

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

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**APPLICATION TO CHANGE WATER RIGHT)
NO. 76H-30159806 BY CITY OF HAMILTON } PRELIMINARY DETERMINATION TO
GRANT CHANGE**

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On April 25, 2023, the City of Hamilton (Applicant) submitted Application to Change Water Right No. 76H-30159806 to change Provisional Permit (Permit) No. 76H 30003846 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 30159803, 76H 30159804, 76H 30159805

- 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 Provisional Permit 76H 30003846. The permit was granted for 2.23 cubic feet per second (CFS) (1,000 gallons per minute (GPM)) flow rate with no volume from two groundwater wells (Well 8 & Well 9). The purpose is Municipal with a priority date of September 23, 2002. 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 30003846	2.23	0	Municipal	01/01 to 12/31	SWSWNE (Well 8) NWSWNE (Well 9) SEC 30, T6N, R20W	9/23/2002

2. The permitted points of diversion are groundwater Well 8 located in the SWSWNE and groundwater Well 9 located in the NWSWNE of Section 30, T6N, R20W, Ravalli County. The current permitted place of use consists of a municipal service area covering approximately 5,280 acres. 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. Beneficial Water Use Permit Application No. 76H 30003846 was filed on September 23, 2002, and issued on January 28, 2003. The application was filed to provide supplemental flow for Wells 8 & 9. A Project Completion Notice was filed with the Department on December 28, 2007, and the Department verified a flow rate of 2.23 CFS for this Permit on August 26, 2009, based on capacity of the pumps installed in Wells 8 & 9 which are each capable of producing 1000 GPM

(2.23 CFS) simultaneously. Statement of Claim 76H 214440-00 was changed in 2003 to replace the original well (Well 4) by Wells 8 & 9. In combination, Permit 76H 30003846 and Claim 76H 214440-00 allow the Applicant to pump a total of 1,600 GPM (3.57 CFS) from Wells 8 & 9.

4. Permit 76H 30003846 is supplemental and associated with six other water rights 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 21-00 (Well 5), Provisional Permit Nos. 76H 57746-00 (Well 6), 76H 107696-00 (Well 7) 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 numbers 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 21-00	76H 30159803	7/19/1973	Well 5	Provisional Permit, unperfected
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 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 30003846 being changed in this application, Permit 76H 21-00, 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 Wells 8 & 9, and

to change the place of use for all the City of Hamilton’s municipal wells. The authorization allowed the City of Hamilton to move a flow rate of 600 GPM and volume of 968 acre-feet from Claim 76H 214440-00 from Well 4 to Wells 8 & 9. 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 30003846 to create a consistent and single place of use for all of Hamilton’s municipal water rights 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.

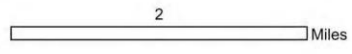
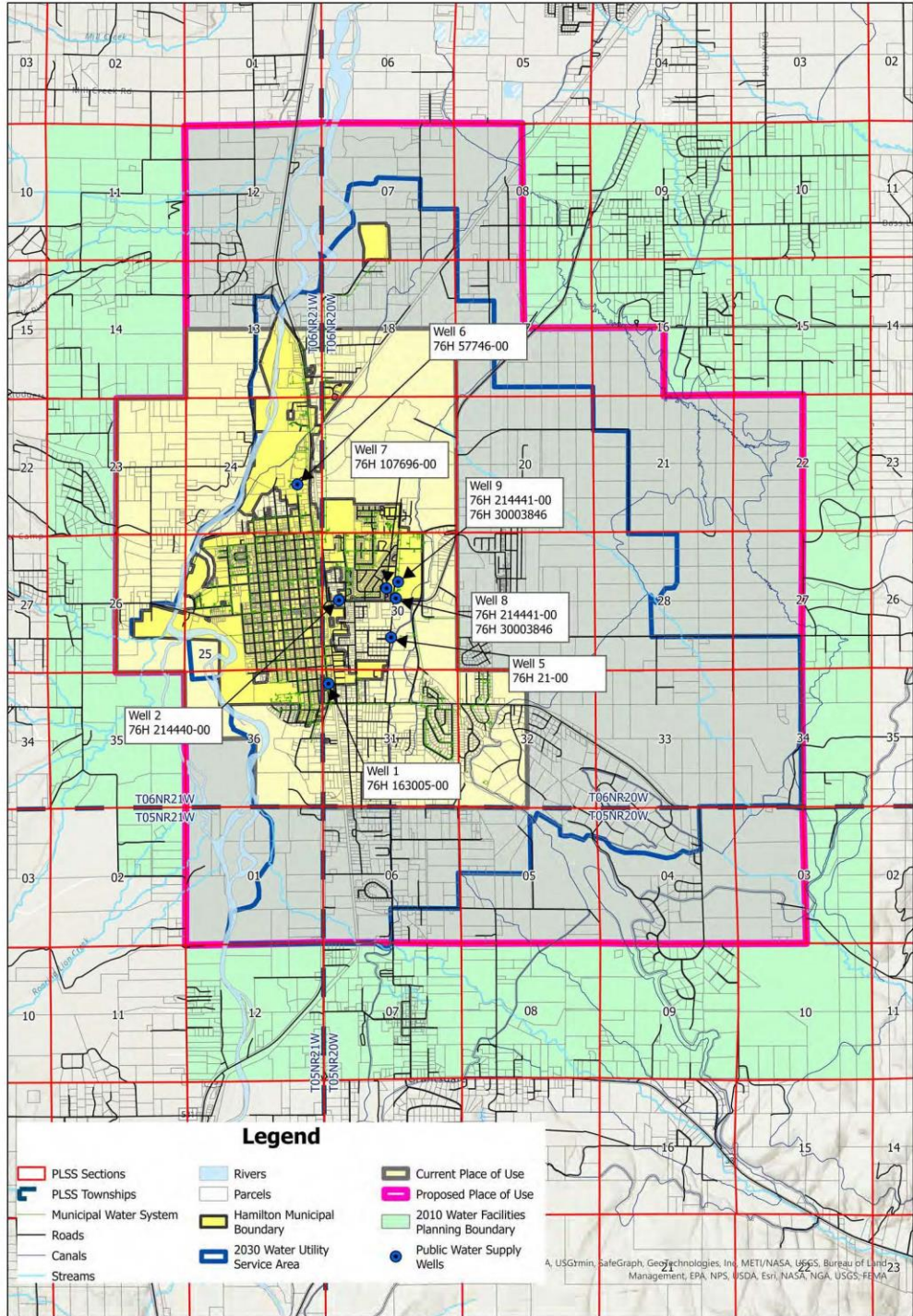
Table 3 – Legal Land Description of proposed Place of Use

	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 30003846. Wells 8 & 9 will continue to be pumped within their respective authorized flow rates of 2.23 CFS (1,000 GPM) for Permit 76H 30003846 and up to a maximum allowable flow rate of 1,600 GPM in combination with 76H 214440-00 (600 GPM). The Department authorized the Applicant to change the flow rate of 600 GPM from Statement of Claim 76H 214440-00 from Well 4 to Well 8 & 9 in Change Authorization No. 76H 30003848. 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. Permit 76H 30003846 was filed September 23, 2002, and issued on January 28, 2003, to allow an additional supplemental flow of 2.23 CFS (1,000 GPM) to be diverted from Well 8 & Well 9 with no volume. Permit Application 76H 30003846 was submitted to acquire a new water right to meet future anticipated demands identified in the 2002 Preliminary Engineering Report, Water System Improvements, prepared by Professional Consultants Incorporated for the City of Hamilton.

13. Well 8 (GWIC ID # 263225) and Well 9 (GWIC ID # 263224) were both drilled in 2003 and are located west of Kurtz Lane, just north of the East Side Highway in the High School Well Field. Well 8 is 59 feet deep and consists of a 16-inch steel casing to 59 feet along with a continuous stainless steel screen. The well log indicates the well produced 850 gpm during a 12-hour pump test with a drawdown of 25 feet. Well 9 is 70 feet deep and consists of a 16-inch steel casing to 70 feet along with a continuous stainless steel screen. The well log indicates the well produced 1,000 gpm during a 12-hour pump test with a drawdown of 24 feet.

14. Hamilton's municipal water system consists of seven production wells (Wells 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.

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

16. Pursuant to ARM 36.12.1902(1)(b), the historic use of a Provisional Permit must be described as it was used at the filing date of the project completion notice. A Project Completion Notice was filed with the Department on December 28, 2007, and Permit 76H 30003846 was verified for a flow rate of 2.23 CFS (1,000 GPM) on August 26, 2009. The verified volume was based on pump capacity in Well 8 & 9 which are each capable of producing 1000 GPM simultaneously. The Applicant also provided measurement reports submitted for Wells 8 & 9 from 2005 through 2008. During the month of June 2007, the highest monthly average flow rate value was recorded with the in-line volumetric flow meter, indicating 1,549 GPM (3.45 CFS) were being diverted from Wells 8 & 9 over a period of a month based on volume produced. Wells 8 & 9 have a maximum allowable flow rate of 1600 GPM using Permit 76H 30003846 (1000 GPM) and Statement of Claim 76H 214440-00 (600 GPM). The Department authorized the Applicant to change the point of diversion of Statement of Claim 76H 214440-00 from Well 4 to Well 8 & 9 in Change Authorization No. 76H 30003848.

17. Provisional Permit 76H 30003846 was granted by the Department for additional flow rate only therefore this water right does not include any volume to the municipal water supply system and the Department made no findings regarding historical diverted or consumed volumes for this historical use analysis. The volume associated with the flow rate of Permit 76H 30003846 is accounted for with Claim 76H 214440-00, which claims a maximum diverted volume of 1,610 AF, of which 968 AF may be diverted using Wells 8 & 9.

18. Changes in place of use for Well 5 (76H 21-00), Well 6 (76H 57746-00), Well 7 (76H 107696-00), and Well 8 & 9 (76H 30003846) 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.

19. The Department finds the maximum historically diverted flow rate of Permit 76H 30003846 to be 2.23 CFS (1,000 GPM).

FINDINGS OF FACT – Adverse Effect

20. Water diverted from Wells 8 & 9 with Permit 76H 30003846 will continue to be pumped within its permitted flow rate of 2.23 CFS.

21. Volumetric totalizing meters are on all of Hamilton's production well 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 diverted and consumptive volumes were not assessed for Permit 76H 30003846 in this application, as this water right does not include any volume. This Change Authorization, 76H 30003848, was verified on August 26, 2009. Since Permit 76H 30003846 was granted for additional flow rate only, there is no additional volume pumped from Wells 8 & 9 associated with the permit. With no volume associated with the water right there is no consumptive use that would result in depletions to either groundwater or surface water sources resulting from this appropriation.

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 2003 because this application does not seek to increase the amount of water diverted from Wells 8 and 9. The Applicant's plan is to continue diverting water at the same flow rate that was originally permitted, and from the same wells, 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 30003846 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 30003846 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
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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

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 30003846 for the purpose of municipal use. This purpose is recognized by the Department as a beneficial use. 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 30003846 may provide 2.23 CFS and 0.00 acre-feet.

28. The Applicant proposes to continue to use the permitted flow rate of 2.23 CFS from Wells 8 & 9. The flow rate of the water right being changed was determined to be a beneficial use of water when Beneficial Water Use Permit Application 76H 30003846 was issued.

29. The Department finds the post-change appropriation of the permitted flow rate of Permit 76H 30003846 for municipal purposes in the City of Hamilton to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The well locations, depths, and pumps of Wells 8 & 9 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 30003846 was issued.

POSSESSORY INTEREST

FINDINGS OF FACT

32. This application is for 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 potential for adverse effect.³ A comparative analysis of the historic use of the water right to the

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).

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

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

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 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.)

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. 41l 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 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

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).

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 Permit No. 76H 30003846 can be changed and that the change of place of use will not increase the 2.23 CFS flow rate or 0 AF volume. (FOF Nos. 12-19)

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. 20-26)

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); Toohey 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 2.23 CFS flow rate of water requested is the amount needed to sustain the beneficial § 85-2-402(2)(c), MCA (FOF Nos. 27-29)

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. 30-31)

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 No. 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 30159806 should be granted subject to the following.

The Department determines the Applicant may change the place of use of Provisional Permit No. 76H 30003846 to accommodate the anticipated future municipal growth of the City of Hamilton through planning year 2070. The point of diversion at Wells 8 & 9 in the SWSWNE and NWSWNE of Section 30, T6N, R20W, flow rate of 2.23 CFS, and amount of water diverted will remain unchanged. The place of use shall be changed from an area encompassing approximately 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