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

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IN THE MATTER OF CHANGE )  
APPLICATION NO. 41E-30148132 BY USA )  
(DEPT. OF AGRICULTURE FOREST ) **FINAL ORDER**  
SERVICE) AND USA (DEPT OF INTERIOR )  
BUREAU OF LAND MANAGEMENT) )

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On January 31, 2023, I conducted a hearing related to the above-captioned application. For the reasons set forth below, I hereby overrule the valid objection filed by McCauley Family Ranch LLC (Objector) and GRANT the USA Dept. of Agriculture Forest Service and USA Dept. of Interior Bureau of Land Management (Applicants) application on the terms and conditions set forth herein.

**BACKGROUND AND PROCEDURAL HISTORY**

On September 13, 2021, the Department of Natural Resources and Conservation (DNRC) issued a Preliminary Determination to Grant (2021 PDG) regarding the above-captioned change application (2020 Change Application). The 2020 Change Application seeks to change the point of diversion and place of use for Water Right Statement of Claim number 41E 54725-00 in order to split the claim between its decreed direct-from-source point of diversion and a pump and stock tank system. 2021 PDG at 3. Specifically, the 2020 Change Application seeks to divert water at a flow rate of 1.8 gallons per minute (GPM) over a 45-day period to a storage tank located within the claim's historical place of use for distribution to four troughs. *Id.* The 2020 Change Application asserts that the historical volumetric use of the claimed water right is 4.68 acre-feet of water (AF) per year. *Id.* The 2021 PDG was publicly noticed pursuant to § 85-2-307, MCA, and Objector timely filed a valid objection to the

application on the ground of adverse effect. See DNRC Validity Determination of November 24, 2021, at 1.

On December 8, 2021, DNRC assigned me to be the hearing examiner presiding over this contested case. On March 17, 2022, Objector moved to certify this matter to the Water Court on the ground that DNRC's 2021 PDG had conducted an improper quantification of Applicants' water right. Applicants filed a response in opposition to Objector's motion on April 7, 2022, and I heard oral argument on the motion the following day. I denied the motion in an Order issued April 12, 2022, on the ground that the Water Court had validly quantified the right using a narrative rather than a numeric standard and that DNRC's determination of historical diverted and consumptive use volumes in the 2021 PDG reflected an appropriate exercise of its authority to process change applications rather than an improper incursion on the exclusive jurisdiction of the Water Court. Order of April 12, 2022, at 2. In that same April 12<sup>th</sup> Order, I set a hearing date, which was subsequently continued. The matter eventually came on for hearing on January 31, 2023, and pursuant to my post-hearing order of February 2, 2023, the parties both filed proposed findings of fact and conclusions of law on March 17, 2023.

### **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).<sup>1</sup> Consequently, in this case, Applicants must show that:

- 1) 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;
- 2) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 3) the proposed use of water is a beneficial use; and

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1. 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 instant Change Application.

- 4) the Applicants have 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.

Section 85-2-402(2)(a)-(d), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's 2021 PDG reflects DNRC's preliminary determination that Applicants have proven those criteria by the requisite standard in connection with the 2020 Change Application.

The issuance of DNRC's 2021 PDG does not relieve Applicants of their obligation to prove that the applicable criteria are satisfied. It does, however, have the effect of shifting the burden of production to Objector to demonstrate that Applicants failed to satisfy their burden on the criterion at issue in the valid objection. Because Applicants retains the burden of proof as to the criteria, Applicants may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing. See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005). In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.*, ¶ 2 (see § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")).

### **UNCONTESTED CRITERIA**

Because no valid objections were filed as to the adequacy of the means of diversion, possessory interest, water quality, or the beneficial nature of the proposed use of water for the 2020 Change Application, and because there is no evidence in the record that would cause me to revisit DNRC's 2021 PDG as to those four criteria, I find that Applicants have met their burden in regard to those four criteria for the reasons set forth in the 2021 PDG,

which I incorporate herein by reference. 2021 PDG, ¶¶ 17-24, 34-39.

### **APPEARANCES AND WITNESSES**

At the hearing on January 31, 2023, Applicants were represented by counsel Jennifer Newbold and John Chaffin. Objector was represented by counsel Jack Connors. Applicants called as witnesses Thor Burbach, Forest Service Program Manager; Don Despain, retired employee of the Bureau of Land Management; and Lucas Phillips, Forest Service Rangeland Specialist. Objector called as witnesses Edward McCauley, for McCauley Family Ranch LLC; and Jennifer Daly, DNRC Helena Regional Manager. Both parties cross-examined the others' witnesses.

### **EXHIBITS**

In addition to the administrative records maintained by DNRC for the 2020 Change Application, and the video and audio recordings of the hearing, the record in this case includes the following exhibits offered by the Applicants and Objector that I admitted at the hearing:

#### **Applicants' Exhibits:**

- 1) **Exhibit A-1:** 1982 Statement of Claim
- 2) **Exhibit A-2:** Map – Pipeline System
- 3) **Exhibit A-3:** Change Application #1 filed November 7, 2014 (excerpted portion)
- 4) **Exhibit A-4:** Change Application #2 filed January 21, 2020 (excerpted portion)
- 5) **Exhibit A-5:** Pump Flow Chart & Specification/Calculations
- 6) **Exhibit A-6:** Map – Allotment Boundaries (*same as Exhibit O-5*)
- 7) **Exhibit A-7:** 1967 – Letter re: fencing and coordinated management planning
- 8) **Exhibit A-8:** 1967 – Field meeting notes re: intensive management
- 9) **Exhibit A-9:** 1968 – Typed notes re: cooperative management of Little Boulder
- 10) **Exhibit A-10:** 1968 – Cooperative Range Management Agreement
- 11) **Exhibit A-11:** 1969 Little Boulder Allotment Management Plan
- 12) **Exhibit A-12:** 1976 – Letter re: establishment of 2 allotments (Little Boulder No. 214 and Galena No. 225)
- 13) **Exhibit A-13:** 1983 – MOU re: coordinated management plan
- 14) **Exhibit A-14:** 1989 – Coordinated Resource Management Plan

- 15) **Exhibit A-15:** Map – Fence Installation
- 16) **Exhibit A-16:** 1921-1975 Actual Use Summary Sheet
- 17) **Exhibit A-17:** 1921-1933 Actual Use Record
- 18) **Exhibit A-18:** 1934-1946 Actual Use Record
- 19) **Exhibit A-19:** 1947-1958 Actual Use Record
- 20) **Exhibit A-20:** 1969-1974 LB Grazing Rotation Notes

**Objector's Exhibits:**

- 1) **Exhibit O-1:** Copy of change application 41E 30071675 (application #1)
- 2) **Exhibit O-2:** General Abstract 41E 77028-00 Ground Water Certificate; Map
- 3) **Exhibit O-3:** 1984 Environmental Assessment - BLM (EA Number: MT-075-94-15)
- 4) **Exhibit O-4:** USDI – BLM Headwaters Resource Area Actual Grazing Use Report, dated 10/20/1995.
- 5) **Exhibit O-5:** Map of Galena and Little Boulder Allotments
- 6) **Exhibit O-6:** General Abstract 41E 54723-00 Statement of Claim; Map
- 7) **Exhibit O-7:** Photo of Boulder River, dated 09/25/2013.
- 8) **Exhibit O-8:** Hand-written notes from Edward McCauley
- 9) **Exhibit O-9:** 2016 USDA Forest Service Term Grazing Permit – Parts 1 and 2 (Fitzgerald Ranch Inc.)
- 10) **Exhibit O-10:** 2020 USDA Forest Service Term Grazing Permit – Parts 1 and 2 (McCauley Ranches LLP)
- 11) **Exhibit O-11:** Grazing Permit for Fitzgerald Ranch Inc., Effective 03/01/2021 to 02/28/2031

**ADVERSE EFFECT**

The sole criterion at issue in this case is adverse effect. The determination of whether Applicants have met their burden of proving by a preponderance of the evidence that the proposed change will not adversely affect the water right of another water user is closely related to the threshold question of the volume of water historically used pursuant to the water right sought to be changed. See *Town of Manhattan v. DNRC*, 2012 MT 81, ¶10, 364 Mont. 450, 276 P.3d 920 (2012); *In re Royston*, 249 Mont. at 431-32 (without adequate evidence of

historical volume of use, a record cannot support a finding of no adverse effect).

### **FINDINGS OF FACT<sup>2</sup>**

1. On April 27, 1982, Applicants filed Statement of Claim 41E 54725-00, asserting a right to use up to 10.6 GPM<sup>3</sup> with a total volume of 1.62 acre-feet (AF) for direct-from-source stockwater use to water up to 294 cattle from the North Fork of the Little Boulder River on a Forest Service grazing allotment know as Allotment 225. Exhibit A-1 at 2. Allotment 225 is also commonly known as the “Galena Allotment.” Hearing video at 9:09:20-30 (testimony of Applicants’ witness Thor Burbach).
2. Claim 41E 54725-00 appeared in the Basin 41E Temporary Preliminary Decree and Preliminary Decree without a defined flow rate and with a narrative volume quantification remark stating that “this water right includes the amount of water consumptively used for stockwatering purposes at the rate of 30 gallons per day [(GPD)] per animal unit.” Exhibit O-1 at 63. The volume remark further explained that “animal units shall be based on reasonable carrying capacity and historical use of the area served by this water source.” *Id.*
3. On November 7, 2014, Applicants filed with DNRC change application 41E 30071675 (2014 Change Application), seeking to change Water Right number 41E 54725-00. In that application, Applicants sought “to split the use of this water right claim between stock watering direct from source and a pump and stock tank system.” Exhibit O-1 at Bates 0006, ¶ 3.

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2. Section 2-4-623(4), MCA, provides that when parties submit proposed findings of fact and conclusions of law, as that parties in this case have done at my request, my “decision must include a ruling upon each proposed finding.” The Montana Supreme Court has held that this provision “does not require a separate, express ruling on each required finding as long as the agency’s decision and order in such proposed findings are clear[.]” *State ex rel. Montana Wilderness Association v. Board of Natural Resources and Conservation*, 200 Mont. 11, 40, 638 P.2d 734, 749 (1982) (citing *Montana Consumer Counsel v. Public Service Commission and Montana Power Co.*, 168 Mont. 180, 541 P.2d 770 (1975)). Thus, while I utilize the gravamen of certain of Applicants’ and Objector’s specific proposed findings in this Order, there are others that I implicitly reject as being inconsistent with the findings I lay out and the conclusions I draw therefrom.

3. The original Statement of Claim asserted a flow rate of 10.6 cubic feet per second (cfs) rather than 10.6 GPM. Exhibit A-1 at 2. Applicants’ witness Thor Burbach testified at the hearing that this claimed flow rate was likely an error and that a flow rate of 10.6 gallons per minute was intended. Hearing video at 9:08:21-9:09:12. Objector’s witness Jennifer Daly corroborated Mr. Burbach’s testimony. Hearing video 14:26:10-25. I find this testimony credible, as 10.6 cfs would be an extraordinarily high flow rate for the claimed stockwater use.

Specifically, the 2014 Change Application contemplated diverting up to 1.12 AF/year into a stock tank system at a flow rate of 2.037 GPM. *Id.*, ¶ 5.

4. In assessing the historical use of Water Right number 41E 54725-00 in connection with the 2014 Change Application, DNRC found that “[b]ased on historic[al] grazing records maintained by the Butte District of the Beaverhead/Deer Lodge National Forest, the pre-1973 carrying capacity of [Allotment 225] was 240 [animal units<sup>4</sup>],” with a “historic[al] diverted and consumed volume [of] 1.12 AF[.]” *Id.* at Bates 0014-15, ¶ 17. DNRC arrived at the total volume of 1.12 AF by multiplying 240 animal units by “the New Appropriation standard of 15 gallons per animal unit per day,” dividing that figure by 365 to obtain a per day volume and multiplying that figure by 100 to reflect the historical annual grazing period of 100 days. *Id.* at Bates 0015, ¶ 17. DNRC calculated the “maximum historic[al] flow rate” for this right to be 2.54 GPM. *Id.*

5. On August 31, 2016, DNRC issued a preliminary determination to grant the 2014 Change (2016 PDG), and the application was publicly noticed. See *id.* at Bates 0030-31. Edward K. McCauley filed a valid objection to the application. *Id.* at Bates 0158. In pre-hearing motions practice, Objector moved for the dismissal of the 2014 Change Application on the ground that Applicants had failed to timely make it correct and complete. *Id.* at Bates 0246. The Hearing Examiner assigned to the contested case dismissed the 2014 Change Application on that ground. *Id.*

6. On January 21, 2020, Applicants filed the 2020 Change Application with DNRC. The 2020 Change Application seeks to change the same water right at issue in the 2014 Change Application, Water Right number 41E 54725-00. PDG at 1. This time, however, Applicants asserted that the historical use of the grazing allotment was 509 animal units with a historical flow rate of 10.6 GPM. Applicants Exhibit 2 at 3.<sup>5</sup> Based on this information and applying the adjudication standard of 30 GPD per animal unit, DNRC calculated the historical diverted and consumed volume to be 4.68 AF. PDG at 6, ¶ 7. In the 2020 Change Application, Applicants

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4. In this context, an “animal unit” is a cow-calf pair. See *Steffen v. Dept. of State Lands*, 223 Mont. 176, 178, 724 P.2d 713, 715 (1986).

5. It is not clear to me how Applicants arrived at the 10.6 GPM flow rate for the 1982 Statement of Claim based on 294 animal units and the identical flow rate in the 2020 Change Application based on 509 animal units. Because of the conclusions I set forth below, however, I see no need to resolve that question in the course of ruling on the ultimate issues in this matter.

sought authorization to divert 1.8 GPM into its stock tank system, with “the remaining flow rate [being] left instream....” *Id.*

7. The two change applications thus differ markedly in terms of the historical volumes and flow rates identified; differences that predominantly stem from the number of animal units asserted in each application to have historically used the claimed source. This is information that seemingly should not vary, as nothing occurring between 2014 and 2020 could change the historical use of the water right. Yet the 2021 PDG makes no mention of the 2014 Change Application and contains no analysis of these discrepancies. Nor is there anything in either of the claim files for the two change applications that explains the differences asserted by Applicants in the respective change applications in the number of animal units that historically used Water Right number 41E 54275-00.

8. At the hearing, Objector’s witness Jennifer Daly explained why DNRC calculated the volume and flow rate differently in the two applications. Specifically, she testified that DNRC’s preliminary review of a change application involving a stockwater right can be significantly shaped by the information presented by the applicant. If the applicant does not specifically request to apply the adjudication standard of 30 GPD per animal unit, DNRC will evaluate the historical flow rate under the New Appropriation standard of 15 GPD per animal unit, which DNRC believes to be a more precise and scientifically reasonable estimate of stock consumption than the adjudication standard, which is intended as a maximum. But where an applicant requests the use of the adjudication standard, DNRC defers to that request to avoid invading the province of the Water Court. Hearing video at 14:28:12-14:29:22; 14:58:54-14:59:06.

9. The differences in volume and flow rate identified by DNRC in connection with the two change applications, therefore, can be partially explained by the differences in the way Applicants framed the applications, with DNRC then utilizing the 15 GPD per animal unit standard in connection with the 2014 Change Application and the 30 GPD per animal unit standard in connection with the 2020 Change Application.

10. There remain, however, the discrepancies between the applications in the number of animal units that Applicants assert have historically used the claimed water. Ms. Daly testified that DNRC relies on the information provided by an applicant in connection with the requested



change to assess the number of animal units that historically utilized a claimed right since the Water Court does not decree a specific number as part of its adjudication of an underlying claim. Hearing video 14:22:28-14:23:45. Ms. Daly also testified that it was her understanding that Applicants had identified additional historical information between the filing of the two change applications capable of supporting the assertion of a greater number of animal units historically utilizing the claimed source. Hearing video at 14:59:05-23. The 2021 PDG, however, does not identify that as the basis for difference in the number of animal units identified in the two applications. Thus, due to the different figures asserted by applicants in the different change applications, and the lack of any discussion or explanation in the 2021 PDG regarding the divergence from the information relied on in the 2016 PDG, I find that neither PDG is an independent source of information upon which I can rely to ascertain the number of animal units that historically used Water Right number 41E 54275-00.

11. One key question identified by the parties that is directly relevant to the historical animal unit inquiry is whether the appropriate geographic scope of consideration is the Galena allotment – the Forest Service grazing unit (number 225) specifically identified in the Statement of Claim for Water Right 41E 54275-00 – or a broader swath of the Boulder National Forest that today is comprised of multiple allotments but that historically were less- or entirely un-fenced, allowing more cattle freer access to a multiplicity of water sources including the portions of the Little Boulder River that are the sources for Water Right 41E 54275-00. See Exhibits A6-A15.

12. Applicants' witness Thor Burbach testified that limitations with the database in place during the claim filing period in 1982 meant that the Forest Service needed to file multiple water rights to encompass water used by cattle along stream segments and to allocate animal unit numbers to discrete fields – even when in reality they would have had access to multiple portions of a source – because they could only make one entry in the database per element (e.g. place of use, point of diversion) even when the reality on the ground was more complex. Hearing video at 9:17:15-9:18:51; 9:23:13-36.

13. Mr. Burbach also testified that he was unaware of the basis for the 294 animal units asserted in the 1982 Statement of Claim for Water Right number 41E 54275-00 but that, based on his research into Forest Service records, 509 animal units appeared to be a

reasonable assessment of the number of cattle that historically had access to the place of use for that water right. Hearing video at 9:21:02-18. Mr. Burbach further testified that, based on his calculations, historical use by 509 animal units would comport with the flow rate of 10.6 GPM asserted in the 1982 Statement of Claim. Hearing video at 9:28:05-57; 10:27:48-10:29:10.

14. Applicants' witness Don Despain testified at the hearing that prior to the creation and fencing off of the Galena allotment in 1976, cattle permitted to graze on the Little Boulder Allotment and the Chinese Diggings Allotment (which would also have access to the stock tank system for which Applicants are seeking this change authorization) both also had access to the stream reach associated with Water Right 41E 54275-00. Hearing video at 10:53:25-56; 11:14:13-11:16:20; *see also* Exhibit A-15.

15. Applicants' witness Lucas Phillips testified at the hearing about the Forest Service's actual use records for the portion of the Boulder National Forest that contains the place of use for Water Right 41E 54275-00 and how that information was deployed in developing the 2020 Change Application. Hearing video at 13:11:45-13:16:44. Specifically, Mr. Phillips testified that he calculated from those records that the average number of animal units that had access to the historical Little Boulder allotment (from which the Galena allotment was carved out in 1976) from 1921 to 1975 was 499. Hearing video at 13:16:13-13:16:44.

16. Exhibits A-17, A-18, and A-19 are Forest Service actual use records depicting the number of animal units utilizing the historical Little Boulder allotment from 1921-1933, 1934-1946, and 1947-1958 respectively. They are generally consistent with Mr. Phillips' testimony, showing a high of 955 animal units on the allotment in 1923 and a low of 342 animal units in 1937. Exhibit A-16 illustrates that average use was closer to 400 animal units during the period from 1938 to 1967 before jumping back a bit above 500 animal units from 1968 to 1975, the year before the Galena allotment was fenced off.

17. Objector's witness Edward McCauley testified at the hearing that he believed that Applicants have overstated the carrying capacity of the Galena allotment in a manner that renders the 509 animal units identified in the 2020 Change Application an overstatement of actual historical use. Hearing video at 16:01:55-16:04:41. *See also* Exhibit O-8. Mr. McCauley also testified that the period for which he has personal knowledge of conditions and grazing

use on the Little Boulder allotment begins in the late 1960s or early 1970s. Hearing video at 15:15:41-52.

18. I find that the witness testimony and exhibits adduced by Applicants discussed above are more persuasive regarding the full scope of actual historical use than Mr. McCauley's testimony and Objector's exhibit.

19. The fact that roughly 500 animal units had access to the place of use associated with Water Right 41E 54275-00, however, does not fully resolve the question of how much water was historically used under that right. This is so for two reasons. First, while I find it more likely than not that those animals had access to the source, the testimony of Mr. Burbach, Mr. Despain, and Mr. Phillips identified above also supports the conclusion that those cattle similarly had access to other water sources contained within the historical Little Boulder allotment that are subject to other water rights claimed by the Forest Service. See *also* Exhibits O-2 and O-6. Therefore, the full water consumption of the 509 animal units is not appropriately attributable exclusively to Water Right number 41E 54275-00. Second, the record reflects that the adjudication standard of 30 GPD per animal unit is a *maximum* volume of use—not necessarily a historically accurate one. See Finding of Fact ¶ 8, *supra*.

20. Applicants address these issues in the 2020 Change Application by seeking to change the place of use (from direct-from-source to a stock tank system) for only a portion of the animal units that utilize the water associated with Water Right 41E 54725-00, and to remove from the source only a portion of the water that was historically consumed direct-from-source. Specifically, the 2021 PDG recites that “[t]he pump system is intended to move approximately 168 [animal units] off stream to less vulnerable parts of the allotment to reduce riparian impacts of stock grazing at the source.” 2021 PDG at 6. The 2020 Change Application contemplates an additional 72 animal units continuing to drink direct-from-source for a total of 240 animal units, a number smaller than the historical maximum of 509 animal units (and one that matches the number of animal units identified in the 2014 Change Application).<sup>6</sup>

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6. Unlike the 2014 Change Application, the 2020 Change Application identifies an additional 202 animal units who will also continue to drink direct-from-source on top of the other 72. Exhibit A-4 at 2. Although the 2021 PDG fails to address this difference, the 2020 Change Application reflects that Water Right 41E 54275-00 historically served three grazing allotments, but that only cattle from two of the allotments will be able to access the tank system the changed water right

21. Moreover, “[a] flow rate of 1.8 GPM will be diverted to the stock tanks, the remaining flow rate will be left instream for the remaining stock.” *Id.* The flow rate of 1.8 GPM is less than the cumulative flow rate DNRC calculated as the maximum historical use of Water Right 41E 54275-00 in the 2016 PDG when it used the new appropriation standard of 15 GPD per animal unit to determine historical use and prior to Applicants presenting their evidence regarding the larger number of animal units that historically had access to that water right’s source. Exhibit O-1 at 15. It is also lower than the flow rate asserted in the original Statement of Claim for this water right. Exhibit A-1 at 2. Furthermore, the pump system is to be used for only 45 days a year, despite the historical period of use of Water Right number 41E 54275-00 being 153 days. See 2021 PDG at 5-6. Mr. Burbach testified that the annual volume of water Applicants intend to pump into the stock tank system is approximately 0.7 AF. Hearing video at 10:40:25-10:41:46. Thus while it may not be possible to quantify with precision the actual historical consumption of water pursuant to this water right, see Hearing video at 14:55:36-14:56:44 (testimony of Ms. Daly), the volume associated with the change purported to be authorized by the 2021 PDG is assuredly less than the volume quantified by the Water Court in decreeing Water Right number 41E 54275-00. As there are now fewer cattle grazing the place of use of this water right than the maximum number that historically did so and the proposed change is not intended to increase the number of animal units currently utilizing the source, I find that there will be no expansion of the historical use of this water right if the 2020 Change Application is granted and Applicants use water consistent with the approved change.

22. In the absence of an expansion of the historical use of the water right, I find that there will be no adverse effect to Objector from the grant of the 2020 Change Application. At least as much water will remain instream after satisfaction of Water Right number 41E 54275-00 after the change as did historically.

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is intended to serve. Exhibit A-4 at 5. The 202 cattle separately identified on the 2020 Change Application are the number with access to the third allotment but not the two the tank system will serve. *Id.* Mr. Burbach also testified specifically to this point at the hearing, Hearing video at 10:38:15-10:39:08, and I find his explanation credible.

## CONCLUSIONS OF LAW

23. The majority of the 2021 PDG's conclusions of law regarding adverse effect accurately recite the applicable principles of Montana law. Consequently, I adopt the relevant paragraphs from the 2021 PDG and incorporate them herein by reference. 2021 PDG at 9-14 (¶¶ 25-31).

24. I part company from the 2021 PDG, however, with its conclusion that Applicants have proven by a preponderance of the evidence the specific volume historically used pursuant to Water Right number 41E 54275-00, and consequently reject ¶¶ 32-33 of the 2021 PDG. For the reasons set forth above at Findings of Fact ¶¶ 21-23, however, I nonetheless conclude that Applicants have proven by a preponderance of the evidence that the proposed change will not cause adverse effects to "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)(a), MCA, **so long as** the changed water right is used consistent with the description of the stock tank system as described in the 2020 Change Application and in the testimony of Mr. Burbach, including the maximum flow rate of 1.8 GPM and a maximum annual volume pumped to the tank system of 0.7 AF.

25. As adverse effect was the sole change criterion at issue in this case, I conclude that Applicants have satisfied their burden under § 85-2-402(2), MCA, and are entitled to have the 2020 Change Application granted. However, because it is not possible to ascertain the volume of water used by cattle drinking from the tank system in the absence of a measurement or monitoring plan, Hearing video at 14:56:30-14:57:34, nor to accurately determine the volume that will be consumed direct from source, I find two conditions must be imposed before I can issue a Final Order granting the 2020 Change Application.

26. These conditions are the following: 1) Applicants must install a water meter in the pipeline nearest the pump and provide monthly and annual records of the amount of water pumped from the source into the tank system to the DNRC; and 2) a remark shall be added to Water Right 41E 54275-00 that this change authorization does not increase the decreed volume for that water right.

## **CONCLUSION**

Objector has failed to bear its burden of production for the valid objection it filed in connection with the 2020 Change Application. Applicants have met their burden of proof to show by a preponderance of the evidence that they have satisfied all of the applicable criteria necessary to warrant a grant of the 2020 Change Application with the addition of the two conditions identified above.

## **FINAL ORDER**

Change Application No. 41E 30148132 is hereby GRANTED for the reasons set forth in this Final Order as to the criterion of adverse effect and for the reasons set forth in the 2021 PDG as to the other applicable criteria of § 85-2-402, MCA, subject to the following terms and conditions:

1. Additional places of use (stock tanks) are authorized to be in the (1) SESESW Sec 36. T6N, R5W (2) SESESE Sec 36. T6N, R5W (3) E $\frac{1}{2}$ E $\frac{1}{2}$ NESE Sec 1, T5N, R5W, Jefferson County.
2. The periods of diversion and use are from June 1 through October 31.
3. The maximum flow rate Applicants may divert into the stock tank system is 1.8 GPM.
4. The maximum annual volume Applicants may divert into the stock tank system is 0.7 AF.
5. Applicants must install a water meter in the pipeline nearest the pump and provide monthly and annual records of the amount of water pumped from the source into the tank system to the DNRC.
6. The following remark shall be added to Water Right number 41E 54725-00: IN NO EVENT SHALL THIS CHANGE AUTHORIZATION INCREASE THE VOLUME DECREED FOR WATER RIGHT 41E 54275-00.

## **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, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 13<sup>th</sup> day of June 2023.

/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 13<sup>th</sup> day of June 2023 by first class United States mail and/or by electronic mail.

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