Creek above the Holmstrom Ditch POD is associated with approximately 80 acres (36% of the total 222 acre POU) as shown on (Figure 1).

The POU shown on Figure 1 were developed by the DNRC in support of the PD. Due to different software and quality of historic aerial photography used to develop the POU's, their presentation on Figure 1 displays a slightly inaccurate representation of the POU

with respect to current aerial photography. To be consistent with the geometry of the DNRC POU determinations, these POU boundaries were not modified.

Mitigation Plan

The volume and flow rate of water required to mitigate irrigation season return flows varies monthly based on the HDV and HCU as shown in Table 1. The revised mitigation plan to simulate irrigation season return flow from the eastern Adams Creek POU to Sheep Creek upstream of the Holmstrom Ditch POD is proposed as follows:

- The volume of water diverted to the Upper Adams Creek Ditch via POD-1 is shown in Table 1; which is based on the following equation:
 - $Diverted\ Volume = (HDV * 0.36) - HCU + Conveyance\ Loss$
- Water will remain in the ditch and will not be applied to the field.
- Water will be allowed to discharge to the ephemeral drainage immediately east of the POU and ultimately discharge to Sheep Creek.

TABLE 1. IRRIGATION SEASON MITIGATION PLAN FOR EASTERN ADMAS CREEK PLACE OF USE

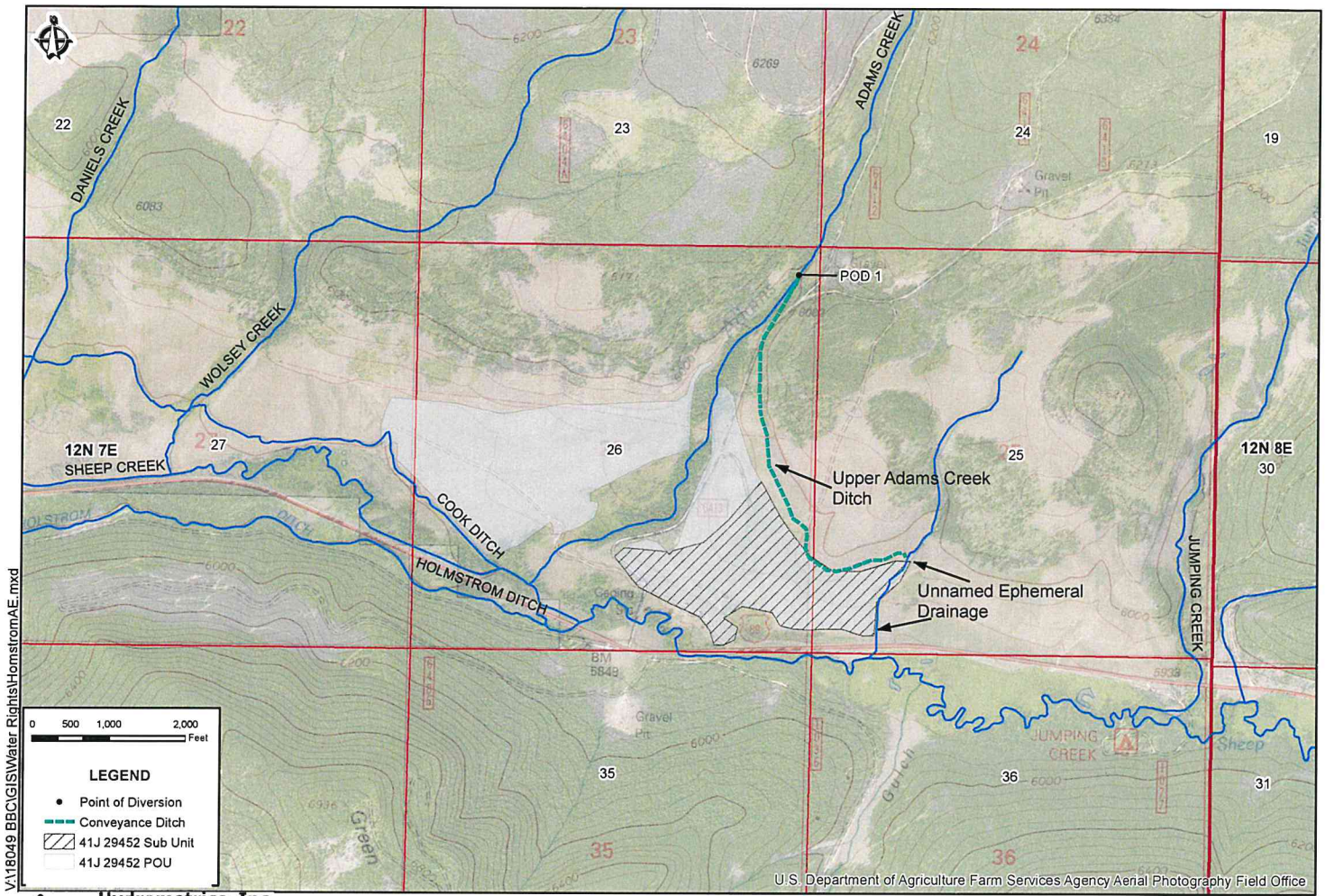
| Source | Month | May | June | July | Aug | Sept |
|---|------------|-------|-------|-------|-------|-------|
| | Days/unit | 31 | 30 | 31 | 17 | 30 |
| Average Available Flow at Point of Diversion ¹ | Flow (cfs) | 23.7 | 28.9 | 15.7 | 8.4 | 6.1 |
| Average Monthly Diverted Flow Rate and Historic Diverted Volume | Flow (cfs) | 7.5 | 7.5 | 7.5 | 6.3 | 4.6 |
| | Vol (AF) | 461.2 | 446.3 | 461.2 | 212.4 | 272.7 |
| Upper Adams Creek Ditch Conveyance Loss | Flow (cfs) | 0.9 | 0.9 | 0.9 | 0.9 | 0.9 |
| | Vol (AF) | 55.3 | 53.5 | 55.3 | 30.3 | 53.5 |
| 36% of Historic Diverted Volume | Flow (cfs) | 2.7 | 2.7 | 2.7 | 2.3 | 1.7 |
| | Vol (AF) | 166 | 160.7 | 166 | 76.5 | 98.2 |
| Monthly Historic Consumptive Use | Flow (cfs) | 0.1 | 0.9 | 1.2 | 2.0 | 0.1 |
| | Vol (AF) | 5.2 | 51.8 | 74.5 | 68.3 | 8.9 |
| Monthly Diversion for Irrigation Season Return Flow Mitigation | Flow (cfs) | 3.5 | 2.7 | 2.4 | 1.1 | 2.4 |
| | Vol (AF) | 216.2 | 162.4 | 146.9 | 38.5 | 142.8 |

1. Statistical data derived from USGS Streamstats and presented in Hydrometrics, 2019a.

References

Hydrometrics, 2019a. Evaluation of Historic Diverted Volume for Water Rights 41J 29449-00, 41J 29450-00, 41J 29451-00, 41J 29452-00, 41J 198907-00, and 41J 198908-00. Technical Memorandum to Doug Mann, DNRC, November 7, 2019.

Hydrometrics, 2019b. Thorson Ranch – Flood Irrigation Runoff, Technical Memorandum to Jerry Zieg, Sandfire Resources America, Inc., August 7, 2019. Included as Appendix B of *Updated Groundwater Flow Model: Thorson Ranch Return Flow Analysis* Technical Memorandum to Jerry Zieg and Doug Mann. December 31, 2019.



Hydrometrics, Inc.
 Consulting Scientists and Engineers

FIGURE 1
Holmstrom Ditch Mitigation Plan
TINTINA MONTANA, INC.
Meagher County, Montana

RECEIVED

JUL 11 2022

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
HEARINGS UNIT

W. John Tietz
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
800 North Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624
(406) 443-6820
(406) 443-6882 (fax)
john@bkbh.com

Attorneys for Change Applicants Tintina Montana, Inc. and Thorson Ranch, LLC

Jenny K. Harbine
Benjamin J. Scrimshaw
EARTHJUSTICE
313 E. Main Street
Bozeman, MT 59772-4743
(406) 586-9699
jharbine@earthjustice.org
bscrimshaw@earthjustice.org

Patrick Byorth
Meg Casey
TROUT UNLIMITED INC.
MONTANA WATER PROJECT
321 E. Main Street, Ste. 411
Bozeman, MT 59715-4797
(406) 599-8666
patrick.byorth@tu.org
megan.casey@tu.org

*Attorneys for Objectors Montana Trout Unlimited,
Trout Unlimited, Montana Environmental Information Center,
Earth Works, and American Rivers*

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

| | |
|--|--|
| IN THE MATTER OF CHANGE APPLICATION NOS.: 41J-30116556, 41J- 30116557, 41J-30116558, AND 41J-30116559 BY THORSON RANCH, LLC | STIPULATION AND AGREEMENT |
|--|--|

This Stipulation and Agreement is for the purpose of resolving objections to Thorson Ranch LLC's Change Applications 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 by Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earth Works, and American Rivers (the "Conservation Objectors"). This Stipulation and

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| STIPULATION AND AGREEMENT Thorson Ranch, LLC and Conservation Objectors Change Application Nos. 41J-30116556, 41J- 30116557, 41J-30116558, and 41J-30116559 | Page 1 of 6 | 2832166/5408.001 |
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ATTACHMENT 2

Agreement is entered into by Thorson Ranch, LLC (“Thorson Ranch”) and the Conservation Objectors

RECITALS

1. Thorson Ranch submitted Change Applications 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 to the Montana Department of Natural Resources and Conservation (“DNRC”) for the purpose of offsetting surface water depletions resulting from Groundwater Application for Beneficial Water User Permit No. 41J 30116562 by Tintina Montana for use at the Black Butte Copper Mining Project in Meagher County, Montana. The change applications seek to add two purposes (marketing for mitigation and aquifer recharge) and adding a place of use for each additional purpose. On March 13, 2020, the DNRC issued a Preliminary Determination to Grant Change for each of the change applications.

2. The Conservation Objectors filed objections to Change Application Nos. 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 asserting that (1) Thorson Ranch did not provide sufficient evidence of the historic irrigated acreage to warrant DNRC’s findings; (2) Thorson Ranch overestimated the historic diverted volume from Jumping Creek and Adams Creek, and (3) the disruption of return flows could adversely affect instream flow reservations from August through April.

3. DNRC determined the Conservation Objectors’ objections to be valid objections, and the matter was set on a hearing docket before DNRC Hearings Examiner Jay D. Weiner.

4. On September 16, 2020, Thorson Ranch entered into a stipulation with Objector Meagher County Newlan Creek Water District (hereinafter the “District”) to resolve the District’s objections to the Thorson Ranch change applications. Relevant to this Stipulation, the Thorson Ranch-District stipulation requires that at times when water right claim 41J 29452-00 is used for mitigation, water from Adams Creek will be diverted into the Upper Adams Ditch, conveyed through the ditch, and discharged into Sheep Creek above the Holmstrom Ditch diversion without any irrigation use. The monthly flows to be diverted into Adams Creek during mitigation use are described in the Thorson Ranch- District stipulation.

5. The Parties wish to settle the Conservation Objectors’ objections to Change Application Nos. 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 without resorting to a hearing before the DNRC.

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| STIPULATION AND AGREEMENT Thorson Ranch, LLC and Conservation Objectors Change Application Nos. 41J-30116556, 41J- 30116557, 41J-30116558, and 41J-30116559 | Page 2 of 6 | 2832166/5408.001 |
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AGREEMENT

In consideration of the mutual covenants and conditions listed below, the parties agree and stipulate as follows:

1. The 30-acre overlapping place of use for claims 41J 29452-00 and 41J 29449-00, as shown on Exhibit A attached herewith, will not be irrigated when either claim 41J 29452-00 or 41J 29449-00 are retired for mitigation in any given year. In years that claim 41J 29452-00 is used for mitigation, water from Adams Creek will be diverted into the Upper Adams Ditch, conveyed through the ditch, and discharged into Sheep Creek above the Holmstrom Ditch diversion without any irrigation use. The monthly flows to be diverted into Adams Creek during mitigation use are described in the Thorson Ranch- District stipulation.

2. Thorson Ranch will limit diversions from Jumping Creek for the purpose of irrigation pursuant to claim 41J 29449-00 to 75% of the available flow, not to exceed 5.62 CFS, and will install and maintain flow measurement gages in Jumping Creek above the diversion and in-ditch below the diversion to monitor the diverted flow. At each site, Tintina shall record and make available monthly measurements throughout the irrigation season in years the water rights are used for irrigation. The requirements of this provision shall terminate once mitigation water is no longer required after closure of the Black Butte Copper Mining Project.

3. Thorson Ranch will limit diversions from Adams Creek for the purpose of irrigation pursuant to claim 41J 29452-00 to 75% of the available flow, not to exceed 5.62 CFS, and will install and maintain flow measurement gages in Adams Creek above the diversion and in-ditch below the diversion to monitor the diverted flow. At each site, Tintina shall record and make available monthly measurements throughout the irrigation season in years the water rights are used for irrigation. The requirements of this provision shall terminate once mitigation water is no longer required after closure of the Black Butte Copper Mining Project.

4. Thorson Ranch will limit diversions from Wolsey Creek for the purpose of irrigation pursuant to claim 41J 29451-00-00 to 75% of the available flow, not to exceed 7.5 CFS, and will install and maintain flow measurement gages in Wolsey Creek above the diversion and in-ditch below the diversion to monitor the diverted flow. At each site, Tintina shall record and make available monthly measurements throughout the irrigation season in years the water

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| STIPULATION AND AGREEMENT Thorson Ranch, LLC and Conservation Objectors Change Application Nos. 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559 | Page 3 of 6 | 2832166/5408.001 |
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rights are used for irrigation. The requirements of this provision shall terminate once mitigation water is no longer required after closure of the Black Butte Copper Mining Project.

5. Each year prior to use of water for irrigation or mitigation, Tintina will designate the water rights that will be used for mitigation for that water year, and the total volume of water so designated shall be at least 110% the anticipated water needs for the mitigation plan.

6. This Stipulation and Agreement is the compromise of disputed water use applications and is not to be construed as an admission against the interest of either party.

7. The terms of this Stipulation and Agreement are binding on the parties, their successors, and assigns.


8. Either party may seek enforcement of the terms of this Stipulation and Agreement in a court of competent jurisdiction or, if appropriate, before the DNRC.

9. Each party agrees to bear its own costs and attorney fees arising from the negotiation and execution of this Stipulation and Agreement in proceedings before the DNRC concerning the Conservation Objectors' objections to Change Application Nos. 41J-30116556, 41J-30116557, 41J-30116558, and 41J-30116559.

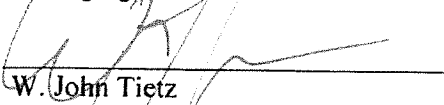
11. Each undersigned party has entered into and executed this Stipulation and Agreement voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.

12. This stipulation and Agreement may be executed by the parties in counterparts, each of which when executed and filed with the DNRC shall be an original, but all of which together shall constitute one instrument.

THORSON RANCH, LLC.


Barbara Russel
Managing Member

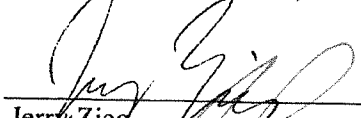
6-27-22
Date


W. John Tietz
Attorney for Thorson Ranch, LLC

6/30/2022
Date


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| STIPULATION AND AGREEMENT Thorson Ranch, LLC and Conservation Objectors Change Application Nos. 41J-30116556, 41J- 30116557, 41J-30116558, and 41J-30116559 | Page 4 of 6 | 2832166/5408.001 |
|--|-------------|------------------|

TINTINA MONTANA, INC.



Jerry Zieg
Senior Vice President

6/27/2022
Date



W. John Tietz
Attorney for Tintina Montana, Inc.

6/30/2022
Date

MONTANA TROUT UNLIMITED

David Brooks

Date

TROUT UNLIMITED

Colin Cooney

Date

MONTANA ENVIRONMENTAL INFORMATION CENTER

Derf Johnson

Date

EARTH WORKS

Bonnie Gestring

Date

AMERICAN RIVERS

Scott Bosse

Date

TINTINA MONTANA, INC.

Jerry Zieg
Senior Vice President

Date

W. John Tietz
Attorney for Tintina Montana, Inc.

Date

MONTANA TROUT UNLIMITED



David Brooks

2022-06-28

Date

TROUT UNLIMITED

Colin Cooney

Date

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Derf Johnson

Date

EARTH WORKS

Bonnie Gestring

Date

AMERICAN RIVERS

Scott Bosse

Date

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Jerry Zieg
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Date

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Attorney for Tintina Montana, Inc.

Date

MONTANA TROUT UNLIMITED

David Brooks

Date

TROUT UNLIMITED



Colin Cooney

6/28/2022

Date

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Date

TROUT UNLIMITED

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Derf Johnson

Date

6/29/22

EARTH WORKS

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AMERICAN RIVERS

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Date

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Date

TROUT UNLIMITED

Colin Cooney

Date

MONTANA ENVIRONMENTAL INFORMATION CENTER

Derf Johnson

Date

EARTH WORKS

Bonnie Gestring

Bonnie Gestring

June 28, 2022

Date

AMERICAN RIVERS

Scott Bosse

Date

| | | |
|--|-------------|------------------|
| STIPULATION AND AGREEMENT Thorson Ranch, LLC and Conservation Objectors Change Application Nos. 41J-30116556, 41J- 30116557, 41J-30116558, and 41J-30116559 | Page 5 of 6 | 2832166/5408.001 |
|--|-------------|------------------|

TINTINA MONTANA, INC.

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Senior Vice President

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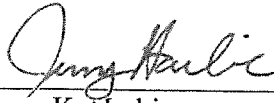
Date

AMERICAN RIVERS

Thomas Kiernan

Tom Kiernan

6/29/22
Date



Jenny K. Harbine
Attorney for Conservation Objectors

6/30/2022

Date

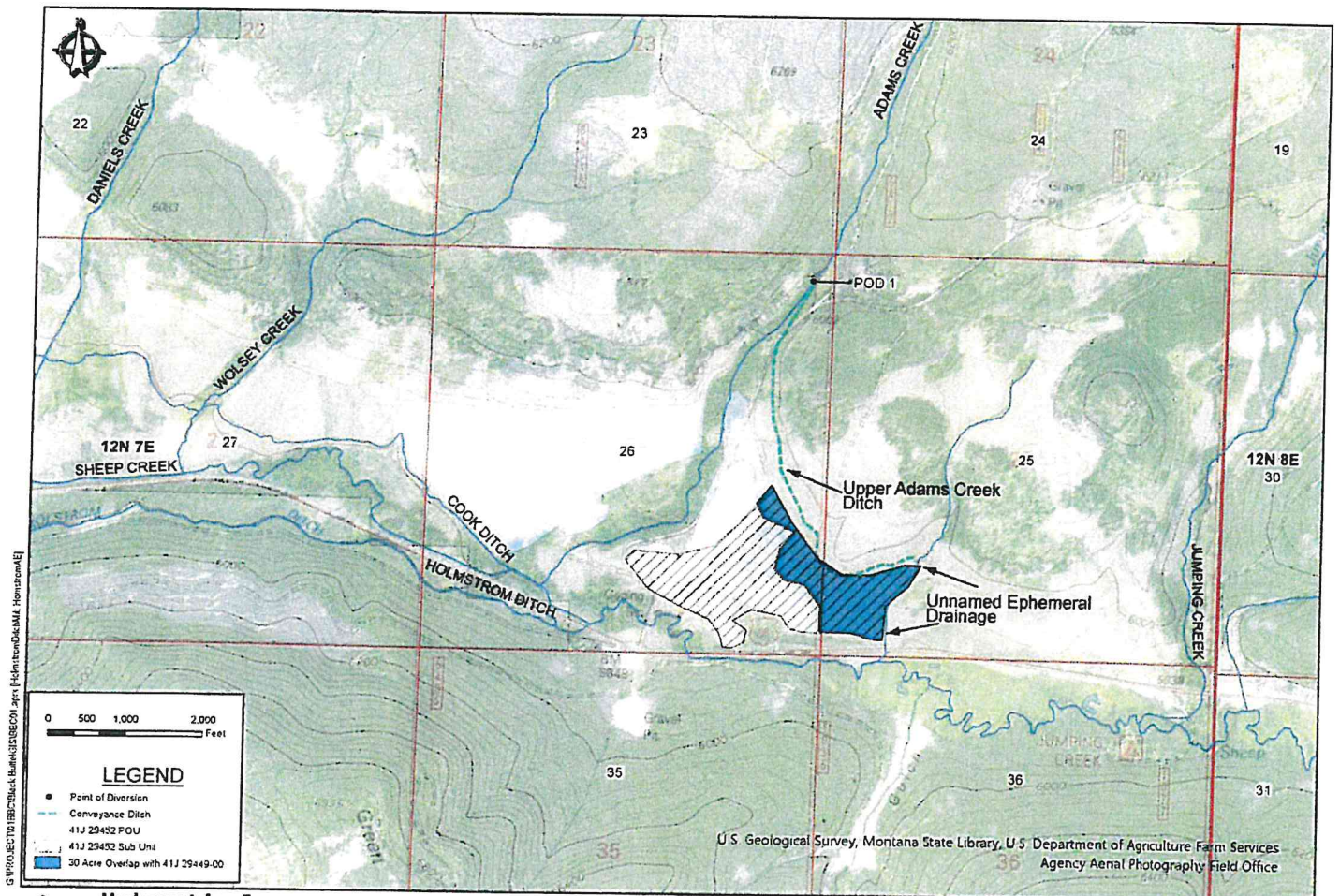


FIGURE 1
Holmstrom Ditch Mitigation Plan
TINTINA MONTANA, INC.
Meagher County, Montana

Exhibit A

Hydrometrics, Inc.
 Consulting Scientists and Engineers