

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

**APPLICATION TO CHANGE WATER RIGHT)
NO. 76H 30159803 BY CITY OF HAMILTON } PRELIMINARY DETERMINATION TO
GRANT CHANGE**

On April 25, 2023, the City of Hamilton (Applicant) submitted Application to Change Water Right No. 76H 30159803 to change Provisional Permit (Permit) No. 76H 21-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website on May 1, 2023. A preapplication meeting was held between the Department and the Applicant on February 24, 2023. The Application was determined to be correct and complete on October 13, 2023. An Environmental Assessment for this Application was completed on February 7, 2024.

INFORMATION

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

Application as filed:

- Application to Change a Non-Irrigation Water Right, Form 606-NIR
- Criteria Supplement to Form 606
 - Water Rights Needs Assessment for City of Hamilton by HDR Engineering Inc. dated August 31, 2020
- Maps:
 - Aerial photo showing historical and proposed places of use
 - Aerial photo showing City of Hamilton water distribution system
 - Aerial photo showing City of Hamilton water distribution model with proposed extensions

Information within the Department's Possession/Knowledge

- DNRC surface water and groundwater right records
- Application materials for pending Change Application Nos. 76H 30159804, 76H 30159805, 76H 30159806

- Department Technical Report dated October 13, 2023
- DNRC Environmental Assessment, dated, February 7, 2024

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change the place of use of unperfected Provisional Permit 76H 21-00. The permit was granted for 2 cubic feet per second (CFS) (898 gallons per minute (GPM)) flow rate and 1,448 acre-feet (AF) diverted volume from a groundwater well. The purpose is Municipal with a priority date of July 19, 1973. The period of use and period of diversion is January 1 through December 31 annually. The elements of the water right being changed are summarized in Table 1.

Table 1: Provisional Permit Proposed for change

WR Number	Flow Rate (CFS)	Volume (AF)	Purpose	Period of Use	Point of Diversion	Priority Date
76H 21-00	2	1,448	Municipal	01/01 to 12/31	NWSWSE SEC 30, T6N, R20W	7/19/1973

2. The permitted point of diversion is a groundwater well (Well 5) located in the NWSWSE of Section 30, T6N, R20W, Ravalli County. The current permitted place of use consists of a municipal service area covering approximately 5,280 acres, as certified on August 26, 2009, per Change Authorization 76H 30003848. The municipal service area is located in the S2 Sec 18, W2 Sec 32, and all of Sections 19, 30, and 31 in T6N, R20W and S2 Sec 13, E2 Sec 23, E2 Sec 26, N2 Sec 36, SE Sec 36, and all of Sections 24 and 25 in T6N R21W in Ravalli County. The place of use is in the Hamilton Municipal Boundary and surrounding area.

3. Permit 76H 21-00 is unperfected. The permitted use of water has not been put to beneficial use in its entirety for the underlying water right, and the Applicant has until December 31, 2030, to put water to its full beneficial use and file a Project Completion Notice with the Department.

4. Permit 76H 21-00 is supplemental and associated with six other water rights (seven wells) serving the municipal water system because they are manifold into a common distribution system and have the same place of use. The City of Hamilton has submitted Applications to Change a Water Right for three of their other municipal water rights, Provisional Permit Nos. 76H 57746-00 (Well 6), 76H 107696-00 (Well 7), and 76H 30003846 (Wells 8 & 9) that are being processed concurrently with this change application as required under the provisions of ARM 36.12.1901(7). A total of four change applications were submitted for this project because upon completion of the proposed change in water use these water rights will have the same place of use and purpose but different points of diversion (different wells). The Applicant filed a motion to Amend with the Montana Water Court to amend the place of use for Statements of Claim 76H 214440-00 (Well 4), 76H 214441-00 (Well 2), and 76H 163005-00 (Well 1) in Case No. 76HA-6003-A-2023. If the proposed change in water use is authorized by the Department and Motion to Amend is approved by the Montana Water Court, all of the City of Hamilton’s municipal water rights will have the same place of use. The six supplemental water rights and their corresponding change applications and/or water court amendments are listed below.

Table 2: Supplemental Water Rights

Water Right	Change Application submitted	Priority Date	Point of Diversion	Type
76H 57746-00	76H 30159804	12/20/1984	Well 6	Provisional Permit, unperfected
76H 107696-00	76H 30159805	5/14/1999	Well 7	Provisional Permit, unperfected
76H 30003846	76H 30159806	9/23/2002	Well 8, Well 9	Provisional Permit, verified
76H 214440-00	Motion to Amend filed with the Montana Water Court	4/10/1946	Well 8, Well 9 ⁽¹⁾	Statement of Claim
76H 214441-00	Motion to Amend filed with the Montana Water Court	12/26/1934	Well 2	Statement of Claim
76H 163005-00	Motion to Amend filed with the Montana Water Court	6/22/1934	Well 1	Statement of Claim

(1) The point of diversion for Well 4 was changed to Wells 8, 9, and Well 4 is no longer in use.

5. Change Authorization 76H 30003848, issued by the Department on January 28, 2003, included Permit 76H 21-00 being changed in this Application, Permit 76H 57746-00, Permit 76H 107696-00, Claim 76H 163005-00, Claim 76H 214440-00, and Claim 76H 214441-00. The change authorization was submitted to change the point of diversion for Claim 76H 214440-00 (Well 4 ⁽¹⁾) as it was abandoned and removed from service, to Well 8 and Well 9 and to change the place of use for all the City of Hamilton’s municipal wells. The change also added a place of storage for the 3.10 acre-feet above ground storage tank to the above listed water rights. The

project completion notice for Change Authorization 76H 30003848 was received on December 28, 2007. Change Authorization 76H 30003848 was verified on August 26, 2009

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicant proposes to change the place of use of Permit 76H 21-00 to create a consistent and single place of use for all of Hamilton’s municipal water rights and wells to accommodate the projected future municipal growth through planning year 2070, as projected in the Water Rights Needs Assessment for Hamilton by HDR Engineering Inc. dated August 31, 2020.

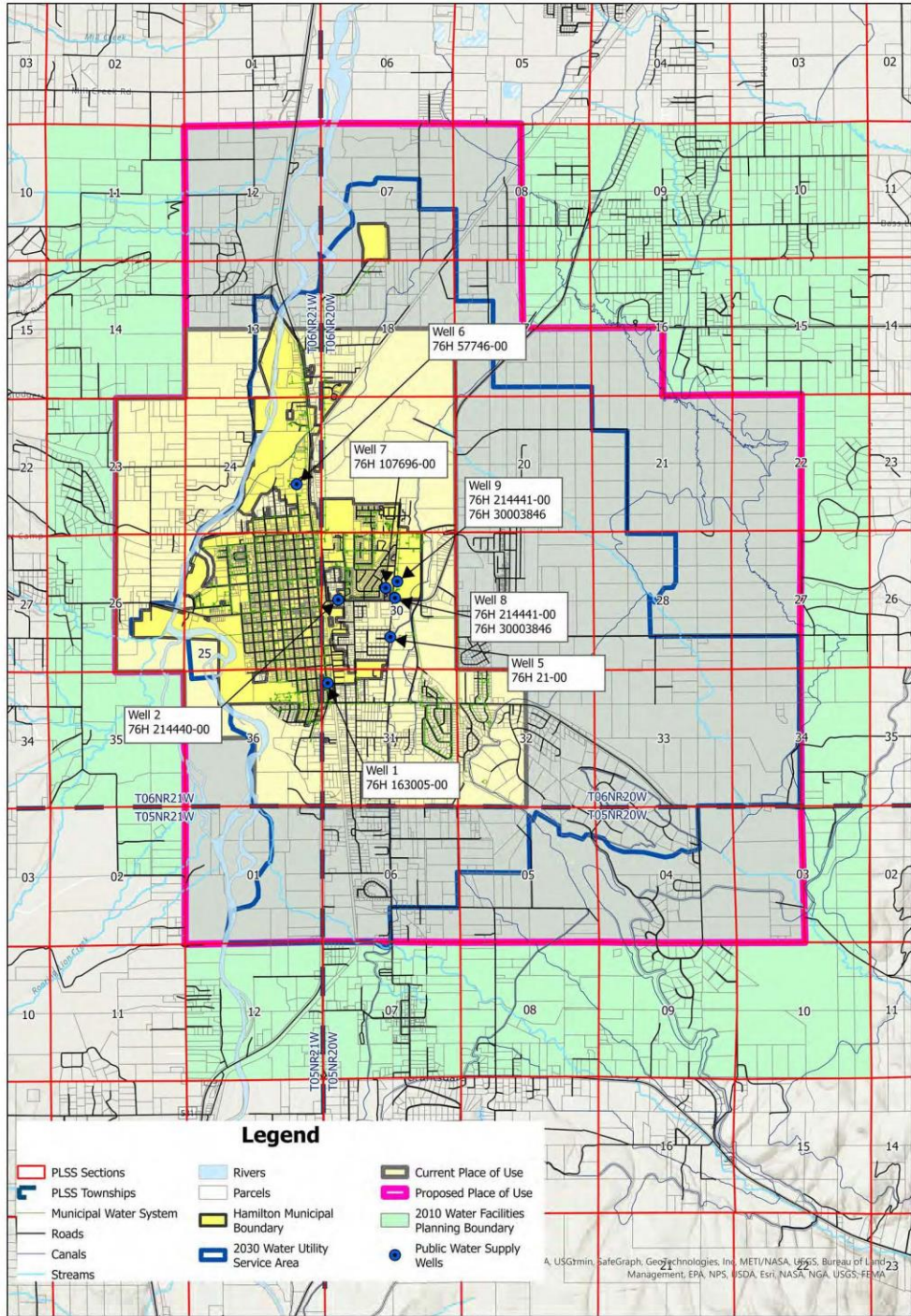
7. The existing service area for the water right being changed comprises an area that is approximately 5,280 acres within Ravalli County. The proposed service area that will be served by all the Hamilton municipal water rights comprises an area 15,680 acres in size, within the sections shown in Table 3 below.

Table 3 – Legal Land Description of proposed Place of Use

	Section	Township	Range
W2	3	5 N	20 W
ALL	4	5 N	20 W
ALL	5	5 N	20 W
ALL	6	5 N	20 W
ALL	1	5 N	21 W
ALL	7	6 N	20 W
W2	8	6 N	20 W
SW	16	6 N	20 W
NW	17	6 N	20 W
S2	17	6 N	20 W
ALL	18	6 N	20 W
ALL	19	6 N	20 W
ALL	20	6 N	20 W
ALL	21	6 N	20 W
W2	22	6 N	20 W
W2	27	6 N	20 W
ALL	28	6 N	20 W
ALL	29	6 N	20 W
ALL	30	6 N	20 W
ALL	31	6 N	20 W
ALL	32	6 N	20 W
ALL	33	6 N	20 W
W2	34	6 N	20 W
ALL	12	6 N	21 W
ALL	13	6 N	21 W
E2	23	6 N	21 W
ALL	24	6 N	21 W
ALL	25	6 N	21 W
E2	26	6 N	21 W
ALL	36	6 N	21 W

8. The Applicant does not propose to change the flow rate, volume, or purpose of Permit 76H 21-00. Well 5 will continue to be pumped within its respective authorized flow rate of 2 CFS (898 GPM) up to an annual diverted volume of 1,448 AF with the water right being changed. Map 1 shows the proposed elements of this application.

9. The municipal water system is operated in compliance with Montana Department of Environmental Quality (DEQ) rules and regulations.



ATTACHMENT A.2 - MAP-1
 NIR.2 - PLACE OF USE DESCRIPTION
 WATER SERVICE AREA
 HAMILTON, MONTANA

Map 1

CHANGE CRITERIA

10. 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 probably 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.

11. 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, at ¶¶ 29-31; Town of Manhattan, at ¶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

12. The water right to be changed is Permit 76H 21-00, which is unperfected. The Project Completion Notice due date is December 31, 2030, and the Applicant has until then to put the permitted flow rate and volume of water to the full beneficial use and file a Project Completion Notice with the Department. Under the provisions of ARM 36.12.1902(1)(b), historical use information is not required for provisional permits for which a project completion notice is not yet due and has not been filed; such provisional permits are considered to be “unperfected” and allowed to continue to grow into their permitted flow rated and volumes, and therefore a historical use analysis is not required for this water right change application.

13. The Department finds the maximum historically diverted flow rate and volume of Permit 76H 21-00 to be 2.00 CFS and 1,448 AF, respectively.

FINDINGS OF FACT – Adverse Effect

14. The Department issued Permit 76H 21-00 on December 4, 1975, for a flow rate of 2.00 CFS (898 GPM) up to an annual diverted volume of 1,448 AF from a groundwater well (Well 5) located in NWSWSE of Section 30, T6N, R20W, Ravalli County. The period of diversion is from January 1 through December 31 annually for municipal purposes.

15. Well 5 (GWIC ID #54443) is located just east of Kurtz Lane along an irrigation canal that parallels Big Corral Road in Hamilton, Montana. The 128-foot deep well was completed in 1975 and consists of 10-inch steel casing to a depth of 109 feet with perforations from 87 to 90 feet, without a screen. It is equipped with a 6-inch submersible 30 horsepower pump and pitless adapter. The pump is set at an unknown depth. The well log for Well 5 indicates that the well produced 500 GPM during a 16-hour pump test with drawdown of 80 feet.

16. Hamilton’s municipal water system consists of seven production wells (Well 1, 2, 5, 6, 7, 8 & 9), a ground level water storage tank, two booster pump stations, and a network of pipes, valves, and hydrants that make up the distribution system. All of the wells are manifold into a single distribution system. The distribution system consists of water mains ranging from 2-inch to 12-inch in diameter, constructed from galvanized iron, cast iron, steel, ductile iron, and poly-vinyl chloride piping. One booster station, located in the SENW of Section 30, T6N, R20W, receives water from Wells 5, 7, 8, and 9 and is referred to as the Kurtz Lane Booster Station. This station is a packaged-type station enclosure with two booster pumps, space for additional pumps, a

standby engine generator, and associated transfer switch, variable frequency drives for the wells, and soft starters for two booster pumps. The booster station also contains sodium hypochlorite and phosphate storage along with feed pumping and a 30,000-gallon contact basin that provides disinfection for chlorine potable water that is pumped into the distribution system. Wells 1, 2, and 6 are connected directly to the distribution system and pump against system head pressure that is controlled by the elevation of the 3.10 AF storage tank located in the SWSW of Section 32, T6N, R20W, on Sky West Lane. The Weber Booster Station, located in the SWNE of Section 31, T6N, R20W, serves Weber Estates and Hillcrest Subdivisions located off Golf Course Road. This booster station is equipped with five 7.5 horsepower pumps that can pump up to 1,350 GPM to provide potable water for domestic use. All of the wells are controlled by a central Supervisory Control and Data Acquisition (SCADA) system, and wells turn on based on the level of the city storage tank. Wells are alternated to ensure that all wells are used on a regular basis, runtimes are equalized, and stop/start conditions are minimized at certain flow rates. The well controls are set to keep the storage tank full within the top two feet of the tanks useable volume on a regular basis to maintain adequate storage for peak hour events and fire suppression.

17. Wastewater is collected from the end users and treated in the Hamilton's wastewater Treatment system, which discharges treated effluent to the Bitterroot River.

18. Proposed consumptive use was not assessed during processing of the original permit application submitted on July 19, 1973. As this is an unperfected permit, historical consumptive use was not calculated for this change application pursuant to ARM 36.12.1902(1)(b).

19. Changes in place of use for Provisional Permit Nos. 76H 21-00 (served by Well 5), 76H 57746-00 (served by Well 6), 76H 107696-00 (served by Well 7), and 76H 30003846 (served by Wells 8 & 9) have all been proposed in separate pending change applications (FOF 4). The water rights are supplemental because they are all comingled into Hamilton's water distribution system and have overlapping places of use.

20. Water diverted from Well 5 with Permit 76H 21-00 will continue to be pumped within its permitted flow rate of 2.00 CFS and diverted volume of 1,448 AF.

21. Volumetric totalizing meters are on all of Hamilton's production wells which record the monthly volumetric production from each well. The Applicant currently records the monthly volumetric production from each well but is not required to submit measurement records to the Department. Upon authorization of the proposed change in service area, the Applicant will be

required to record monthly water use and report measurements to the Department annually. The water measurement condition will ensure that the permitted flow rate and volume are not exceeded as a result of the proposed change in place of use.

22. Historical consumptive use was not assessed for Permit 76H 21-00 in this application, as this is an unperfected permit with an active change authorization for the addition of a 3.1 AF storage tank to the municipal water distribution system and to change the place of use for all of the City of Hamilton's municipal wells. This Change Authorization, 76H 30003848, was verified on August 26, 2009. Proposed consumptive use was not assessed during processing of the original permit application, therefore no comparison of historical and proposed consumptive uses was conducted for the subject change application.

23. The proposed change in service area will not create an additional effect on water levels in neighboring wells outside of what was originally assessed when the permit was issued in 1975. The Applicant's plan is to continue diverting water at the same flow rate and up to the same annual volume that were originally permitted, and from the same well, and because only their place of use is changing, the Department finds there will be no change in the rate or timing of net depletions from what was originally permitted.

24. The Applicant proposes to change the place of use for Permit 76H 21-00 and all of Hamilton's water rights serving the municipal service area. This will create a homogenous place of use for the water rights serving Hamilton's current population and projected growth. The existing wells are manifold into one central supply system, with water from each well and water right being co-mingled and delivered to a common place of use. The current service area (place of use) for Permit 76H 21-00 is 5,280 acres within Sections 18, 19, 30, 31, 32 of T6N, R20W. The proposed service area for all of Hamilton's municipal water rights comprises an area 15,680 acres in size with the legal land descriptions listed in Table 3 below.

Table 3 – Legal Land Description of proposed Place of Use

	Section	Township	Range
W2	3	5 N	20 W
ALL	4	5 N	20 W
ALL	5	5 N	20 W
ALL	6	5 N	20 W
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ALL	20	6 N	20 W
ALL	21	6 N	20 W
W2	22	6 N	20 W
W2	27	6 N	20 W
ALL	28	6 N	20 W
ALL	29	6 N	20 W
ALL	30	6 N	20 W
ALL	31	6 N	20 W
ALL	32	6 N	20 W
ALL	33	6 N	20 W
W2	34	6 N	20 W
ALL	12	6 N	21 W
ALL	13	6 N	21 W
E2	23	6 N	21 W
ALL	24	6 N	21 W
ALL	25	6 N	21 W
E2	26	6 N	21 W
ALL	36	6 N	21W

25. This Change Authorization will be subject to the following condition to ensure no adverse effect pursuant to § 85-2-402 (2)(a), MCA.

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE

APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

26. The Department finds there will be no adverse effect to other water users resulting from the proposed change in place of use under the terms and conditions set forth in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

27. The Applicant proposes to continue to use Permit 76H 21-00 for the purpose of municipal use. The flow rate and volume of the water right being changed were determined to be a beneficial use of water when Beneficial Water Use Permit Application 76H 2100 was granted and authorized by the Department. The Applicant has the right to develop the permitted amount of water (1,448 AF at a flow rate of 2 CFS) to its fullest extent until the Project Completion Notice deadline date for this application. According to Hamilton's Water Rights Future Needs Assessment, Hamilton's future water need for municipal water supply is estimated to be 9,085.1 AF/YR by 2070. Hamilton's seven municipal water rights (Permit 76H 21-00, Permit 76H 57746-00, Permit 76H 107696-00, Claim 76H 163005-00, Claim 76H 214440-00, Claim 76H 214441-00, and Permit 76H 30003846) added together have a total authorized flow rate of 15.29 CFS and volume of 7,608.8 AF/YR, of which Permit 76H 21-00 may provide 2 CFS up to 1,448 AF per year.

28. The Department finds the post-change appropriation of the permitted flow rate and volume of Permit 76H 21-00 for municipal purposes in the City of Hamilton to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

29. Well 5 (GWIC ID #54443) was drilled to 128 feet and backfilled to a depth of 109 feet and is equipped with a 30 HP 6-inch submersible pump and pitless adapter. The well was drilled in 1975 and consists of 12-inch steel casing with a perforated pipe from 87-90 feet, and a 10-inch well screen. The well log indicates that the well produced 500 GPM during a 16-hour pump test with drawdown of 80 feet.

30. The well location, depth, and pump will not be changed as a result of this authorization. Areas within the post-change place of use that do not currently have the infrastructure in place to provide water will be developed based on Montana Department of Environmental Quality (DEQ) rules. An overall schematic of the current water system, including water mains along with a map showing the proposed change in place of use, is included in the original application materials submitted by the Applicant. The current place of use for this water right consists of 5,280 acres, and the proposed place of use that will be reflected on all of Hamilton's municipal water rights will consist of a municipal service area covering 15,680 acres.

31. The Department finds the means of diversion, construction, and operation of the appropriation works are adequate for the beneficial use. The existing means of diversion was determined to be adequate when Beneficial Water Use Permit Application 76H 21-00 was issued and Change Authorization 76H 30003848 was granted.

POSSESSORY INTEREST

FINDINGS OF FACT

32. This application is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water (ARM 36.12.1802). The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

33. 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, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

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

35. 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, at ¶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

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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).

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, at ¶144-45; 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 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

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. §85-2-234, MCA

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

36. 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, at ¶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; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); 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

37. 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 ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original

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, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

38. 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).

39. 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.

40. The Applicant has proven by a preponderance of the evidence that unperfected Permit No. 76H 21-00 can be changed and that the change of place of use will not increase the 1,448 AF of diverted volume and 2 CFS flow rate. (FOF Nos. 12-13)

41. 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. § 85-2-402(2)(b), MCA. (FOF Nos. 14-26)

BENEFICIAL USE

42. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 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, Montana First Judicial District Court (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, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (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).

43. The Department may issue a change authorization for less than the amount of water requested but may not issue a change authorization for more water than is requested or more water than can be beneficially used without waste for the purpose stated in the application. § 85-2-312, MCA; see also, McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

44. The Department can also consider waste in a change proceeding. Hohenlohe at ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” § 85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

45. Applicant proposes to use water for municipal use which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence municipal is a beneficial use and that 1,448 acre-feet of diverted volume and 2 CFS flow rate of water requested is the amount needed to sustain the beneficial § 85-2-402(2)(c), MCA (FOF Nos. 27-28)

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. 29-31)

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 Nos. 32)

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. 76H 30159803 should be granted subject to the following.

The Department determines the Applicant may change the place of use of Provisional Permit No. 76H 21-00 to accommodate the anticipated future municipal growth of the City of Hamilton through planning year 2070. The point of diversion at Well 5 in the NWSWSE of Section 30, T6N, R20W, flow rate of 2 CFS, and maximum 1,448 AF of water diverted will remain unchanged. The place of use shall be changed from an area encompassing 5,280 acres to an area encompassing 15,680 acres within the sections shown in the table below.

Legal Land Description of Proposed Place of Use

	Section	Township	Range
W2	3	5 N	20 W
ALL	4	5 N	20 W
ALL	5	5 N	20 W
ALL	6	5 N	20 W
ALL	1	5 N	21 W
ALL	7	6 N	20 W
W2	8	6 N	20 W
SW	16	6 N	20 W
NW	17	6 N	20 W
S2	17	6 N	20 W
ALL	18	6 N	20 W
ALL	19	6 N	20 W
ALL	20	6 N	20 W
ALL	21	6 N	20 W
W2	22	6 N	20 W
W2	27	6 N	20 W
ALL	28	6 N	20 W
ALL	29	6 N	20 W
ALL	30	6 N	20 W
ALL	31	6 N	20 W
ALL	32	6 N	20 W
ALL	33	6 N	20 W
W2	34	6 N	20 W
ALL	12	6 N	21 W
ALL	13	6 N	21 W
E2	23	6 N	21 W
ALL	24	6 N	21 W
ALL	25	6 N	21 W
E2	26	6 N	21 W
ALL	36	6 N	21 W

This change will be subject to the following water measurement condition:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this 8th day of February 2024.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 8th day of February 2024, by first class United States mail.

MILLER LAW, PLLC
401 WASHINGTON ST.
MISSOULA, MT 59802

/Original signed by Heather McAdams/

Heather McAdams, (406) 542-5890