

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

* * * * *

**APPLICATIONS TO CHANGE WATER
RIGHT NOS. 42KJ 30164394 AND 42KJ
30165338 BY STEVEN & PATRICIA
THOENY**

**DRAFT PRELIMINARY
DETERMINATION TO GRANT
CHANGES**

* * * * *

On September 3, 2024, Steven & Patricia Thoeny (Applicants) submitted Application to Change Water Right No. 42KJ 30164394 to change Groundwater Certificate 42KJ 30115997 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Application was first determined to be correct and complete as of October 16, 2024. On January 29, 2025, the Applicants submitted a request to modify the application pursuant to ARM 36.12.1401, which reset application timelines. Change Application No. 42KJ 30165338 was created for the temporary portion of the change application. The Department published receipt of this application on its website. Following the resetting of timelines, the amended Change Application No. 42KJ 30164394 and new Change Application No. 42KJ 30165338 were determined to be correct and complete as of March 28, 2025. An Environmental Assessment for both applications was completed on April 4, 2025.

INFORMATION

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

Application as filed:

- Application for Change of Appropriation Water Right, Additional Stock Tanks, Form 606-ST
- Attachments:
 - Montana Sage Grouse Habitat Conservation Program consultation letter, dated May 2, 2024
 - Montana DNRC Trust Lands Management Division Authorization for Temporary Change in Appropriation Right Consent Form, for State Agricultural and Grazing Lease No. 2063, dated July 28, 2024

- Maps:
 - 2011 topographic map showing the existing place of use and point of diversion, and proposed place of use for Groundwater Certificate 42KJ 30115997, made July 29, 2024
 - 2011 topographic map with existing place of use and point of diversion, and proposed place of use and means of conveyance for Groundwater Certificate 42KJ 30115997 drawn on, made July 29, 2024
 - Undated aerial imagery overlayed with proposed place of use and means of conveyance on State Trust Lands Management Division section, made April 18, 2024
- Department-completed Technical Analyses based on information provided in the Form 606-ST Change Application, dated April 18, 2025

Information Received after Application Filed

- Application Amendment Form 655, received January 29, 2025
 - Undated topographic map overlayed with the additional proposed places of use and means of conveyance created by NRCS, made January 29, 2025

Information within the Department's Possession/Knowledge

- Water right file for Groundwater Certificate 42KJ 30115997
- DNRC water rights database
- DNRC change manual

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.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicants propose two changes to Groundwater Certificate 42KJ 30115997. Change Application No. 42KJ 30164394 is a permanent change to the place of use to include five (5) new

tanks. Change Application No. 42KJ 30165338 is a temporary change to the place of use to include the five (5) permanent tanks and two (2) temporary tanks on land owned by the State of Montana and managed by DNRC School Trust Lands Management Division (TLMD). Because two (2) of the places of use are temporary and will expire, while the five (5) others are permanent, two applications were created. Both the temporary and permanent changes were described together in the Technical Analyses document and will be described together in this preliminary determination.

2. Groundwater Certificate 42KJ 30115997 was filed for 30 GPM and 8.5 AF diverted volume for stock use. The project is in Rosebud County and the source is groundwater. The point of diversion is a groundwater well in the SWSWSE Sec. 31, T8N, R42E. The historical place of use includes three stock tanks located in the SWSWSE Sec. 31, T8N, R42E; NWSENE Sec. 1, T7N, R41E; and Gov't Lot 3 (SWNESW), Sec. 1, T7N, R41E, connected by a pipeline system.

Table 1: Water Right Proposed for Change

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of Diversion	Place of Use	Priority Date
42KJ 30115997	Stock	30 GPM	8.5 AF	Jan 1 – Dec 31	SWSWSE Sec. 31, T8N, R42E, Rosebud County	See Table 2	01/29/2018

Table 2: Historical Place of Use of Water Right Proposed for Change

Gov't Lot	Quarter Sections	Section	Township	Range	County
	SWSWSE	31	8N	42E	Rosebud
	NWSENE	1	7N	41E	Rosebud
3	SWNENW	1	7N	41E	Rosebud

3. Statement of Claim 42KJ 16907-00 and Statement of Claim 42KJ 108284-00 both overlap the historical place of use for Groundwater Certificate 42KJ 30115997 and are for the same purpose of stock. Statement of Claim 42KJ 16907-00 and Statement of Claim 42KJ 108284-00 are surface water rights for the same on-stream dam in the SENE Sec. 1, T7N, R41E, and are used to service the same herd as Groundwater Certificate 42KJ 30115997. The source of the two claims is an unnamed tributary to Horse Creek which is ephemeral and unreliable. The herd will use the various sources as available to them. These water rights are not proposed for change.

4. Statement of Claim 42KJ 16909-00 is also an overlapping water right for a groundwater well with a purpose of stock. This well was abandoned and is no longer used. It was replaced by

Groundwater Certificate 42KJ 30115997. Statement of Claim 42KJ 16909-00 is not proposed for change.

5. Statement of Claim 42KJ 16905-00 and Statement of Claim 42KJ 16906-00 both serve the same herd and generally overlap the proposed place of use in the NENENE Sec. 2, T7N, R41E for Change Application No. 42KJ 30164394 and 42KJ 30165338. Statement of Claim 42KJ 16905-00 is for a well with a purpose of stock and a period of use from May 1 to October 19. The Applicants do not use this well or water right because they range cattle all year round and do not want to be limited by the seasonal period of use. Statement of Claim 42KJ 16906-00 is a surface water right for an on-stream dam on an unnamed tributary of Horse Creek. The source is ephemeral and unreliable. The herd will use the various sources as available to them.

6. There are no previous change authorizations to this water right.

CHANGE PROPOSAL

FINDINGS OF FACT

7. The Applicants propose a temporary and permanent change to the place of use of Groundwater Certificate 42KJ 30115997. The Applicants propose to add five (5) new tanks through permanent Change Application No. 4KJ 30164394 for a total of eight (8) tank locations. The proposed permanent places of use for Change Application No. 42KJ 30164394 are the three (3) historical tanks (Table 2), and five (5) new tanks in the following: SENESW Sec. 1, T7N, R41E; Gov't Lot 2 (W2NWNE) Sec. 2, T7N, R41E; NENWSE Sec. 2, T7N, R41E; SWSENE Sec. 35, T8N, R41E; and SWNWSW Sec. 35, T8N, R41E. The places of use are described in Table 3 and shown in Figure 1.

Table 3: Proposed place of use for Change Application No. 42KJ 30164394

ID	Gov't Lot	Quarter Section	Section	Township	Range	County	Land Ownership
1		SWSWSE	31	8N	42E	Rosebud	Thoeny
2		NWSENE	1	7N	41E	Rosebud	Thoeny
3	3	SWNENW	1	7N	41E	Rosebud	Thoeny
4		SENESE	1	7N	41E	Rosebud	Thoeny
5	2	W2NWNE	2	7N	41E	Rosebud	Thoeny
6		NENWSE	2	7N	41E	Rosebud	Thoeny
7		SWSENE	35	8N	41E	Rosebud	Thoeny
8		SWNWSW	35	8N	41E	Rosebud	Thoeny

8. The Applicants propose to add seven (7) new tanks in temporary Change Application No. 4KJ 30165338 for a total of ten (10) tank locations. The proposed places of use for temporary Change Application No. 42KJ 30165338 are the three (3) historical tanks (Table 2), the five (5) permanent tanks in Change Application No. 42KJ 30164394 (Table 3), and two (2) temporary tanks located in the NWSESE and NESENW of Section 36, T8N, R41E. The places of use are described in Table 4 and shown in Figure 2.

Table 4: Proposed place of use for temporary Change Application No. 42KJ 30165338

ID	Gov't Lot	Quarter Section	Section	Township	Range	County	Land Ownership
1		SWSWSE	31	8N	42E	Rosebud	Thoeny
2		NWSENE	1	7N	41E	Rosebud	Thoeny
3	3	SWNENW	1	7N	41E	Rosebud	Thoeny
4		SENESE	1	7N	41E	Rosebud	Thoeny
5	2	W2NWNE	2	7N	41E	Rosebud	Thoeny
6		NENWSE	2	7N	41E	Rosebud	Thoeny
7		SWSENE	35	8N	41E	Rosebud	Thoeny
8		SWNWSW	35	8N	41E	Rosebud	Thoeny
9		NWSESE	36	8N	41E	Rosebud	State of Montana
10		NESENW	36	8N	41E	Rosebud	State of Montana

The temporary places of use are on land owned by the State of Montana and managed by DNRC TLMD. These places of use are being added through a temporary change in appropriation right to use the lessee's water right on school trust land for the duration of State Agricultural and Grazing Lease No. 2063 (State Lease AG-2063) pursuant to §§85-2-407 and -441, MCA. The temporary change will expire February 28, 2027, in conjunction with State Lease AG-2063. State Lease AG-2063 took effect March 1, 2017, for a term of 10 years, with an expiration date of February 28, 2027. In the instance temporary Change Authorization 42KJ 30165338 is not

renewed, expires, or is terminated, Groundwater Certificate 42KJ 30115997 will be used in accordance with the terms set forth in the change version established through Change Application No. 42KJ 30164394. There will be no changes to point of diversion, period of diversion, period of use, flow rate, volume, or purpose.

9. The five (5) additional tanks being permanently added through Change Application No. 42KJ 30164394 are included in the total seven (7) tanks as the proposed temporary place of use for Change Application No. 42KJ 30165338. If both changes are authorized, temporary Change Authorization No. 42KJ 30165338 will be the active version of the water right and the place of use for the temporary change is ten (10) tanks until such time the change authorization expires and Groundwater Certificate 42KJ 30115997 reverts to the three (3) historical tanks and five (5) permanent tanks authorized in Change Application No. 42KJ 30164394.

10. Should Change Application No. 42KJ 30165338 be authorized, the following condition will be added to the water right to satisfy the possessory interest criterion:

IN THE PRESENT CASE, THE APPLICANTS ARE THE OWNER OF GROUNDWATER CERTIFICATE 42KJ 30115997. THE APPLICANTS PROPOSE TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO 2063. THE APPLICANTS OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42KJ 30115997 ON THE STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42KJ 30165338, AND GROUNDWATER CERTIFICATE 42KJ 30115997 WILL REVERT TO THE PREVIOUS ACTIVE CHANGE VERSION.

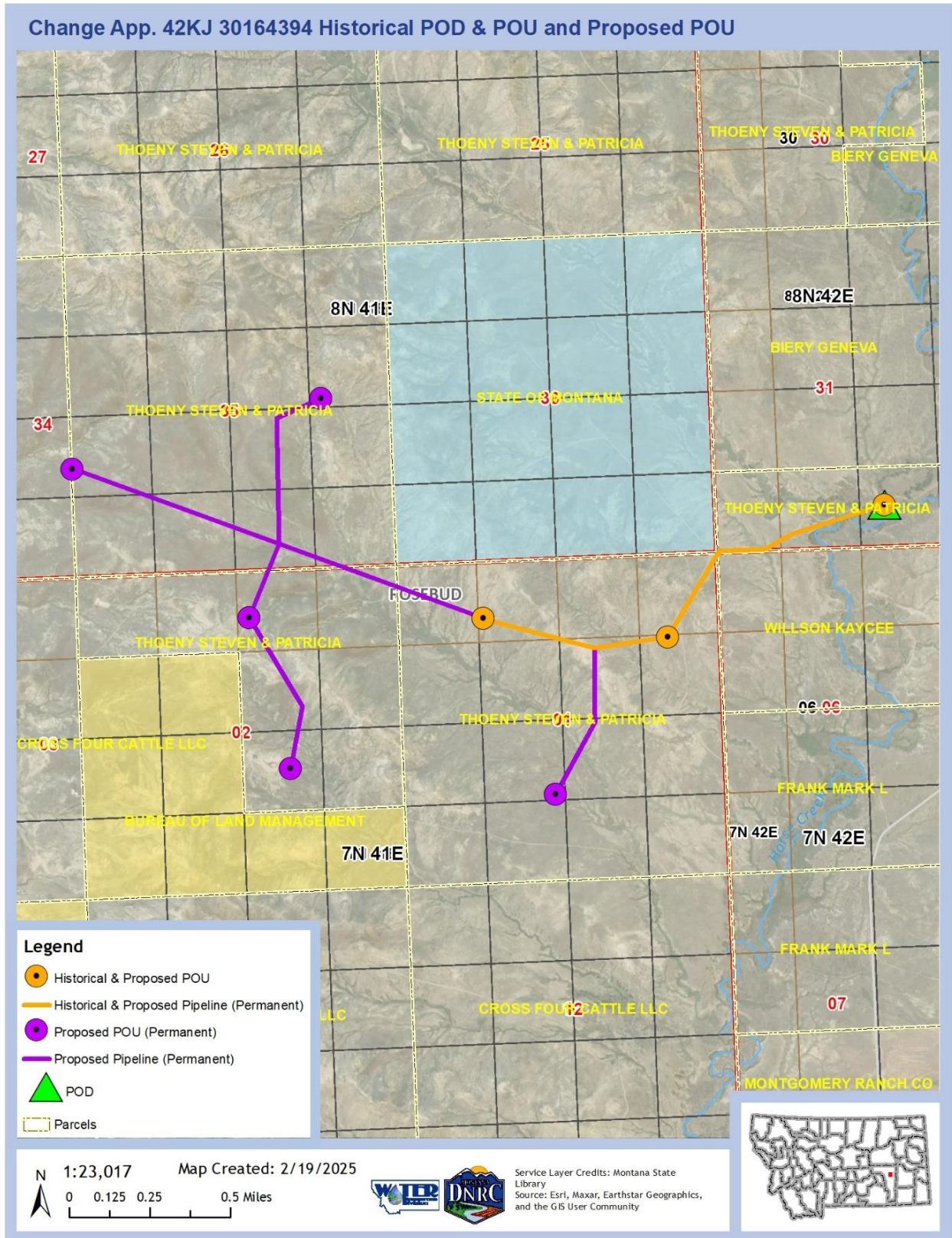


Figure 1: Map of POD and proposed POU for Change Application No. 42KJ 30164394

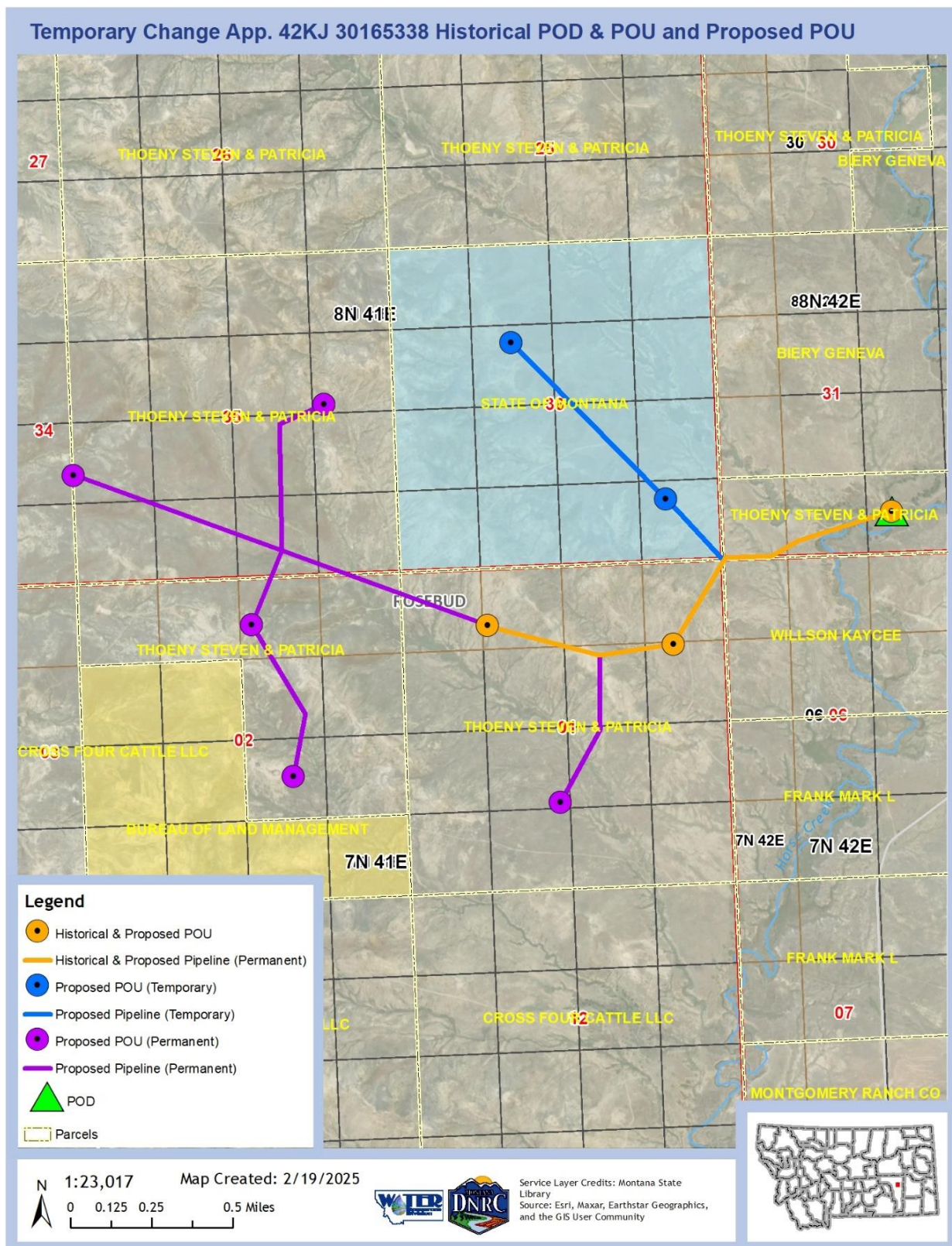


Figure 2: Map of POD and proposed POU for temporary Change Application No. 42KJ 30165338

CHANGE CRITERIA

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

12. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, ¶¶ 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).

13. In addition to the § 85-2-402(2), MCA, Applicants for a temporary change authorization must comply with the requirements and conditions set forth in § 85-2-407, MCA. Section 85-2-441, MCA, provides that a water right owner may temporarily apply water diverted from a well or developed spring located on private land to beneficial use on state trust land for the duration of a state land lease held by the water right owner. Pursuant to § 85-2-407, MCA, a temporary change may be approved for a period not to exceed 10 years. Upon expiration of the temporary change, the water right will automatically revert to its original terms. This temporary change may be renewed an indefinite number of times but may not exceed 10 years for each renewal. An application for renewal requires the written consent of the DNRC TLMD.

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

14. The historical point of diversion for Groundwater Certificate 42KJ 30115997 is a groundwater well used for stock in the SWSWSE Section 31, T8N, R42E, Rosebud County. It has a priority date of January 29, 2018. The historical place of use are three tanks in the SWSWSE Sec. 31, T8N, R42E, and the NWSENE and Government Lot 3 (SWNENW), Sec. 1, T7N, R41E, Rosebud County. The Applicants propose to permanently change the place of use of Groundwater Certificate 42KJ 30115997 in Change Application No. 42KJ 30164394 and temporarily change the place of use in Change Application No. 42KJ 30165338. The Applicants propose to add five (5) new tanks in five (5) new places of use through Change Application No. 42KJ 30164394, and seven (7) new tanks (with two (2) of them being temporary) in seven (7) new places of use through Change Application No. 42KJ 30165338.

15. A pipeline system connects the tanks in the places of use to the point of diversion. The existing tanks have an approximate 1,000-gallon capacity and are equipped with floats which turn off water to the tank when the tank is full. There are no losses associated with the historical conveyance system.

16. The flow rate is 30 GPM for 8.5 AF of water annually. The historical flow rate of 30 GPM is based on the amount of time to fill a 5-gallon bucket measured with a stopwatch. This is supported by information provided in the Notice of Completion of Groundwater Development as filed on January 29, 2018, and by the air test completed by the well driller noted on the Well Log Report, GWIC 294156.

17. The stock purpose is for up to 500 head of cattle (animal units or AU) from January 1 to December 31. The volume of 8.5 AF was determined using the Department standard for livestock of 15 GPD/AU or 0.017 AF/AU ($500 \text{ AU} * 0.017 \text{ AF/AU} = 8.5 \text{ AF}$). Stock use is considered 100% consumptive therefore the historical consumed volume and historical diverted volume are the same, and the Department finds the historical consumed and diverted volume is 8.5 AF, as shown in Table 4.

Table 4. Historical consumed and diverted volumes

Purpose	Animal Units	Consumed Volume	Diverted Volume
Stock	500 AU	8.5 AF	8.5 AF

18. Statement of Claim 42KJ 16907-00 and Statement of Claim 42KJ 108284-00 both overlap the historical place of use for Groundwater Certificate 42KJ 30115997 and are for the same purpose of stock. Statement of Claim 42KJ 16907-00 and Statement of Claim 42KJ 108284-00 are surface water rights for the same on-stream dam in the SENE Sec. 1, T7N, R41E and are used to service the same herd as Groundwater Certificate 42KJ 30115997. The source of the two claims is an unnamed tributary to Horse Creek which is ephemeral and unreliable. Statement of Claim 42KJ 30112138 is owned by the Montana State Board of Land Commissioners for stock use from Schultz Creek in the E2, Sec. 36, T8N, R41E and overlaps the proposed place of use. The Applicants may be able to use this water right while leasing the section. The Applicants' herd will use the various sources as available to them. Statement of Claim 42KJ 16909-00 is also an overlapping water right for a groundwater well with a purpose of stock. This well was abandoned and is no longer used. It was replaced by Groundwater Certificate 42KJ 30115997.

19. The Department finds the historical use, as shown in Table 5.

Table 5. Summary of historical use findings for Groundwater Certificate 42KJ 30115997

Priority Date	Flow Rate (GPM)	Purpose	Diverted Volume (AF)	Consumptive Volume (AF)	Place of Use	Point of Diversion
January 29, 2018	35	Stock	8.5	8.5	SWSWSE Sec. 31, T8N, R42E; NWSENE, Sec. 1, T7N, R41E; Gov't Lot 3 (SWNENW), Sec. 1, T7N, R41E, Rosebud County	SWSWSE Sec. 31, T8N, R42E, Rosebud County

ADVERSE EFFECT

FINDINGS OF FACT

20. The historical use for Groundwater Certificate 42KJ 30115997 is for 30 GPM up to 8.5 AF for stock purposes for 500 AU from January 1 to December 31 (Table 5). In Change Application No. 42KJ 30164394, the Applicants propose to supply water from the existing well to five (5) additional stock tanks, for a total of eight (8) tanks supplied through the pipeline system. In Change Application No. 42KJ 30165338, the Applicants propose to temporarily supply water to seven (7) additional stock tanks, for a total of ten (10) tanks supplied through the pipeline system. In both Change Applications, the herd size will not increase under the proposed change. Neither the flow rate nor the volume will increase as part of these changes. There will be no change in the rate or timing of stock use. Only the place of use will change due to the addition of stock tanks. Water will be conveyed to the additional stock tanks through a pipeline so there will be no conveyance losses. The Applicants propose to equip each stock tank with float/shut-off valves to control flow to the tanks. All tanks are automatically shut off via float valve. The Applicants can shut off the well pump if call is made. There are no plans or requirements to measure diversion or use from this system. The Department finds there will be no adverse effect as a result of this change.

BENEFICIAL USE

FINDINGS OF FACT

21. For both Change Application No. 42KJ 30164394 and 42KJ 30165338, the Applicants propose to use water for stock which is recognized as a beneficial use under the Montana Water Use Act. §85-2-102 (5), MCA. These changes authorizing additional places of use will allow the Applicants to rotate grazing and better manage the range and their cattle herd.

22. The Applicants propose to use 30 GPM flow rate, and 8.5 AF diverted volume. This amount is supported by the historical beneficial use and Department standards. The volume of 8.5 AF is the maximum amount consumed by the Applicants' livestock.

23. The Applicants have existing, overlapping water rights on the historical and proposed places of use, but these rights are unreliable or not in use.

24. The Department finds that stock is a beneficial use, and the flow rate and volume are the amounts of water necessary for stock.

ADEQUATE DIVERSION

FINDINGS OF FACT

25. The Applicants divert water by means of a groundwater well, GWIC ID 294156. The well is 120 feet in depth and was drilled by a licensed well driller. The well is connected to a 1.5-mile-long buried pipeline system of 1.5-inch HDP pipe which conveys water to the existing places of use. Each historical place of use has an approximately 1,000-gallon tank. The three tanks are equipped with shut off valves and ball valves with floats to control the level of the water and/or shut off water. The well has a 1 HP pump which can provide the flow rate necessary to maintain the tanks as the level set by the float valves. The well has a shut off valve and the pump can be shut off if valid call is made.

26. In Change Application No. 42KJ 30164394, the proposed places of use will be served by the existing pipeline and approximately 3 miles of new pipeline to connect the five (5) proposed tanks. The proposed pipeline will be buried 1.5-inch HDP pipe and will attach to the existing pipeline in two places: at the end of the existing pipeline at Tank 3 in Gov't Lot 3 (SWNENW) Sec. 1, T7N, R41E; and between Tanks 2 and 3 in the NWSWNE Sec. 1, T7N, R41E. The proposed five (5) new tanks will have an approximate 1,500-gallon capacity each. The new tanks will be equipped with shut off valves and ball valves with floats to control the level of the water and/or shut off water. The proposed pipeline and tank system is designed by the US Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS). The Department finds the proposed means of diversion and conveyance systems to be adequate for Change Application No. 42KJ 30164394.

27. In Change Application No. 42KJ 30165338, the proposed places of use will be served by the existing pipeline, approximately 3 miles of new pipeline to connect the five (5) proposed permanent tanks, and a 1.0-mile-long extension added from the SESW Sec. 31, T8N, R42E, onto TLMD land to service the two (2) temporary tanks. The proposed pipeline will be buried 1.5-inch HDP pipe and will attach to the existing pipeline in three places: at the end of the existing pipeline at Tank 3 in Gov't Lot 3 (SWNENW) Sec. 1, T7N, R41E; between Tanks 2 and 3 in the NWSWNE Sec. 1, T7N, R41E; and in the SESESE corner of Sec. 36, T8N, R41E. The proposed seven (7) new tanks will have an approximate 1,500-gallon capacity each. The new tanks will be equipped with shut off valves and ball valves with floats to control the level of the water and/or shut off water. The proposed pipeline and tank system is designed by the USDA NRCS. The Department

finds the proposed means of diversion and conveyance systems to be adequate for Change Application No. 42KJ 30165338.

POSSESSORY INTEREST

FINDINGS OF FACT

28. 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. All places of use proposed in permanent Change Application No. 42KJ 30164394 are owned by the Applicants.

29. For Change Application No. 42KJ 30165338, some of the proposed places of use are located on property owned by the State of Montana TLMD and leased by the Applicants. These places of use are being added through a temporary change in appropriation right to use the lessee's water right on school trust land for the duration of State Lease AG-2063 pursuant to §§85-2-407 and -441, MCA. Authorizations for Temporary Change in Appropriation Right for the lease was signed by the Applicant on July 22, 2024, signed by Chris Pileski for the DNRC Eastern Land Office on October 17, 2024, and signed by Elizabeth Miller for DNRC TLMD Ag and Grazing Bureau on July 29, 2024. State Lease AG-2063 took effect March 1, 2017, for a term of 10 years with an expiration date of February 28, 2027. If the Applicants renew the lease, they must apply to renew the temporary change authorization to continue using these places of use.

30. The following condition is proposed to satisfy the possessory interest criterion: IN THE PRESENT CASE, THE APPLICANTS ARE THE OWNER OF GROUNDWATER CERTIFICATE 42KJ 30115997. THE APPLICANTS PROPOSE TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO 2063. THE APPLICANTS OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42KJ 30115997 ON THE STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42KJ 30165338, AND GROUNDWATER CERTIFICATE 42KJ 30115997 WILL REVERT TO THE PREVIOUS ACTIVE CHANGE VERSION.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

31. 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

32. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11, 103 P.2d at 1072-74; *Matter of Royston*, 249

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

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

33. 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 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

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

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

34. 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 subsequent water users).⁵

35. 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;

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.)

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).

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

36. 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).

37. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of 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.

38. Based upon the Applicants' evidence of historical use, the Applicants have proven by a preponderance of the evidence the historical use of Groundwater Certificate 42KJ 30115997 to be a diverted volume of 8.5 AF, a historically consumed volume of 8.5 AF, and flow rate of 30 GPM. (FOF Nos. 14-19)

39. Based upon the Applicants' comparative analysis of historical 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 No. 20)

BENEFICIAL USE

40. Change Applicants 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).

41. Applicants propose to use water for stock which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence stock is a beneficial use and that 8.5 AF of diverted volume and 30 GPM flow rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 21-24).

ADEQUATE MEANS OF DIVERSION

42. Pursuant to § 85-2-402 (2)(b), MCA, the Applicants 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).

43. Pursuant to § 85-2-402 (2)(b), MCA, Applicants have 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. 25-27)

POSSESSORY INTEREST

44. Pursuant to § 85-2-402(2)(d), MCA, the Applicants 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.

45. The Applicants have 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. 28-30)

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. 42KJ 30164394 should be GRANTED subject to the following.

The Department determines the Applicants may change Groundwater Certificate 42KJ 30115997 by permanently adding five (5) additional places of use. The Applicants will add five (5) new tanks in the SENESW Sec. 1, T7N, R41E; Gov't Lot 2 (W2NWN) Sec. 2, T7N, R41E; NENWSE Sec. 2, T7N, R41E; SWSENE Sec. 35, T8N, R41E; and SWNWSW Sec. 35, T8N, R41E, Rosebud County, for stock use. There will be no changes to point of diversion, period of diversion, period of use, flow rate, volume, or purpose.

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 42KJ 30165338 should be GRANTED subject to the following.

The Department determines the Applicants may change Groundwater Certificate 42KJ 30115997 by temporarily adding seven (7) additional places of use. The Applicants will add seven (7) new tanks in the SENESW Sec. 1, T7N, R41E; Gov't Lot 2 (W2NWN) Sec. 2, T7N, R41E; NENWSE Sec. 2, T7N, R41E; SWSENE Sec. 35, T8N, R41E; SWNWSW Sec. 35, T8N, R41E; and NWSESE and NESENW of Section 36, T8N, R41E, Rosebud County. Part of the proposed place of use is on land owned by the State of Montana and managed by DNRC School Trust Lands Management Division. These places of use are being added through a temporary change in appropriation right to use the lessee's water right on school trust land for the duration of State Agricultural and Grazing Lease No. 2063 (State Lease AG-2063) pursuant to §§85-2-407 and -441, MCA. The temporary change will expire February 28, 2027, in conjunction with State Lease AG-2063. State Lease AG-2063 took effect March 1, 2017, for a term of 10 years, with an expiration date of February 28, 2027. In the instance temporary Change Authorization 42KJ 30164394 is not renewed, expires, or is terminated, Groundwater Certificate 42KJ 30115997 will be used in accordance with the terms set forth on the original version of the water right. There will be no changes to point of diversion, period of diversion, period of use, flow rate, volume, or purpose. If granted, the Change Authorization will be subject to the following condition:

IN THE PRESENT CASE, THE APPLICANTS ARE THE OWNER OF GROUNDWATER CERTIFICATE 42KJ 30115997. THE APPLICANTS PROPOSE TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL &

GRAZING LEASE OF STATE LANDS AGREEMENT NO 2063. THE APPLICANTS OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42KJ 30115997 ON THE STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NO. 2063 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42KJ 30165338, AND GROUNDWATER CERTIFICATE 42KJ 30115997 WILL REVERT TO THE PREVIOUS ACTIVE CHANGE VERSION.

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 22nd day of April 2025.

/Original signed by Mark Elison/

Mark Elison, Manager
Billings 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 22nd day of April, 2025, by first class United States mail.

PATRICIA & STEVEN THOENY
827 QUARTER HORSE ROAD
ROSEBUD, MT 59347

BILLINGS Regional Office, (406) 247-4415