

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

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APPLICATION TO CHANGE WATER RIGHT) NO. 41K 30165051 BY PETER WOELKERS) AND MONICA WOELKERS)	DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE
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On January 22, 2025, Peter Woelkers and Monica Woelkers (Applicant) submitted Application to Change Water Right No. 41K 30165051 to change Statement of Claim 41K 210274-00 to the Lewistown Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on December 5, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on December 16, 2024. The Department delivered the Department – completed technical analysis on January 8, 2025. The Application was determined to be correct and complete as of February 4, 2025. An Environmental Assessment for this application was completed on February 6, 2025.

INFORMATION

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

Application as filed:

- Irrigation Application for Change of Appropriation Water Right, Form 606-IR
- Applicant submitted a hand drawn map that depicted the means of conveyance and location of sprinkler / garden hose locations. This hand drawn map was used by the Department as a reference for creating **Figure 1**.

Information within the Department's Possession/Knowledge

- Water Resources Survey photo MX-4G-31 Cascade County dated August 28, 1950 & MX-4G-32 Cascade County dated August 28, 1950.
- Claim file 41K 210274-00.
- Letter to the Applicant from Dixie Brough on August 7, 2024, to provide notice of Water Court case 41K-0581-R-2024.

- Department Technical Analysis completed by Jackson Sansone, DNRC Water Resource Specialist, dated January 8, 2025.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Lewistown Regional Office at 406-538-7459 to request copies of the following documents.
 - Development of standardized methodologies to determine Historic Diverted Volume Memo dated September 13, 2012.

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; AC means acres; and AF/YR means acre-feet per year; TWP means township; RGE means range; LLD means legal land description.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the point of diversion of Statement of Claim No. 41K 210274-00 in this Application. Statement of Claim No. 41K 210274-00 is filed for 12.40 GPM flow rate and an undefined diverted volume as decreed by the Montana Water Court from Sun River using a Red Lion pump for the purpose of irrigating a claimed maximum of 2.00 acres. A summary of the water right prosed for change is provided in **Table 1** below. Although the place of use is a single tax parcel there are three different LLD's on the abstract. ID 1 is NWNWSW Section 32 Township 21N Range 2E. ID 2 SWSWNW Section 32 Township 21N Range 2E. ID 3 NENESE Section 31 Township 21N Range 2E. These Places of Use are summarized in **Table 2** below. The period of use is May 1 to October 31. The point of diversion is located in the NENESE of Section 31 Township (TWP) 21N Range (RGE) 2E in Cascade County and water is conveyed to the place of use by means of a PVC pipe distribution system.

Table 1: Water right proposed for change

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
41K 210274-00	12.40 GPM	Undefined (Total vol. shall not exceed amount put to historical and beneficial use.)	Irrigation	May 1 – October 31	See Table 2 below	NENESE 31 TWP 21N RGE 2E Cascade	October 7, 1892 Enforceable priority date: June 30, 1973

2. There are no supplemental or overlapping water rights at the documented Place of Use for Statement of Claim No. 41K 210274-00.

3. There have been no change authorizations to Statement of Claim No. 41K 210274-00.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant is proposing to change the Point of Diversion for Statement of Claim 41K 210274-00 from NENESE Section 31 TWP 21N RGE 2E to NWNWSW of Section 32 TWP 21N RGE 2E. The period of use will remain May 1 to October 31. There are no proposed changes in purpose. Historically, the Applicant claimed to irrigate a maximum of 2.00 acres, however, during the Department conducted technical analysis it was determined that the parcel encompassing the place of use is 1.52 acres. Therefore, the Department can only verify 1.52 acres of historical use. This results in a modification to the Places of Use which is summarized in **Table 3** below. The flow rate of 12.40 GPM and the means of diversion will not be modified as part of this change application. **Figure 1** shows the elements of the Applicant's proposed change. Application to Change Water Right No. 41K 30165051 revealed information related to the legal land descriptions for the claimed places of use. Due to more accurate legal land descriptions, aerial photos, and advancements with technology, the Department has determined that one of the listed places of use is not actually irrigated as part of Statement of Claim No. 41K 210274-00.

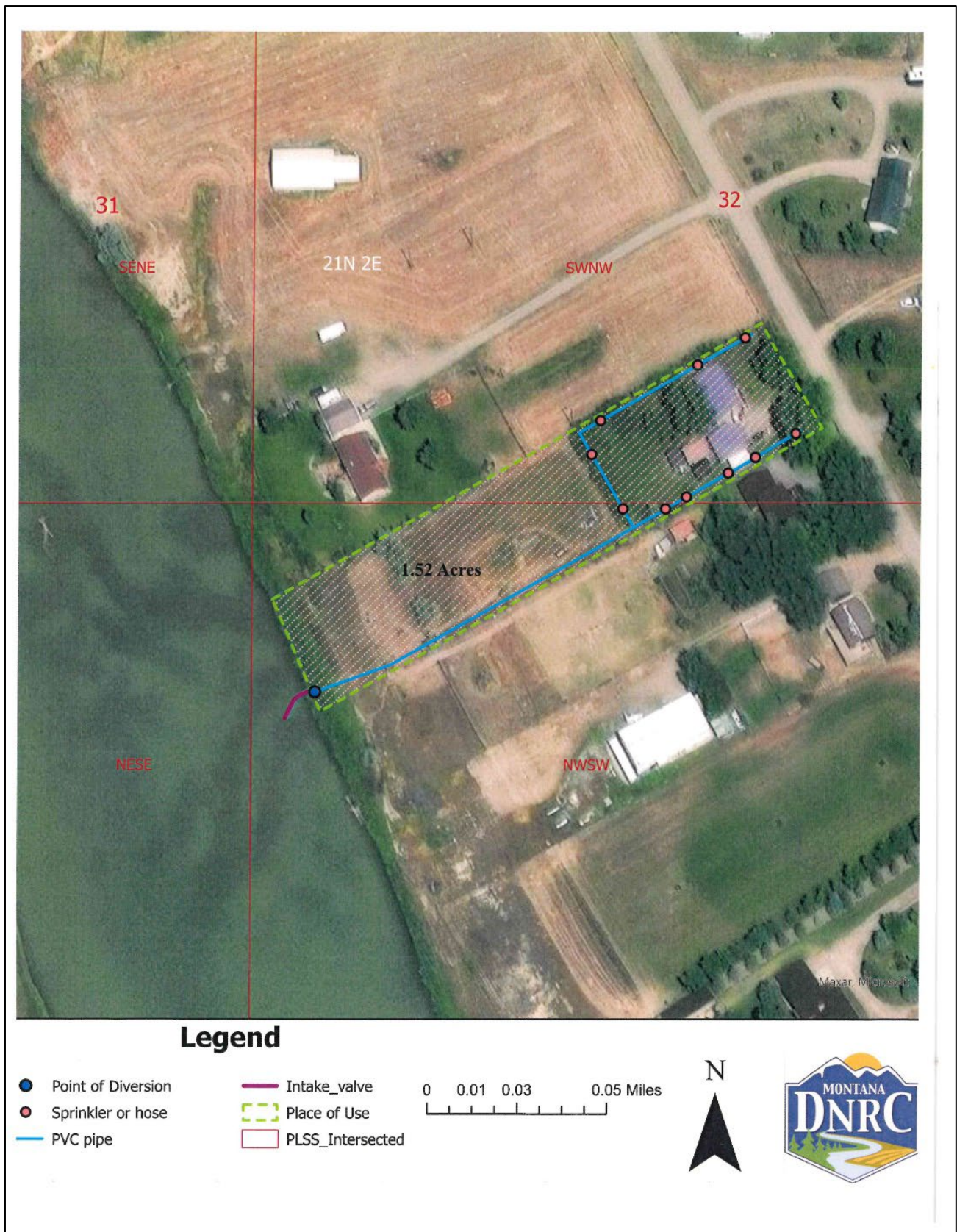


Figure 1. Historical and proposed use map for change application 41K 30165051

CHANGE CRITERIA

5. 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.

6. 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

7. Statement of Claim No. 41K 210274-00 has a priority date of October 7, 1892, but an enforceable priority date of June 30, 1973. This is due to a late filing date of July 21, 1982. As mandated by section 85-2-221(3), MCA, this claim is subordinate, and therefore junior, to all Indian and federal reserved water rights and all valid timely filed claimed based on state law.

8. Claimed Place of Use description:

Table 2: Places of Use for Statement of Claim No. 41K 210274-00

ID	Size	LLD
1	1.00	NWNWSW Section 32 TWP 21N RGE 2E
2	0.85	SWSWNW Section 32 TWP 21N RGE 2E
3	0.15	NENESE Section 31 TWP 21N RGE 2E

a. The Water Resource Survey (WRS) shows that this area has been historically irrigated, encompassing the Applicant's claimed places of use. The WRS photos show irrigation in the NWNWSW of Section 32 TWP 21N RGE 2E and SWSWNW Section 32 TWP 21N RGE 2E. The claimed place of use NENESE Section 31 TWP 21N RGE 2E was not historically irrigated as seen in Figure 1 above. Aerial photos MX-4G-31 & MX-4G-31 in Cascade County dated August 28, 1950.

b. The department considers the information submitted by the Applicant to be in alignment with historical water use in the area. The Applicant is not the original claimant; therefore, some historical water use knowledge is not firsthand and was gleaned from the original claim file and Water Resource Survey photos.

Table 3: Proposed places of use. LLD's for Applicant's tax parcel.

ID	Size (acres)	LLD
1	0.85	NWNWSW Section 32 TWP 21N RGE 2E
2	0.67	SWSWNW Section 32 TWP 21N RGE 2E

9. Statement of Claim 41K 210274-00 historically had an undefined diverted volume and consumptive volume. These volumes were calculated as part of the Technical Analysis for change application 41K 30165051 to quantify this appropriation. Whilst these volumes are undefined on

the general abstract for 41K 210274-00, the original Applicant claimed 4.16 AF/YR. This figure is less than half of the total diverted volume calculated for the Applicant's proposed irrigation. Additionally, the acreage was historically undefined. The general abstract for 41K 210274-00 communicates a maximum acreage of 2.00. In tandem with clarifying the volumes associated with 41K 210274-00, a more precise figure was determined as part of the Department's Technical Analysis. The actual maximum acreage for the Applicant's place of use, as verified by the Department, is 1.52 acres.

10. Historically consumed volume use was calculated per ARM 36.12.1902(16). For more detail see the figures represented in **Table 4** below. These are based on location of the historical place of use and information submitted by the Applicant. The general abstract for Statement of Claim No. 41K 210274-00 does not define the historically irrigated acreage or the specific volume demands associated with this beneficial use. This information was collected as part of the Department completed technical analysis in accordance with administrative rule and department standard practices (ARM 36.12.1303).

Table 4: Historically consumed volume (HCV) and field application volume for the historical place of use:

[Cascade County] [Sun River] [Sprinkler] ET (Inches)	Historical (1964-1973) Management Factor, [Cascade County]	Historically Irrigated Acres	HCV (<i>Excluding IL</i>)	On- Farm Efficiency	Field Application Volume	Historical Irrecoverable Losses (IL): [<i>Sprinkler</i>]	HCV (<i>Including IL</i>)
18.10	57.3%	1.52	1.41	70%	2.02 AF	0.2	1.61

11. There are no supplemental water rights linked to Statement of Claim No. 41K 210274-00 at the time of the change application.

12. Description of the **historical point of diversion, means of conveyance, and historical flow rate.**

- a. The historically claimed point of diversion is NENESE Section 31 TWP 21N RGE 2E in Cascade County.
- b. According to a Statement of Claim for Existing Water Rights form filed by the original water right owner, which was received by the Department on March 18, 1983, the means of diversion is a pump with a capacity of 75 GPM.

c. Limited information was provided regarding Means of Conveyance at the time of original filing. The box for pipeline is checked and a pump with a 75 GPM capacity were used to divert water.

d. The historical conveyance system had the capacity to irrigate based off proof of irrigation in the WRS aerial photos.

13. Both the historically claimed period of diversion and period of use are May 1 to October 31. The water right is used consistently throughout the period of use for sprinkler irrigation.

14. The total historically diverted volume is 2.02 acre-feet. As part of the evaluation for Change Application No. 41K 30165051, the Department has quantified the volumes associated with the Applicant's beneficial use. This information is detailed further in **Tables 5 & 6** below.

Table 5: Historically diverted volume of Statement of Claim No. 41K 210274-00

Water Right Number	Field Application Volume	Conveyance Loss Volume	Historically Diverted Volume
41K 210274-00	2.02 AF	0 AF	2.02 AF

15. The Department finds the following historical use.

Table 6: Summary of historical use findings for Statement of Claim No. 41K 210274-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
41K 210274-00	June 30, 1973	2.02 AF	12.40 GPM	Irrigation (1.52 acres)	1.61 AF	See Table 2 above	NENESE Section 31 TWP 21N RGE 2E

ADVERSE EFFECT

FINDINGS OF FACT

16. Through Change Application 41K 30165051, the Applicant is proposing to change the point of diversion from NENESE Section 31 TWP 21N RGE 2E to NWNWSW Section 32 TWP 21N RGE 2E. The purpose is sprinkler irrigation and in this case the Applicant is irrigating grass. These elements are proposed to remain unchanged from the historical use. The flow rate is proposed to remain the same as the 12.40 GPM historically authorized. According to information available on the pump manufacturers website, the pump capacity for the Applicant's Red Lion 3 HP model 614481 is 124 GPM. Although the capacity is greater than the permitted flow rate, the pump can be operated at 12.40 GPM or less as historically demonstrated by the Applicant.

17. The only proposed change to Statement of Claim No. 41K 210274-00 is to change the Legal Land Description where water is diverted from the Sun River, fundamentally leaving the water right appropriation identical to its historical use. The Point of Diversion will change from NENESE Section 31 TWP 21N RGE 2E to NWNWSW Section 32 TWP 21N RGE 2E. Proposed volume was calculated using the DNRC Irrigation Calculator tool that adheres to Water Use Standards established in 36.12.115.

18. The proposed change will not cause adverse effect to other water users. The proposal in change application 41K 30165051 does not alter the demands or timing of water needs on the Sun River. Although it does change the location where water is diverted from the river, it is moving laterally across the river, to the NWNWSW of Section 32 TWP 21N RGE 2E. This is neither an upstream nor downstream move. Additionally, the claim file for Statement of Claim 41K 210274-00 indicate that water has likely been diverted from the NWNWSW of Section 32 TWP 21N RGE 2E since early 1983. However, this was an unauthorized change in point of diversion that went against statements made in the original claim filing. Amending this unauthorized change in point of diversion is the sole intention of change application 41K 30165051 in response to issue remarks.

19. After evaluating the Applicant's means of diversion the Department has determined that no conveyance losses are expected from the Applicant's conveyance system. Water is diverted from the Sun River with an intake valve that is then pumped into a 2-inch PVC pipe system which distributes water to 10 separate sprinkler or hose sites across the property.

20. There will be no change to the pattern or timing of water diverted from the Sun River as a result of this application.

21. Return flows were not analyzed for Change Application 41K 30165051 because they will enter back into the source where they have historically returned upstream of or at the location of the next downstream appropriator.

22. The Applicant has the ability to respond to call by turning off the pump, which can be accessed through their backyard.

23. The Department finds that no other water rights will be adversely affected because of this change due to the non-invasive nature of the proposal. The intention is to amend an unauthorized change in point of diversion that occurred after June 30, 1973. The proposed purpose will not cause adverse effect because there are no changes to the purpose, flow rate or place of use.

24. As part of the Department conducted technical analysis, it was determined that the place of use legal land descriptions were not accurately reflecting the irrigated acreage on the Applicant's property. One place of use has been removed entirely. The other two have had their acreage modified to reflect the correct LLD's. **Table 3** above reflects the Applicant's place of use for irrigation, as interpreted by the Department, given the resources available at the time of determination.

25. The Applicant proposes to divert 2.02 AF of water from the Sun River to irrigate their 1.52-acre property from May 1 to October 31. Crop consumptive volume would be 1.41 AF. Irrecoverable losses account for 0.2 AF/YR, resulting in a total consumptive volume of 1.61 AF, unchanged from the historical appropriation.

BENEFICIAL USE

FINDINGS OF FACT

26. The Applicant is proposing to change Statement of Claim No. 41K 210274-00 by changing the legal land description for the point of diversion. Flow rate and volume are proposed to remain unchanged. Volume was not quantified for Statement of Claim No. 41K 210274-00 as the time of original filing, however, as part of the change process, the volume was calculated to quantify the Applicant's appropriation. Proposed diverted volume is 2.02 AF and the proposed consumptive volume is 1.61 AF. Irrigation is recognized as a beneficial use by the Department as noted in MCA § 85-2-102(5)(a). There are no proposed changes to the purpose of this water right and the flow rate is proposed to remain the same 12.40 GPM.

ADEQUATE DIVERSION

FINDINGS OF FACT

27. The Applicant proposes to divert water from the Sun River with an intake valve that will funnel water through a Red Lion 3 HP pump. The model number provided by the Applicant, 614481, is advertised as a sprinkler pump with a 124 GPM capacity and a maximum pressure of 59 PSI. This diversion setup allows the Applicant to adequately divert water for the proposed purpose.

28. The Department finds that the proposed diversion is adequate for the proposed flow rate.

POSSESSORY INTEREST

FINDINGS OF FACT

29. The Applicant signed the affidavit on the Application to Change a Water Right form (Form 606) affirming their 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 Department file 41K 30165051.

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).¹

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

¹ 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*, ¶¶ 43-45.²

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.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, ¶ 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*

² See also *Holmstrom Land Co., Inc., v. Newlan Creek Water District*, 185 Mont. 409, 605 P.2d 1060 (1979); *Lokowich v. Helena*, 46 Mont. 575, 129 P. 1063 (1913); *Thompson v. Harvey*, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896) (change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under § 85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. 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).⁴

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

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

subsequent water users).⁵

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).

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. *Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, 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. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. *E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. *See MacDonald*, 220 Mont. at 529, 722 P.2d at 604; *Featherman*, 43 Mont. at 316-17, 115 P. at 986; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

40. The Department has adopted a rule providing for the calculation of historic consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No. 15).

41. If an Applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g., Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*; *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217, 1223-1224 (Colo., 1988) (historical use of a water right could very well be less than the duty of water); *Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water").

42. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 41K 210274-00 to be a diverted volume of 2.02 AF, a historically consumed volume of 1.61 AF, and flow rate of 12.40 GPM. (FOF Nos. 7-15)

43. 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. 16-25)

BENEFICIAL USE

44. 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).

45. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 2.02 acre-feet of diverted volume and 12.40 GPM flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF No. 26).

ADEQUATE MEANS OF DIVERSION

46. 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).

47. 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. 27-28)

POSSESSORY INTEREST

48. 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.

49. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 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. 41K 30165051 should be granted subject to the following.

The Applicants may change the point of diversion from NENESE of Section 31 TWP 21N RGE 2E to the NWNWSW of Section 32 TWP 21N RGE 2E.

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 7 Day of March 2025.

/Original signed by Steven Hamilton/

Regional Manager

Lewistown Regional Office

Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 7 day of March, 2025, by first class United States mail.

PETER & MONICA WOELKERS
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GREAT FALLS, MT 59404

LEWISTOWN Regional Office, (406) 538-7459