

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

APPLICATION TO CHANGE WATER RIGHT)
NO. 41F 30161465 BY JUMPING HORSE) PRELIMINARY DETERMINATION TO
STOCK RANCH, LLC) GRANT CHANGE

On December 11, 2023, Jumping Horse Stock Ranch, LLC (Applicant) submitted Application to Change Water Right No. 41F 30161465 to change Statement of Claim 41F 132847-00 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) after having a preapplication meeting on August 15, 2023. 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 May 13, 2024. The Applicant responded with information dated May 23, 2024. The Application was determined to be correct and complete as of August 21, 2024. An Environmental Assessment for this application was completed on December 17, 2024.

INFORMATION

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

Application as filed:

- Application for Change of Appropriation Water Right - Additional Stock Tanks, Form 606-ST
- Attachments:
 - Appendix A: Preapplication Meeting Form, dated 8/15/2023
 - Appendix B: Affidavit of Steven P. Akin, dated 9/21/2023
- Maps:
 - ST.3.A: Historic Map, map produced by DMS Natural Resources, LLC, dated 8/18/2023, base map 8/7/1976, USGS
 - ST.3.A: Historic Map, map produced by DMS Natural Resources, LLC, dated 8/15/2023, base map 9/1/1979, USDA
 - ST.3.A: Historic Map, map produced by DMS Natural Resources, LLC, dated 8/18/2023, base map 9/14/1984, USGS
 - ST.3.A: Historic Map, map produced by DMS Natural Resources, LLC, dated 8/18/2023, base map 6/23/1995, Google Earth

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- ST.3.A: Historic Map, map produced by DMS Natural Resources, LLC, dated 8/18/2023, base map 9/21/2021, NAIP
- ST.3.A: Proposed Use, map produced by DMS Natural Resources, LLC, dated 12/4/2023, base map 9/21/2021, NAIP

Information Received after Application Filed

- Letter from Applicant's consultant (DMS Natural Resources, LLC) to DNRC dated May 23, 2024, RE: Jumping Horse Stock Ranch, LLC – Response to Deficiency letter for Application to Change a Water Right – Additional Stock Tanks No. 41F 30161465.

Information within the Department's Possession/Knowledge

- DNRC Non-Irrigation Change Application 41F 30161465 Technical Report, dated August 21, 2024
- Application for Change of Appropriation Water Right - Additional Stock Tanks No. 41F 30161463
- DNRC Non-Irrigation Change Application 41F 30161463 Technical Report, dated August 21, 2024
- Application for Change of Appropriation Water Right - Additional Stock Tanks No. 41F 30161464
- DNRC Non-Irrigation Change Application 41F 30161464 Technical Report, dated August 21, 2024

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).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AU means animal units; GPD means gallons per day.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the place of use (POU) of Statement of Claim 41F 132847-00 to add 14 stock tanks and 6 new hydrants to the POU in this Application. Claim 41F 132847-00 is filed for 35 GPM flow rate from groundwater via means of a well for the purpose of stock for 1150 AU. The period of use and diversion is January 1 to December 31 each year. The point of diversion (POD) is claimed in the SWSWSE Section 31, T1N, R2E, Gallatin County. Water was

pumped from the well diversion to a stock tank and automatic waterers in the claimed historical POU in the SWSWSE Section 31, T1N, R2E, Gallatin County.

Table 1. Water right proposed for change

Water Right	Purpose	Flow Rate	Volume	Period of Use	Point of Diversion ¹	Place of Use ¹	Priority Date
41F 132847-00	Stock (1150 AU)	35 GPM	Historical Use Statement	1/1-12/31	SWSWSE Section 31, T1N, R2E, Gallatin County	SWSWSE Section 31, T1N, R2E, Gallatin County	12/31/1958

2. Claim 41F 132847-00 is associated with Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00, as the rights have shared stock use. The three rights provide year-round water to the same 1150 AU from different well diversions. Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00 are proposed for change in concurrent Change Application Nos. 41F 30161463 and 41F 30161464. No other water rights provide water to the 1150 AU for stock use.

3. The Applicant filed an objection to Claim 41F 132847-00 in the Preliminary Decree for Basin 41F² to correct the POD and POU of the claim. The Applicant stated that the well claimed under Claim 41F 132847-00 is located in the SESESW Section 31, T1N, R2E, Gallatin County and the POU is in the SESESW and SWSWSE Section 31, T1N, R2E, Gallatin County. The Department will analyze historical use of Claim 41F 132487-00 given these POD and POU locations.

4. No previous Change Authorizations are associated with the water rights proposed for change.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to add stock tanks and hydrants to the POU of Claim 41F 132847-00. The proposed POU would include 14 new stock tanks and 6 new hydrants, located within the Applicant’s property generally in Section 19, 30, and 31, T1N, R2E, Gallatin County. The proposed change will add 19 new POUs between the hydrants and stock tanks and will continue to use the historical stock tank and automatic waterers in the SESESW and SWSWSE Section 31, T1N, R2E, Gallatin County. The well diversion will be part of a manifold system with

¹ The Applicant submitted an objection to Claim 41F 132847-00 as part of the Preliminary Decree for Basin 41F to correct the POD and POU.

² A copy of the filed objection was submitted by the Applicant as part of the deficiency response received on May 23, 2024.

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Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00, which are part of concurrent Change Application Nos. 41F 30161463 and 41F 30161464. The Applicant will continue to divert groundwater from 1/1 to 12/31 for any six months of the year for stock use up to 1150 AU following the proposed change. No change to POD or purpose is proposed, and this water right does not have a place of storage element.

6. This Change Application was submitted concurrently with Change Application Nos. 41F 30161463 and 41F 30161464 to change the POU of Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00.

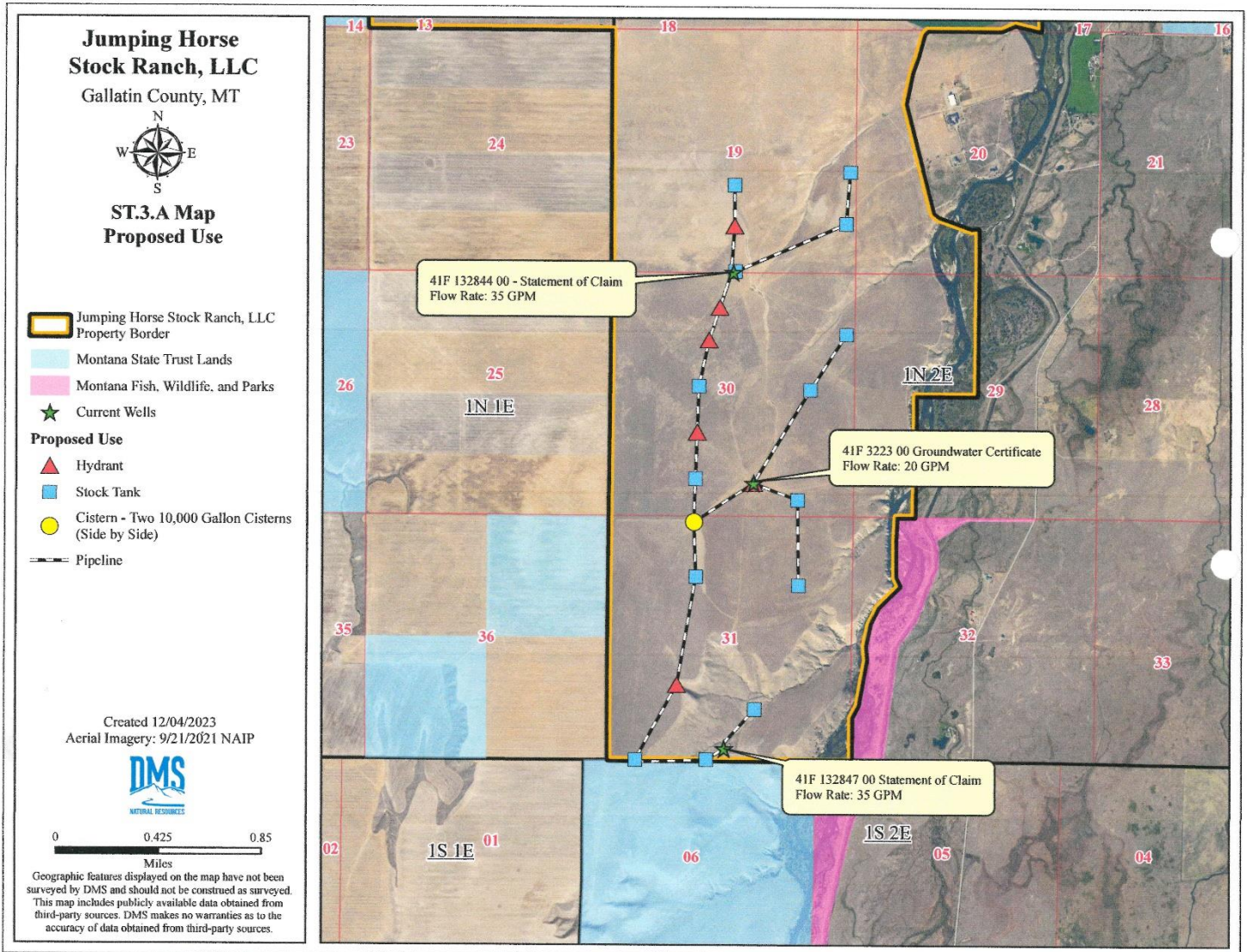


Figure 1. Map of proposed use of Change Application 41F 30161465, produced by DMS Natural Resources, LLC

CHANGE CRITERIA

7. 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 probable 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.

8. 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, ¶¶ 29-31; Town of Manhattan, ¶ 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

9. Statement of Claim 41F 132847-00 is a filed right with a December 31, 1958, priority date. The claim was included in the Temporary Preliminary Decree and Preliminary Decree for Basin 41F.

10. Claim 41F 132847-00 is claimed for stock use for 1150 AU from a stock tank and automatic waterers in and around a calving barn located in the SWSWSE Section 31, T1N, R2E, Gallatin County. The POD and POU for Claim 41F 132847-00 was originally claimed and is currently indexed in the SWSWSE Section 31, T1N, R2E, Gallatin County. However, the Applicant states that the well claimed under Claim 41F 132847-00 is located in the SESESW Section 31, T1N, R2E, Gallatin County and the POU is in the SESESW and SWSWSE Section 31, T1N, R2E,

Gallatin County. The Applicant filed an objection to Claim 41F 132487-00 in the preliminary decree for Basin 41F to correct the POD and POU of the water right. Diversions and use from the well occurred for any six months from 1/1 to 12/31, according to the Applicant. The Applicant stated groundwater was historically pumped from the well to a stock tank and automatic waterers in and around a calving barn. The Applicant provided historical imagery in the maps submitted as ST.3.A. in the Application materials to support the locations of the well diversion, stock tank, and calving barn.

11. Stock use under Claim 41F 132847-00 is shared with Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00. The three water rights provide water from different well diversions for up to 1150 AU. Claim 41F 132847-00 was claimed for 1000 cattle and 100 horses at the time of filing. The Applicant provided an affidavit as Appendix B in the Application stating that the number of livestock each year varied, but cow-calf pairs were run on the property along with bulls and horses historically. The associated water rights are filed on the same stock use, with the maximum number of stock filed being 1150 AU. Stock historically drank from any of the three wells around the property for up to six months from 1/1 to 12/31. The Department finds the maximum AU served by Claim 41F 132847-00 is 1150 AU.

12. Claim 41F 132847-00 has a flow rate of 35 GPM. The originally filed flow rate is 35 GPM, and the Applicant stated the submersible pump consistently diverted water from the well at 35 GPM. The Applicant also measured the flow rate of the well and found it to be 35 GPM. The Department finds the historical flow rate of Claim 41F 132847-00 is 35 GPM.

13. The historical consumptive use (HCV) for Statement of Claim 41F 132847-00 was found using the Department's standard methodology pursuant to ARM 36.12.1902. The water right proposed for change is a Statement of Claim, and the historical use will be evaluated as the right existed prior to July 1, 1973.

14. Claim 41F 132847-00 was pumped from a well into a stock tank for stock use up to 1150 AU for any six months from 1/1 to 12/31. The historical consumptive volume for Claim 41F 132847-00 was found by multiplying the claimed animal units by the historical gallons per day consumed over the period of diversion. This value was then divided by 325,851 gallons to get the acre-feet consumed per year. Since 41F 132847-00 is a Statement of Claim, the Adjudication standard of 30 gallons per day was used for historical use. The Department found the historical volume associated with stock use for any six months out of the year from 1/1 to 12/31. This is described below and summarized in Table 2. The Department find the historical consumed volume of Claim 41F 132847-00 is 19.32 AF.

$$\text{Historic Consumptive Volume} = \frac{\text{Animal Units} * \text{Days Used} * \frac{30 \text{ gallons}}{\text{day}}}{325,851 \text{ gallons/AF}}$$

Table 2. Historical consumptive volume of 41F 132847-00

Water Right	Animal Units	Period of Use	Days Used	Consumptive Volume (AF)
41F 132847-00	1150	1/1-12/31	182.5	19.32

15. Historical diverted volume is the sum of the historical consumed volume and conveyance losses. Water was diverted from a groundwater well and conveyed to a stock tank and automatic waterers in the historical POU via a pipe under Claim 41F 132847-00. No conveyance losses are associated with the system, so the historical diverted volume is equal to the historical consumed volume. The Department finds the historical diverted volume of Claim 41F 132847-00 is 19.32 AF.

16. Claim 41F 132847-00 is associated with Claim 41F 132844-00 and Groundwater Certificate 41F 3223-00, as the rights share stock use. The volume for each water right is not additive, as stock use is shared between the rights. Together, all three associated water rights will not exceed a total 19.32 AF for stock use of 1150 AU.

17. The Department finds the following historical use for Claim 41F 132847-00, as seen in Table 3.

Table 3. Historical use of Claim 41F 132847-00

Water Right	Priority Date	Flow Rate	Diverted Volume	Consumed Volume	Purpose	Point of Diversion	Place of Use
41F 132847-00	12/31/1958	35 GPM	19.32 AF	19.32 AF	Stock (1150 AU)	SESESW Section 31, T1N, R2E, Gallatin County	SESESW & SWSWSE Section 31, T1N, R2E, Gallatin County

ADVERSE EFFECT

FINDINGS OF FACT

18. The Applicant proposes change the POU of Claim 41F 132847-00. No change to the POD or purpose is proposed, and this water right does not involve a place of storage. The historical POU will be used along with the proposed POU.

19. The Applicant proposes to add 14 stock tanks and 6 new hydrants to Claim 41F 132847-00. The hydrants will be used to fill portable water tanks that can be moved around the pastures depending on stock needs. The proposed change will add 19 new POUs between the hydrants and stock tanks. The Applicant states the historical automatic waterers, located in the SESESW and SWSWSE Section 31, T1N, R2E, Gallatin County, will continue to be utilized. A total 14 stock tanks and 6 hydrants will be in the system after the proposed change.

20. The new stock watering system will consist of three wells, appropriated under Groundwater Certificate 41F 3223-00 and Claims 41F 132844-00 and 41F 132847-00. Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00 are proposed for change in Change Application Nos. 41F 30161463 and 41F 30161464. The three wells will provide water for 1150 animal units for up to six months of the year. The wells will be manifold into a single system. Water will be pumped from the wells and piped into two cistern holding tanks in the NWNENW Section 31, T1N, R2E, Gallatin County. From the cisterns, water will be gravity fed into the tanks and hydrants. The hydrants will be used to fill portable stock tanks that can be moved around the pasture in the proposed POU. Through the manifold system water will be pumped and piped into 14 stock tanks and 6 hydrants total for up to six months from 1/1 to 12/31.

21. The proposed hydrants and stock tanks will continue to provide groundwater for 1150 AU for a maximum of six months from 1/1 to 12/31, as done historically. The exact six months of diversion and use will vary each year, depending on stock needs. As the number of stock using water under Claim 41F 132847-00 is not increasing, the proposed consumed and diverted volumes are equal to the historical consumed and diverted volumes. The Department finds the proposed consumed volume is 19.32 AF and the proposed diverted volume is 19.32 AF.

22. The Applicant stated each stock tank will be equipped with a curbstop to shut off the well individually, as well as a float valve that will be used to control flow into the new tanks. The Applicant also stated that each segment of the pipelines will be able to be isolated and will be equipped with valves to direct water only to where it is needed. The valves installed on the system will allow the Applicant to limit water use to the historical volumes and keep the tanks and hydrants from overflowing. The number of stock will not increase with the additional stock tanks and hydrants, as the system will continue to provide water to 1150 AU. The volume of water associated with the system will not increase as no increase in stock units will occur and the system will be equipped with valves to control flow into the new tanks. The Department finds no increase in volume will occur as a result of the proposed change.

23. The Department analyzed an area of potential impact for the proposed change. The area included the location of the new stock watering system in Sections 19, 30, and 31, T1N, R2E, Gallatin County. Wells located in the new stock watering system are proposed for change in this Change Application or in Change Application Nos. 41F 30161463 and 41F 30161464. As the proposed change is only to add additional stock tanks to the existing stock water system of Claim 41F 132847-00, no change in volume or pumping schedule will occur from the proposed change.

The Department finds the proposed change to add POUs to Claim 41F 132847-00 will not cause adverse effect.

BENEFICIAL USE

FINDINGS OF FACT

24. The Applicant proposes to use groundwater for livestock, which is a recognized beneficial use of water in the State of Montana. Stock has been and will continue to be a beneficial use of water under Claim 41F 132847-00. Stock will drink from an existing water system with additional stock tanks for any six months from 1/1 to 12/31 after the change and no increase in AU are proposed.

25. The Applicant proposes to divert and consumed 19.32 AF at a flow rate equal to 35 GPM from groundwater for stock use for up to 1150 AU. Claim 41F 132847-00 will continue to be diverted and used for about six months from 1/1 to 12/31 each year, alongside Groundwater Certificate 41F 3223-00 and Statement of Claim 41F 132844-00. Adding new stock tanks and hydrants to the existing stock watering system will allow the Applicant to distribute water for grazing management around the POU. The Department finds the use of Claim 41F 132847-00 for stock to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

26. The Applicant proposes to divert water under Claim 41F 132847-00 at a flow rate of 35 GPM for a stock watering system. The Applicant will continue to divert Claim 41F 132847-00 for up to six months from 1/1 to 12/31 each year.

27. The stock watering system will be supplied by three groundwater wells, proposed for change in this Change Application or Change Application Nos. 41F 30161463 and 41F 30161464. Each well is appropriated by a different water right and the system is manifold together. Each well will be equipped with a submersible pump, a Goulds Series 23 Stage 4" Pump 5hp, that has a maximum pumping rate capacity of 50 GPM. Water will be pumped from the well to two 10,000-gallon cisterns and then the stock tanks and hydrants, conveyed via 2" HPDE pipe.

28. The proposed diversion and conveyance structures have a capacity greater than the total flow rate diverted from the well into the stock watering system. The Department finds the proposed means of diversion and conveyance to be adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

29. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Change Application 41F 30161465)

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

30. 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*, ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied).³

31. 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

³ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11,103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.⁴

32. 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*, ¶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.⁵ 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*, ¶ 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 appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); *Matter of Application*

⁴ 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).

⁵A 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. Section 85-2-234, MCA

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).⁶

33. 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*, ¶ 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; ARM 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

⁶ 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.)

subsequent water users).⁷

34. 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 ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

35. 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 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

⁷ 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, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

36. 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. ARM 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. ARM 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. ARM 36.12.1901 and 1903.

37. 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).

38. 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).

39. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Claim 41F 132847-00 to be a diverted volume of 19.32 AF, a historically consumed volume of 19.32 AF, and flow rate of 35 GPM. (FOF Nos. 9 – 17)

40. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(a), MCA. (FOF Nos. 18 – 23)

BENEFICIAL USE

41. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 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. ARM 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 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (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).

42. In *Sitz Ranch v. DNRC*, the applicant could only demonstrate need for 200 to 300 acre-feet of water but requested 800 acre-feet. *Sitz Ranch v. DNRC*, DV-10-13390, 2-3, Fifth Judicial

District Court, Order Affirming DNRC Decision (2011). The court upheld DNRC's decision that the applicant requested more water than could be beneficially used and thus did not prove beneficial use.

43. Applicant proposes to use water for stock which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 19.32 acre-feet of diverted volume and 35 GPM flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 24 – 25)

ADEQUATE MEANS OF DIVERSION

44. 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).

45. 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. 26 – 28)

POSSESSORY INTEREST

46. 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 ARM 36.12.1802.

47. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 29).

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. 41F 301614645 should be granted subject to the following.

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The Applicant is authorized to divert Statement of Claim 41F 132847-00 from a point of diversion, a groundwater well, in the SESESW Section 31, T1N, R2E, Gallatin County. Under Claim 41F 132847-00, the Applicant may divert a maximum volume of 19.32 AF and consumed a volume of 19.32 AF at a flow rate of 35 GPM for up to six months from 1/1 to 12/31 for up to 1150 AU in the following places of use, all in T1N, R2E, Gallatin County: SWNWSE, NWSWSE, NENESE, NESESE, & SWSWSE Section 19; NESENW, SWSENW, SENENW, NESENE, SWSENE, NWSESW, SWNESW, SWSESE, & NWSWSE Section 30; SWNENW, SWNESW, NWSENE, Government Lot 4 SWSWSW, SESESW, SWSWSE, & NWSWSE Section 31. The maximum flow rate and volume that will be diverted from groundwater by the water right proposed for change cannot exceed 35 GPM and 19.32 AF.

NOTICE

The 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 18th day of December 2024.

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

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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 18th day of December, 2024, by first class United States mail.

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