

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

**COMBINED APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.)
76K 30064113 AND CHANGE 76K 30070513) PRELIMINARY DETERMINATION TO
BY KOOTENAI LODGE ESTATES LLC) GRANT COMBINED APPLICATION**

On September 28, 2012 and November 7, 2014, Kootenai Lodge Estates LLC (Applicant) submitted an Application for Beneficial Water Use Permit No 76K 30064113 and Change 76K 30070513 respectively to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for multiple domestic (41 homes) and domestic lawn and garden use in Kootenai Lodge Estates. The Change Application is for aquifer recharge of depletions to the Swan River from groundwater pumping for Kootenai Lodge Estates. The Department published receipt of the Application on its website. The Applications were determined to be correct and complete as of May 6, 2015. Applicant submitted a waiver of the timelines in §85-2-307, MCA on March 25, 2013. A major Amendment to Application was submitted by the Applicant on November 7, 2014. An Environmental Assessment for this Application was completed on July 29, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Application to Change, Form 606
- Attachments
- Maps:
 - Aerial map of Subdivision showing proposed POD and Recharge Basin
 - USGS Topographic Site Vicinity Map
 - USGS Topographic Site Vicinity Map showing Historical Diversion System

- Surveyed Plat of Subdivision
- Site layout of water distribution system
- USGS Topographic Site Map showing aquifer recharge layout
- Aquifer Testing Addendum

Information Received after Application Filed

- 8-hour drawdown test on PWS#1
- Montana Secretary of State Principal Information for Kootenai Lodge Estates LLC
- Waiver of Timeline form dated March 25, 2013
- Change application 76K 30070513 for aquifer recharge

Information within the Department’s Possession/Knowledge

- Department Hydrologist Aquifer Test Report Dated November 5, 2012
- Independent review of USGS gage data for the Swan River (Gage #12370000)
- Independent review of USGS gage data for the Flathead River near Polson (Gage #12372000)
- Independent review of senior appropriations on depleted surface sources of Swan River and Flathead Lake

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, parts 3 and 4, MCA).

PROPOSED APPROPRIATION

BENEFICIAL WATER USE PERMIT NO. 76K 30064113

FINDINGS OF FACT

1. The Applicant proposes to divert water from two groundwater wells from the Flathead Valley’s deep alluvial aquifer , PWS1 (GWIC #231690) and PWS2 (GWIC #231691) completed

to depths of 192 feet each from January 1 through December 31 at 297 GPM (0.66 CFS) up to 89.42 AF from a point in the NE¹/₄NE¹/₄NW¹/₄ of Section 14, Township 26N, Range 19W, for 20.67 AF of multiple domestic use (41 hook-ups) from January 1 through December 31 and 68.75 AF for lawn and garden use on 32.12 acres from April 15 through October 15 annually. The place of use is Kootenai Lodge Estates Subdivision and is generally located in the S¹/₂SE¹/₄SW¹/₄ Section 11 and NE¹/₄NW¹/₄ and the NE¹/₄SE¹/₄NW¹/₄ Section 14, all in Township 26N, Range 19W, Lake County approximately 5 miles southeast of Bigfork, Montana.

2. Statement of Claim, 76K 40328 for commercial use on PWS #2 for 30 GPM up to 6 AF of commercial use will still be used at the lodge for the swimming pool and operations at the Kootenai Lodge, which Kootenai Lodge Estates surrounds.
3. The proposed wells and place of use are approximately 840 feet east of the Swan River.
4. Domestic wastewater will be diverted to a community drainfield. Using the Department standard of 10% consumption with drainfields, **2.07 AF** (20.67 AF * 0.10) is expected not to return to source.
5. Lawn and garden consumption is based on estimates provided in Irrigation Water Requirements (IWR) using the Bigfork site value of 17.97 inches or 1.498 feet per acre. Lawn and garden consumption would be **48.12 AF** (1.498 * 32.12 acres).
6. Total consumption for proposed purposes would be **50.19 AF**.
7. The following condition shall exist on the permit:

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 MONTHLY 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.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

8. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

9. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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 use has 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 under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35.

10. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if in further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin R. Mont. (ARM) 36.12.207.

11. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

12. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

13. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

14. A 73-hour aquifer test at a rate of 305 GPM (requested rate is 297 GPM) was run on the Applicant's public water supply (PWS) well #2 and PWS well #1 was used as an observation well. These wells are 84 feet apart, 192 feet deep completed in the Deep Alluvial Aquifer and have static water levels of approximately 44 feet below ground surface (bgs). Maximum drawdown for PWS#1 was 2.29 feet. Three other wells, the Martin well, the Domestic well and Shorty's well located 283 feet, 945 feet and 1,124 feet from the pumped well respectively were also used as observation wells with maximum drawdowns of 1.50 feet, 1.40 feet and 1.30 feet respectively. Discharged water was routed through 350 feet of pipeline and conveyed into neighboring Johnson Creek. Drawdown data from the wells was collected using an In-Situ Level Tracker, Global Logger WL-16, and Telog AquaTroll 200 data loggers and pressure inducers. Aquifer properties derived from the drawdown data of the wells and the analytical software, AQTESOLV[®] using the Theis Solution in a confined aquifer, were Transmissivity of 20,310 ft²/day and a Storativity value of 0.001.

15. The last 34 hours of data retrieved from the 73-hour constant rate test on PWS#2 at 305 GPM was used to approximate drawdown in the production well. This data was extrapolated to a best-fit trendline through the maximum period of diversion or 365 days. Maximum drawdown was 12.25 feet after one year of pumping. With the pump being set at 111.5 feet bgs and a static water level of 45 feet bgs, there would be approximately 54.25 feet of available water column left in the well after a drawdown of 12.25 feet. The water level in PWS#2 achieved 98% recovery 73 hours after pumping ceased.

16. PWS#1 had a 16-hour constant rate test performed at a rate of 300 GPM. At time of testing, static water level was at 39.12 feet bgs and well depth at 194 feet bgs. Maximum drawdown during the test was 6.41 feet leaving 143.47 feet above perforations at 189 feet bgs. The water level in PWS#1 achieved 95% recovery 50 minutes after pumping ceased. Maximum drawdown was modeled at 7.06 feet after one year of pumping at 300 GPM.

17. Department Hydrogeologist reviewed aquifer testing for the Kootenai Lodge Estates wells and found the aquifer testing meets the requirements under ARM 36.12.121 and is an adequate basis to address criteria under MCA 85-2-311.

18. Based on these production wells being completed to a depth of 192 feet in the Flathead Valley’s deep alluvial aquifer, the Department understands this groundwater source to be interconnected with surface water and therefore groundwater levels are effectively controlled by the Flathead River and Flathead Lake. Department memo dated January 10, 2011, acknowledges that this appropriation will not alter the regional gradient and thus the physical availability of groundwater (aquifer flux). The location of this appropriation, however, will likely reduce discharge from the aquifer to Flathead lake and the Swan River between Swan Lake and Flathead Lake in the amount of the consumptive use. Therefore, physical availability has been analyzed for this application for Flathead Lake and the Swan River between Swan Lake and Flathead Lake as required by ARM 36.12.1702.

19. The data from USGS gage station on the Flathead River below Kerr Dam near Polson (#12372000) was assessed to show physical availability from Flathead Lake. This discharge data is for the period of 1938 through October 2014. Table 1 represents year-round median of the mean monthly flow rates and volumes associated to these measurements. Volumes were calculated based on constant median of the mean flow through the month. Period of diversion lows for this application were 6,093 CFS and 362,529 AF in September.

Table 1: Median of the Mean Monthly Flows and Volumes of Flathead Lake (#12372000)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Flow (CFS)	10,270	9,208	7,732	9,215	18,960	25,820	13,605	6,317	6,093	7,342	8,865	9,954
Volume (AF)	631,478	511,359	475,391	548,301	1,165,805	1,536,397	836,539	388,417	362,529	451,442	527,474	612,017

20. The data from USGS gage station on the Swan River near Bigfork (#12370000) was assessed to show physical availability from Swan River. This discharge data is for the period of May 1922 through September 2014. Table 2 represents year-round median of the mean monthly flow rates and volumes associated to these measurements. Volumes were calculated based on

constant median of the mean flow through the month. Period of diversion lows for this application were 443.2 CFS and 24,614.08 AF in February.

Table 2: Median of the Mean Monthly Flows and Volumes of the Swan River (#12370000)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Flow (CFS)	449.6	443.2	586.65	1417.5	2700	3126	1571	662.8	502	517.5	547.3	490.7
Volume (AF)	27644.83	24614.08	36071.7	84347.11	166016.5	186009.9	96597.02	40753.98	29871.07	31819.83	32566.61	30171.97

21. The requested flow of 297 GPM (0.66 CFS) up to 89.42 AF of water is available.

CONCLUSIONS OF LAW

22. Pursuant to § 85-2-311(1)(a) (i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

23. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

24. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Findings of Fact Nos. 14 – 21)

Legal Availability:

FINDINGS OF FACT

25. Based on Department memo dated January 10, 2011, evaluation of legal availability was based on depletions to surface water of Flathead Lake and the Swan River instead of legal demands in the aquifer flux for this application as required by ARM 36.12.1704.

26. The Natural Resource Information System (NRIS) of the Department of Natural Resources and Conservation (DNRC) water right database was used to query water right users from Flathead Lake down to, but not including, Kerr Dam. These appropriations totaled 176.65 CFS.

27. Monthly legal demands were calculated using righted flow rates and assuming total righted volumes based on continuous flow rate needed to be available every month during the period of diversion. This assumption leads to an overestimation of legal demands for their respective periods and as a result the Department finds this an appropriate measure of legal demands. A comparison of the physical availability data obtained from the USGS gauging station #12372000 Flathead River near Polson and the existing legal demands index for Flathead Lake to Kerr Dam are found in the tables below. The following tables show what is physically available from the source minus legal demands of the source showing that the requested flow rate and volume of 297 GPM (0.66 CFS) and 89.42 AF respectively are available.

Flathead Lake Legal Availability – Flow rate (CFS)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Flow Rate (CFS)	10,315	9,174	7,822	9,201	18,560	25,500	13,605	6,317	6,121	7,315	8,891	10,070
Legal Demands (CFS)	88	88	94	120	167	176	177	177	153	135	104	91
Available (CFS)	10,227	9,086	7,728	9,081	18,393	25,324	13,428	6,140	5,968	7,180	8,787	9,979

Flathead Lake Legal Availability – Volume (AF)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
Volume (AF)	634,245	509,470	480,925	547,496	1,141,210	1,517,355	836,539	388,417	364,225	449,782	529,051	619,180
Legal Demands (AF)	5,419	4,902	5,757	7,136	10,294	10,472	10,883	10,857	9,129	8,322	6,159	5,580
Available (AF)	628,826	504,568	475,168	540,362	1,130,916	1,506,883	825,656	377,560	355,096	441,460	522,892	613,0600

28. There are numerous water rights out of Flathead Lake and PPL Montana LLC owns the hydropower water rights for Kerr Dam. PPL Montana LLC and the Confederated Salish and Kootenai Tribes jointly operate Kerr Dam. The two claimed water rights for Kerr Dam are for 14, 540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of PPL Montana LLC’s claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

29. Kerr Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though PPL Montana LLC hydropower water rights at Kerr Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Kerr Dam’s reservoir, Flathead Lake, consistently obtains a full pool status each year.

30. Pending an adjudication of PPL Montana LLC hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water above Kerr Dam can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

31. The Natural Resource Information System (NRIS) of the Department of Natural Resources and Conservation (DNRC) water right database was used to query water right users from the Swan River from Swan Lake down to the confluence of Flathead Lake. These appropriations totaled 686.59 CFS.

32. Monthly legal demands were calculated using righted flow rates and assuming total righted volumes based on continuous flow rate needed to be available every month during the period of diversion. This assumption leads to an overestimation of legal demands for their respective periods and as a result the Department finds this an appropriate measure of legal demands. A comparison of the physical availability data obtained from the USGS gauging station #12370000 Swan River near Bigfork and the existing legal demands index for Swan River to the confluence with Flathead Lake are found in the tables below. The following tables show what is physically available from the source minus legal demands of the source.

Swan River Availability – Flow rate (CFS)

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Flow Rate (CFS)	449.6	443.2	586.65	1417.5	2700	3126	1571	662.8	502	517.5	547.3	490.7
Legal Demands (CFS)	672.67	672.67	672.84	674.29	682.21	686.58	686.59	686.59	686.54	682.39	673.28	672.81
Available (CFS)	-223.07	-229.47	-86.19	743.21	2017.79	2439.42	884.41	-23.79	-184.54	-164.89	-125.98	-182.11

Swan River Availability – Volume (AF)

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Volume (AF)	27644.83	24614.08	36071.7	84347.11	166016.5	186009.9	96597.02	40753.98	29871.07	31819.83	32566.61	30171.97
Legal Demands (AF)	41360.87	37358.2	41371.32	40123.04	41947.46	40854.35	42216.77	42216.77	40851.97	41958.53	40062.94	41369.47
Available (AF)	-13890.7	-12946.3	-5615.05	43523.7	123261.1	144824.7	53636.87	-1834.17	-11332.6	-10283.8	-7758.15	-11466.8

33. Applicant has addressed legal availability of surface water by providing an aquifer recharge plan which proposes to mitigate the depletions to surface water in full. This mitigation/aquifer recharge plan is fully addressed under “Adverse Effect” below.

CONCLUSIONS OF LAW

34. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

35. It is the applicant’s burden to present evidence to prove water can be reasonably considered legal available. *E.g.*, Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311,

MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

36. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and groundwater and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and groundwater appropriators must prove unappropriated surface water, *citing Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing Loyning v. Rankin* (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.*

63997-42M by Joseph F. Crisafulli (DNRC Final Order 1990)(since there is a relationship between surface flows and the groundwater source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to groundwater. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed groundwater appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5; Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

Where a proposed groundwater appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on and availability of water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal

availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion of 3 gpm and 9 gpm respectively to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping).

Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, *supra*.

37. Use of an infiltration gallery for historic irrigation water rights can offset year-around surface water depletions from proposed new groundwater appropriation to prove legal availability. E.g., *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

38. Based on the Applicant’s proposed aquifer recharge plan, the Applicant has proven by a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the applicant seeks to appropriate 297 GPM (.66 CFS) up to 89.42 AF.

39. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the

amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (Findings of Facts Nos. 25 - 33)

Adverse Effect

FINDINGS OF FACT

40. The Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of a prior appropriator will be satisfied contains measures of reduced use and finally total cessation. Applicant proposes to implement the following steps: initially reduce irrigation application 50 percent; cease irrigation application; initiate domestic water rationing to 50 percent during extreme shortage and finally turning the well pumps off.

41. The potential for adverse effect to senior groundwater right appropriators was evaluated using information derived from the aquifer properties. The Theis solution using a transmissivity value (T) of 20,310 ft²/day and a storativity value (s) of 0.001 was used to calculate maximum drawdown in existing wells over a five-year period at a normalized pumping schedule.

Drawdown of more than 1 foot appears in wells within 1,000 feet of the production wells.

Drawdown in these 15 wells range from 1.00 feet to 1.25 feet. The smallest remaining available water column in these wells was calculated at 57 feet. The Department confirms this being a conservative estimation of drawdown in neighboring wells.

42. Domestic wastewater will be diverted to a community drainfield. Using the Department standard of 10% consumption with drainfields, **2.07 AF** (20.67 AF * 0.10) is expected not to return to source. Lawn and garden consumption is based on estimates provided in Irrigation Water Requirements (IWR) using the Bigfork site value of 17.97 inches or 1.498 feet per acre. Lawn and garden consumption would be **48.12 AF** (1.498 * 32.12 acres). Total consumption for proposed purposes would be **50.19AF**.

43. The Well Pumping Depletion Model (WPDM) was used to calculate the long-term net effects to surface source of the Swan River which is approximately 840 feet from the proposed

wells and determined to be hydraulically connected. The model was run for a period of 300 years, at which time the system is assumed to be at equilibrium.

The following table reflects groundwater depletions of the proposed public water supply system totaling 89.42 AF.

Kootenai Lodge Estates – Groundwater Depletion

Pumping Schedule			Pumping Summary		Depletion Summary			At Equilibrium
Date	Pumping Period (months)	Pumping Rate (gpm)	Volume Pumped This Period (acre-feet)	Cumul. Volume Pumped (acre-feet)	Depletion Rate (gpm)	Volume of Depletion (acre-feet)	Volume of Depletion This Period (acre-feet)	Calc. Vol of Depletion This Period (acre-feet)
January	3589	12.81	1.72	26,570.14	18.14	26,403.76	2.51	2.53
February	3590	12.81	1.72	26,571.86	17.35	26,406.14	2.38	2.40
March	3591	12.81	1.72	26,573.59	16.81	26,408.44	2.29	2.31
April	3592	26.37	3.54	26,577.13	27.40	26,411.89	3.45	3.48
May	3593	70.03	9.41	26,586.54	63.24	26,419.55	7.66	7.73
June	3594	108.28	14.55	26,601.10	96.73	26,431.70	12.15	12.27
July	3595	152.09	20.44	26,621.54	135.42	26,448.90	17.20	17.37
August	3596	138.42	18.60	26,640.14	128.25	26,466.17	17.27	17.44
September	3597	75.98	10.21	26,650.36	78.88	26,477.85	11.69	11.80
October	3598	25.93	3.49	26,653.84	35.83	26,483.73	5.88	5.94
November	3599	12.81	1.72	26,655.56	21.65	26,487.09	3.35	3.38
December	3600	12.81	1.72	26,657.28	19.36	26,489.82	2.74	2.77
WPDM - Total Calculated Diversion							88.57	89.42

44. The following table reflects depletions to surface source of the Swan River from the proposed public water supply system totaling 50.19 AF (89.42 AF diverted – return flows of 39.23 AF).

Kootenai Lodge - Net Depletion to Swan River from Proposed Groundwater Development

Month	Groundwater Depletions (acre-feet)	Domestic Returns (acre-feet)	Irrigation Returns (acre-feet)	Net Depletion (acre-feet)
January	2.53	1.55	0.13	0.85
February	2.40	1.55	0.11	0.74
March	2.31	1.55	0.10	0.67
April	3.48	1.55	0.53	1.40
May	7.73	1.55	2.02	4.17
June	12.27	1.55	3.47	7.25
July	17.37	1.55	5.11	10.71
August	17.44	1.55	4.90	10.99
September	11.80	1.55	2.85	7.40
October	5.94	1.55	0.96	3.42
November	3.38	1.55	0.28	1.55
December	2.77	1.55	0.17	1.05
Annual	89.42	18.60	20.63	50.19

45. Water is not legally available for depletion in the Swan River during the months of August through March; therefore, the Applicant must mitigate depletions during this time. Applicant proposes to use its water rights from Johnson Creek and Schmidt Creek (water from both sources flows into the Swan River), for aquifer recharge as proposed in change application 76K 30070513. Historic diversions of stock, domestic, commercial and irrigation claims total 95.70 AF.

46. WPDM was utilized to calculate the rate and timing of historic return flows to the Swan River. Historic commercial and domestic wastewater was sent to a cesspool located northeast of the old lodge and approximately 475 feet from the Swan River. Historic irrigation efficiency was calculated at 60 percent with the point of return being the geometric center of the grounds, which is 463 feet from the Swan River. In order to assess return flow at equilibrium, the volume

of accretion was adjusted to match the calculated volume of return flow and the monthly ratios obtained from the 300th year of the model were assumed to remain constant. The table below shows historic net depletions from the Swan River totaling 53.57 AF.

Kootenai Lodge - Net Depletion to Swan River from Historic Use

Month	Surface Water Diversions (acre-feet)	Domestic & Commercial Returns (acre-feet)	Irrigation Returns (acre-feet)	*Net Depletion (acre-feet)
January	0.47	0.29	0.21	-0.03
February	0.42	0.28	0.18	-0.04
March	0.47	0.28	0.16	0.03
April	2.98	0.51	0.87	1.60
May	11.18	1.10	3.28	6.79
June	17.00	1.19	5.65	10.17
July	24.91	1.20	8.32	15.38
August	22.62	1.21	7.98	13.43
September	11.77	1.22	4.65	5.91
October	2.96	0.62	1.57	0.77
November	0.45	0.34	0.45	-0.34
December	0.47	0.30	0.28	-0.11
Annual	95.70	8.53	33.60	53.57

* negative numbers indicate a net return to the Swan River historically.

47. Proposed depletions were then subtracted from the historic depletions to determine how much mitigation would be required each month.

Kootenai Lodge - Proposed Depletions v. Historic Depletions to Swan River

Month	Historic Depletions (acre-feet)	Proposed Depletions (acre-feet)	Total Change (acre-feet)
January	-0.03	0.85	-0.88
February	-0.04	0.74	-0.78
March	0.03	0.67	-0.63
April	1.60	1.40	0.20
May	6.79	4.17	2.62

June	10.17	7.25	2.92
July	15.38	10.71	4.68
August	13.43	10.99	2.44
September	5.91	7.40	-1.49
October	0.77	3.42	-2.65
November	-0.34	1.55	-1.89
December	-0.11	1.05	-1.16
Annual	53.57	50.19	3.38

* negative numbers indicate a net return to the Swan River historically.

Applicant’s plan for mitigating the Swan River during the months of January through March and September through December for the proposed use is a recharge basin located approximately 980 feet from the Swan River. Water from Johnson Creek will be injected into the recharge basin during the months of June through September at a maximum of 175 GPM.

Johnson Creek Diversion for Recharge

Month	Total Diversion (gpm)	Total Diversion (acre-feet)
January	0	0.00
February	0	0.00
March	0	0.00
April	0	0.00
May	0	0.00
June	175	23.20
July	175	23.97
August	150	20.55
September	79	10.47
October	0	0.00
November	0	0.00
December	0	0.00
Annual		78.20

The return flow from the basin recharge to the Swan River at equilibrium would appear as such:

Kootenai Lodge Estates - Recharge Basin Flow

Pumping Schedule		Pumping Summary		Accretion Summary			At Equilibrium	
Date	Pumping	Pumping	Volume Pumped	Cumul. Volume	Accretion	Volume of	Volume of Accretion	Calc. Vol of Accretion
	Period	Rate	This Period	Pumped	Rate	Accretion	This Period	This Period
	(months)	(gpm)	(acre-feet)	(acre-feet)	(gpm)	(acre-feet)	(acre-feet)	(acre-feet)
January	3589	0.00	0.00	23,266.95	7.14	23,097.34	1.06	1.07
February	3590	0.00	0.00	23,266.95	6.12	23,098.23	0.89	0.90
March	3591	0.00	0.00	23,266.95	5.40	23,099.00	0.77	0.78
April	3592	0.00	0.00	23,266.95	4.86	23,099.69	0.69	0.70
May	3593	0.00	0.00	23,266.95	4.43	23,100.31	0.62	0.63
June	3594	175.00	23.52	23,290.47	140.66	23,115.63	15.32	15.45
July	3595	175.00	23.52	23,313.99	151.47	23,135.39	19.76	19.93
August	3596	150.00	20.16	23,334.15	136.70	23,153.99	18.60	18.76
September	3597	79.00	10.62	23,344.77	82.48	23,166.46	12.46	12.57
October	3598	0.00	0.00	23,344.77	17.49	23,170.61	4.16	4.20
November	3599	0.00	0.00	23,344.77	11.40	23,172.48	1.87	1.89
December	3600	0.00	0.00	23,344.77	8.70	23,173.82	1.33	1.34
WPDM - Total Calculated Accretion:							77.53	78.20
*Calculated Total Accretion at Equilibrium is 78.20								

The net effect to the Swan River after mitigation was calculated by subtracting the proposed depletions associated with the groundwater system and diversion from Johnson Creek from the calculated historic diversions. Then the rate of return (or recharge) associated with seepage from the recharge basin was added. The net effect is an added 3.38 AF to the river system annually, an amount that is required to achieve a 0.00 net effect during the month of November. Net depletion of 4.83 AF in June remains, however, water is legally available for depletion during June.

Kootenai Lodge - Net Effect to Swan River with Recharge Basin

Month	*Historic Depletions (acre-feet)	Proposed GW Depletions (acre-feet)	Proposed SW Diversion (acre-feet)	Recharge to SW Accretion (acre-feet)	Net Effect Swan River (acre-feet)
January	-0.03	0.85	0.00	1.07	0.19
February	-0.04	0.74	0.00	0.90	0.12
March	0.03	0.67	0.00	0.78	0.14
April	1.60	1.40	0.00	0.70	0.89
May	6.79	4.17	0.00	0.63	3.25
June	10.17	7.25	23.20	15.45	-4.83
July	15.38	10.71	23.97	19.93	0.63
August	13.43	10.99	20.55	18.76	0.65
September	5.91	7.40	10.47	12.57	0.61
October	0.77	3.42	0.00	4.20	1.54
November	-0.34	1.55	0.00	1.89	0.00
December	-0.11	1.05	0.00	1.34	0.18
Annual	53.57	50.19	78.20	78.20	3.38

* negative numbers in Historic Depletions indicate a net return to the Swan River historically.

CONCLUSIONS OF LAW

48. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

49. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant

is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

50. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

51. It is the applicant's burden to produce the required evidence. E.g., Id. at Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

52. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a *de minimis* level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8; see also, *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied).

53. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant's burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source."); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006)(adverse effect not required to be measureable but must be calculable); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994).

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

54. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

55. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. E.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential

depletion to the Gallatin River), *affirmed*, *Montana River Action Network v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*,(DNRC Final Order 2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC*.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. *See Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148 Mont. 355, 423 P.2d 587.

Augmentation/ mitigation is also recognized in other prior appropriation states for various purposes. *E.g.* C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

E.g., *Combined Application for Beneficial Water Use Permit No. 76G-30050801 and Change Authorization 76G-30050805 by Missoula County* (DNRC Final Order 2012)(permit granted conditioned on mitigation of depletion ranging .8 to 7.4 gpm); *In the Matter of Application No.*

76H-30046211 for a Beneficial Water Use Permit and Application No.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer (DNRC Final Order 2010, Combined Application)(permit granted conditioned on mitigation).

56. If the applicant seeks to use a mitigation plan to prove lack of adverse effect, the applicant must have a defined mitigation proposal at the time of application. It is the Applicant's burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on this basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted based on plan for mitigation of depletion), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007) (permit granted on basis of plan for mitigation of depletion), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); §85-2-360 *et seq.*, MCA.

57. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

58. The Department will evaluate whether an applicant's proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet § 85-2-311(1)(b), MCA, in the permit proceeding. The applicant's authority to use the water as proposed is assumed for the purposes of the analysis. The authority of the applicant to use the offset water as proposed for the plan is

not determined in the permit proceeding but is determined in any required application for change in appropriation. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department exactly what it proposes for a mitigation/aquifer recharge plan. *E.g.*, Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); § 85-2-360 *et seq.*

59. Pursuant to § 85-2-363, MCA, an applicant whose hydrogeologic assessment conducted pursuant to § 85-2-361, MCA, predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

60. Pursuant to § 85-2-362, MCA, an aquifer recharge plan must include: evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to §§75-5-410 and 85-2-364, MCA; where and how the water in the plan will be put to beneficial use when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; a description of the process by which water will be reintroduced to the aquifer; evidence of water availability; and evidence of how the aquifer recharge plan will

offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

61. In this case the Applicant proposes to mitigate all consumption that causes depletion in months where water is not legally available to deplete from the Swan River. Depletions are fully offset by aquifer recharge water during every month with the exception of June. Water is legally available for depletion during the month of June; therefore, mitigating in June is not required.

62. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed appropriation as conditioned on Applicant's plan. § 85-2-311(d), MCA. (Findings of Fact Nos. 40 – 47)

Adequate Diversion

FINDINGS OF FACT

63. The proposed means of diversion are two wells PWS#1 (GWIC 231690) and PWS#2 (GWIC 231691) both constructed by Billmayer Drilling (MT license #WWC-335) and completed in August and September 2006 respectively. Both were completed to a depth of 192 feet with static water levels at 44 feet bgs and 45 feet bgs respectively. Both wells were screened from 189 feet to 191 feet with PWS#1 having four .25" – 6" torch or plasma. In the pump house, six Goulds (Model V350) hydropneumatic pressure tanks will control the pressure to the system. Once the pressure drops below 50 psi, a pump will turn on and run until the pressure in the water system is at 75 psi. The wells will contain Berkeley Model 6TP-225 (8 stage) submersible turbine pumps with a 25-hp motor. The pumps will cycle on alternate schedules based on demand. From the pump house, water is delivered through approximately 1,500 linear feet of 4-inch water main. Service connections are provided to each of the 41 lots via a 1-inch single tapping saddle. Included pump curve rated production of 297 GPM at 160 total dynamic head (50 psi + 45 feet of lift). System was designed by Billmayer Engineering and specifications were included in application. Because PWS#2 is the POD for Claim 76K 40328 at a flow rate of 30

GPM which is still in use, this well will have a flow rate of 245 GPM attached to it for this application.

CONCLUSIONS OF LAW

64. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

65. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

66. 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. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

67. 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. § 85-2-311(1)(c), MCA. (Finding of Fact No. 63).

Beneficial Use

FINDINGS OF FACT

68. The proposed appropriation is for multiple domestic use on 41 lots up to 20.67 AF and lawn and garden irrigation on 32.12 acres up to 68.75 AF for a total volume of 89.42 AF and 297 GPM (0.66 CFS). The proposed uses encompass Kootenai Lodge Estates.

69. Multiple domestic volume is based on Flathead County Standard of 450 gallons per residence per day for luxury dwellings. These year-round residences would total **20.67 AF** (450 gpd * 41 homes * 365 days ÷ 325,851 gallons).

70. Using Irrigation Water Requirements for the Bigfork site, 17.97 inches (1.498 feet) are needed in a dry year. The entire subdivision of 41.26 acres is proposed to be irrigated. Non-irrigable areas include the impervious surfaces of the buildings, proposed roadways and the Johnson Creek Floodplain leaving 32.12 acres of irrigable area. With the Department efficiency standard of 70% for sprinklers systems, total needed diverted volume would equal **68.75 AF** (1.498 feet * 32.12 acres ÷ .70 efficiency).

71. Total daily demand for the 41 homes, lawn and garden irrigation on 32.12 acres, and commercial use for the lodge (including pool) would be 224,415 gallons at peak demand.

41 homes = 18,450 gpd (41 * 450 gpd)

Lodge = 5,000 gpd (100 gpd * 50 members)

Pool = 400 gpd (40 swimmers * 10 gpd)

Total = 23,850 gpd

Using a peaking factor of 7, the result would be **116 GPM** (7 * 23,850 ÷ 1440 minutes).

During the month of July, when irrigation requirements are at its maximum an average volume of approximately 200,565 gallons per day is required (4.99 inches ÷ 12 * 32.12 acres ÷ .70 efficiency rate * 325,851 gallons ÷ 31 days). This volume can be applied over a period of 18.5 hours with an average flow rate of **180.7 GPM**. Total flow rate required would be **297 GPM** (0.66 CFS).

CONCLUSIONS OF LAW

72. Under § 85-2-311(1)(d), MCA, an applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§ 85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

73. The amount of water under a water right 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, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. BDV-2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (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).

74. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

75. Applicant proposes to use water for multiple domestic and lawn and garden irrigation which are recognized beneficial uses. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence multiple domestic and lawn and garden irrigation are beneficial uses and that 89.42 AF of diverted volume and 297 GPM of water requested is the amount needed to sustain the beneficial use.(Findings of Fact Nos. 68 - 71)

Possessory Interest

FINDINGS OF FACT

76. The Applicant signed and had the affidavit on the application form notarized affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

77. Pursuant to § 85-2-311(1)(e), MCA, an 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, or if the proposed use has 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 under the permit.

78. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, 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.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

79. 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. § 85-2-402(2)(d), MCA. (Finding of Fact No. 76)

CHANGE NO. 76K 30070513
WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

80. Applicant proposes to change the following Statements of Claims: 76K 40313, 76K 40314, 76K 40315, 76K 40316, 76K 40317, 76K 40318, 76K 40319, 76K 40320, 76K 40322, 76K 40326 and 76K 40327. Place of use is Amended Plat of Lot 128, Swan Sites No. 1 Subdivision known as the Historic Kootenai Lodge Estates Subdivision in Section 11 and Section 14 all in Township 26N, Range 19 W, Lake County approximately 5 miles southeast of Bigfork with the western margin of the subdivision bordering the Swan River. Table 1 shows elements of the water right(s) to be changed:

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

W.R. NO.	SOURCE	FLOW	VOLUME	PURPOSE	PERIOD OF USE	POINT(S) OF DIVERSION	PLACE OF USE	PRIORITY DATE
76K40313	Johnson Creek	15 GPM	1.50 AF	Domestic	1/1-12/31	SWNENE S14-T26N- R19W	NWNENW S14-T26N-R19W	8/20/1896
76K40314	Johnson Creek	15 GPM	2.75 AF	Domestic	1/1-12/31	NENENW S14-T26N- R19W	NWNENW S14-T26N-R19W	8/1/1914
76K40315	Johnson Creek	30 GPM		Stock	1/1-12/31	SWNENE S14-T26N- R19W	NENW and SENW S14-T26N-R19W	8/20/1896
76K40316	Johnson Creek	30 GPM		Stock	1/1-12/31	SWNENE S14-T26N- R19W	SWSESW S11-T26N-R19W	10/11/1906
76K40322	Johnson Creek	250 GPM	6 AF	Commercial	4/1-10/19	SWNENE S14-T26N- R19W	NENW, SENW S14 and SESW S11 T26N, R19W	8/1/1914
76K40317	Johnson Creek	196 GPM	43.75 AF	Irrigation	4/15-10/4	SWNENE S14-T26N- R19W	NENW S14-T26N-R19W	8/20/1896
76K40318	Johnson Creek	95 GPM	21 AF	Irrigation	4/15-10/4	SWNENE S14-T26N- R19W	SESW S11-T26N-R19W	10/11/1906
76K40319	Johnson Creek	170 GPM	25 AF	Irrigation	4/1-10/4	SWNENE	NENW and SENW	8/1/1914

						S14-T26N-R19W	S14-T26N-R19W	
76K40320	Schmidt Creek	69.7 GPM	12.30 AF	Irrigation	4/15-10/4	NESWNE S18-T26N-R18W	NENW S14-T26N-R19W	11/22/1923
76K40326	Schmidt Creek	70 GPM	2.0 AF	Commercial	1/1-12/31	NESWNE S18-T26N-R18W	SESW S11-T26N-R19W	11/22/1923
76K40327	Schmidt Creek	100 GPM	10 AF	Commercial	4/1-10-19	NESWNE S18-T26N-R19W	NENW, SENW S14 and SESW S11 T26N, R19W	11/22/1923

81. There are four other Statements of Claims associated with this place of use that are not being included in this change because their uses are considered largely non-consumptive. Those Statements of Claims not included are 76K 40321 and 76K 40325 for power generation, 76K 40323 for recreation and 76K 40324 for fish and wildlife. Statement of Claim 76K 40328 is for commercial use and will continue to be used for the needs of the lodge and pool and shares a point of diversion in the PWS#2 well of proposed Provisional Permit 76K 30064113.

82. Schmidt Creek is a tributary to Johnson Creek which flows into the Swan River above USDA gage #12370000.

83. All water rights listed as being changed or not being changed were historically commingled during operation of the water system.

CHANGE PROPOSAL

FINDINGS OF FACT

84. The Kootenai Lodge property was historically a summer retreat on 41.261 acres. Redevelopment of the property includes a public water supply system from groundwater. This change is to mitigate the impact of new groundwater pumping on the adjacent surface source of the Swan River as proposed in application 76K 30064113. Although retiring all of the Applicant's surface rights from Schmidt Creek and Johnson Creek could mitigate the full volume, it does not mitigate the exact rate and timing of those depletions. The proposed change application would divert water from Johnson Creek and inject it into the shallow substrate such

that it will seep back into the Swan River at the rate and timing required providing aquifer recharge for permit application 76K 30064113. The location of this substrate is the NE¹/₄NE¹/₄NW¹/₄ of Section 14, Township 26N, Range 19W and will be considered the new place of use for this change application.

85. A new point of diversion on Johnson Creek will be used instead of the historic diversion from Schmidt Creek (aka Lost Creek) and the historic diversion on Johnson Creek approximately 2.5 miles east.

86. An in-line flow meter with totalizer will be used to measure the water diverted from Johnson Creek. The following condition applies:

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 MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 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.

§ 85-2-402, MCA, CHANGE CRITERIA

GENERAL CONCLUSIONS OF LAW

87. An applicant in a change proceeding must affirmatively prove all of the criteria in § 85-2-402, MCA. 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), and (16) 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) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

88. The burden of proof in a change proceeding is by a preponderance of evidence, which is “more probably than not.” Hohenlohe ¶¶ 33, 35.

89. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they

existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727;); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also 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). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Water Use Act in § 85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) ... 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.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

90. Montana’s change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as “diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use.” “Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant.”

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) .

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[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

¹ Although Montana has not codified the law in the detail, Wyoming has, and the two states’ requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

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.

Colorado follows a similar analysis under its requirement that a “change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

reduced to a lesser quantity because of the relatively limited actual historic use of the right.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, (DNRC Final Order 1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, (DNRC Final Order 1992); In The Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H, Proposal for Decision and Memorandum at Pgs. 8-22 (Adopted by Final Order January 9, 1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) 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, *citing McDonald*).

The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. [Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 \(1905\)](#). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. [In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). 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. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

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 v. DNRC, 2010 MT 203, ¶¶ 43, 45](#); see also [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 9](#).

91. The extent of the historic beneficial use must be determined in a change case. *E.g.*, [McDonald](#); [Hohenlohe ¶ 43](#); [Quigley](#); [Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 \(Colo. 2002\)](#); [Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 \(Colo.,1999\)](#); [City of Bozeman \(DNRC\), supra](#) (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors”). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie*

evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” § 85-2-234, MCA. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 11 (proof of historic use is required even where a water right is decreed).

92. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. Hohenlohe ¶¶ 30-31.

93. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision); see also Quigley. An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to

reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, 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.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

94. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

95. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

Historic Use:

FINDINGS OF FACT

96. Water Resources Survey, published by the State Engineer's Office in June of 1963 shows none of the acres associated with this change as being irrigated. It does show the Kelly and Evans pipeline diverting from Johnson Creek in the NE¹/₄ NE¹/₄ of Section 14, Township 26N, Range 19W and then running parallel to the stream west to the near edge of the property adjacent to the Swan River. State Engineer's Office field notes dated May 31, 1962 reference the pipe and note 31 irrigable acres with Frances H. Wood and Cornelia A. Hepburn as legal land owners.

97. Historically water was diverted from Johnson Creek and Schmidt Creek (aka Lost Creek) for Kootenai Lodge estate. Water was diverted from Johnson Creek via a diversion dam with headgate. It was conveyed into a 16-inch wood-stave pipeline at a point of diversion located in the SW¹/₄NE¹/₄NE¹/₄ of Section 14, Township 26N, Range 19W. The pipe would convey water approximately 3,800 feet along the north side of Johnson Creek to the power plant located near the confluence with the Swan River. The pipeline was gravity fed with an elevation drop of approximately 40 feet between the point of diversion and the power generation building (Statement of Claims 76K 40321 and 76K 40325). Using the Hazen-Williams formula for full pipe flow and a roughness coefficient of 120 the capacity of the pipeline is estimated to be 9.45 CFS.

98. Water was historically diverted from Schmidt Creek (aka Lost Creek) via a headgate and ditch. Although Schmidt Creek is a tributary of Johnson Creek, occasionally the flow would infiltrate the course alluvial channel and go subsurface; thus being unavailable for diversion. A ditch was constructed to bypass the extremely loose section of the stream. This ditch was trapezoidal with the following dimensions: 3.0 feet wide at the bottom, 3.5 feet wide at the top, and 1.5 feet deep. Using Manning's equation, and a conservative value of 0.04, the capacity of the ditch is estimated to be 23.76 CFS. The point of diversion was located in the SE¹/₄SW¹/₄NE¹/₄ of Section 18, Township 26N, Range 18W. Water diverted from Schmidt Creek was conveyed approximately 0.5 miles south where it discharged into Johnson Creek which served as a natural carrier and provided a secondary point of diversion. All water used at the Kootenai Lodge site

was conveyed through the 16-inch pipeline from Johnson Creek, through the power plant (76K 40321 and 76K 40325 at 6 CFS and 3.44 CFS respectively) and then distributed for other uses.

99. A survey map dated 1925 illustrates location of the ditch relative to Schmidt (aka Lost) Creek and Johnson Creek for the Kelley and Evans property water system. Original maps dated 1925 also show more than 30 structures and a 16-inch water main.

100. Kootenai Lodge Historic District is on the National Register of Historic Places. Historic information for this change was obtained from staff at the current Historic Kootenai Lodge site, an article by Betty Wetzl title “Kootenai Lodge Wilderness Waldorf for Copper Magnates” and the repository of articles found in the Montana Reference section at the Imagine IF Kalispell and North Lake County Public Library. Copies of these articles were included in the application.

101. Statements of Claims 76K 40322, 76K 40326 and 76K 40327 were evaluated for commercial use. Kootenai Lodge became an annual retreat the Kelley/Evans families and those of the other high ranking employees of the Anaconda and Montana Power Companies. The lodge and surrounding cabins provided ornate accommodations for up to 50 guests (total of 33 bathrooms). At its peak, the retreat required 70 employees. A water-heating plant provided hot water throughout the complex with laundry services provided on-site. There was a bar-restaurant where guests could attend evening dinner and activities. A ten car garage stored and provided service to a fleet of vehicles. In the winter, men would cut firewood and put-up ice from the lake. A greenhouse was managed and located to the north of Johnson Creek that was utilized to grow fruits, vegetables and flowers throughout the year. Department of Natural Resources Form 615 was utilized to calculate the historic use associated with operation of the retreat. The following table depicts historic commercial usage:

50 guests	850,000 gallons/season	2.61 AF/season
60 employees	510,000 gallons/season	1.57 AF/season
70 laundry	595,000 gallons/season	1.83 AF/season
50 bar/restaurant	42,500 gallons/season	0.13 AF/season
10 service station	17,000 gallons/season	0.05 AF/season
Total Summer Use	2,014,500 gallons/season	6.18 AF/season
10 employees	97,500 gallons/season	0.30 AF/season

1,500 ft ² greenhouse	273,750 gallons/season	0.84 AF/season
Total year-round Use	371,250 gallons/season	1.14 AF/season

Effluent water was discharged to a community cesspool located on the eastern margin of the property. Claims 76K 40322 and 76K 40327 cite commercial resort use with consumption calculated using the Department domestic standard of 10% equaling 0.62 AF (6.18 AF *.10). Claim 76K 40326 cites commercial greenhouse use. A Department conservative standard of 75% was used to calculate a consumption value of 0.87 AF (1.14 AF * .75). Total commercial consumption is 1.49 AF of the total diverted amount of **7.32 AF** annually.

102. Statements of Claims 76K 40314 and 76K 40313 were evaluated for domestic use. These domestic uses were for homes constructed prior to the main lodge. These homes included the original fish camp, (eventual) maid cabin and (eventual) caretaker's house based on their priorities of 1896 and 1906 respectively. In addition to providing the in-home water for these cabins, an additional 0.5 acres of domestic lawn and garden was included. The DNRC standard of 1 AF per household and 2.5 AF per acre of lawn and garden were used as historic use values. Total domestic use equals **4.25 AF** (3 AF domestic and 1.25 AF domestic lawn and garden). Effluent water was discharged to a community cesspool located near the eastern margins of the property. Consumptive amounts of 10% for domestic and 60% for lawn and garden equal **1.05 AF** (3 AF * .10 + 1.25 AF * .60).

103. Statements of Claims 76K 40315 and 76K 40316 were evaluated for stock use. The main barn had 31 stalls to accommodate Kelley and Evans' families. In addition to the horses, up to 37 head of cattle and 50 chickens were raised on the property. Livestock were kept on the property year-round for lodge use. The DNRC standard of 15 gallons per day per animal unit was used to calculate historic use with the numbers given. Annual stock use equals **1.38 AF** (37 cows (0.62 AF) + 30 horses (0.76 AF) + 50 fowl (0.00 AF)) which is assumed to be 100% consumptive.

104. Statements of Claims 76K 40317, 76K 40318, 76K 40319 and 76K 40320 were evaluated for irrigation use. The areas surrounding the lodge complex were landscaped with 33.1 acres of

lawn and garden. Historic accounts of life at the lodge between 1920s and 1940s indicate 5-power lawn mowers were required to manicure the grounds. A full-time supervisor of lawn work was required to keep the aesthetics of the property to “proper” standards and included a showplace rose garden and dozens of flower boxes and flower beds. Water would have been sprayed throughout the grounds similar to a golf course with hoses and sprinkler irrigation. Wood stave pipes have commonly been dug up when excavating for foundations and utility lines in recent redevelopments at Kootenai Lodge. Using the Department standard for lawn and garden of 2.5 AF/acre would divert 26,964,170 gallons annually or **82.75 AF** (33.1 acres * 2.5 AF). Using Irrigation Water Requirements for the Bigfork area for turf grass would result in a consumptive value of 17.97 inches or **49.65 AF** (1.5 AF * 33.1 acres). This would calculate to an efficiency factor of 60% which is reasonable for sprinkler irrigation of that time.

105. The Department finds the following historic use of **95.70 AF** with **53.57 AF** being consumed at a rate of **1,040.7 GPM (2.32 CFS)**.

Historic Water Use at Kootenai Lodge

Purpose	WR Number	Priority Date	Period of Use	Flow Rate (gpm)	Volume Diverted (acre-feet)	Volume Consumed (acre-feet)
Stock	¹ 76K 40315 00	8/20/1896	1-1 to 12-31	30.0	1.38	1.38
	¹ 76K 40316 00	10/11/1906	1-1 to 12-31	30.0	1.38	1.38
	<i>Combined</i>			<i>60.0</i>	<i>1.38</i>	<i>1.38</i>
Domestic	76K 40314 00	8/1/1914	1-1 to 12-31	15.0	2.75	0.65
	76K 40313 00	8/20/1896	1-1 to 12-31	15.0	1.50	0.40
	<i>Combined</i>			<i>30.0</i>	<i>4.25</i>	<i>1.05</i>
Commercial	² 76K 40322 00	11/22/1923	4-1 to 10-19	100.0	6.18	0.62
	² 76K 40327 00	8/1/1914	4-1 to 10-19	250.0	6.00	0.62
	76K 40326 00	11/22/1923	1-1 to 12-31	70.0	1.14	0.87
	<i>Combined</i>			<i>420.0</i>	<i>7.32</i>	<i>1.49</i>
Irrigation	76K 40317 00	8/20/1896	4-15 to 10-4	196.0	32.50	19.50
	76K 40318 00	10/11/1906	4-15 to 10-4	95.0	15.00	9.00
	76K 40319 00	8/1/1914	4-15 to 10-4	170.0	25.00	15.00
	76K 40320 00	11/22/1923	4-15 to 10-4	69.7	10.25	6.15
	<i>Combined</i>			<i>530.7</i>	<i>82.75</i>	<i>49.65</i>

Total	<i>Combined</i>	1,040.7	95.70	53.57
¹ Claim same animals with different places of use; maximum combined diverted volume is 1.38 acre-feet per year. ² Claim same place of use and purpose from two different sources; max combined diverted volume is 6.18 acre-feet per season.				

CONCLUSIONS OF LAW

106. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval. § 85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120; 85-2-102(12)(“Existing right” or “existing water right” means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973). An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Quigley, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (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, *citing Featherman v. Hennessy*, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of

change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

107. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, as reflecting basic water law principles).

The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. *Id.* at Pg. 14; *In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008)(applicant must provide evidence on actual historic use of water right regardless of decree; statement that “we will not be using any more water than was used before” is not sufficient).

108. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716

(judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

109. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902.

If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902, the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”).

110. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

111. Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a

condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (DNRC Final Order 1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, *supra*.

112. The Department has the authority to consider waste in determining a volume for change in a water right.

The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.](#)

Hohenlohe ¶ 71.

113. Applicant may proceed under ARM 36.12.1902, the Department’s historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has not elected to proceed under ARM 36.12.1902. (Finding Of Fact No.104)

114. The Applicant has proven by a preponderance of the evidence the historic use of Water Right Claims No. 76K 40313, 76K 40314, 76K 40315, 76K 40316, 76K 40317, 76K 40318, 76K 40319, 76K 40320, 76K 40322, 76K 40326 and 76K 40327 diverted 95.70 AF and 1,040.7 AF with a consumptive use of 53.57 AF. (Findings Of Fact No. 96 - 105)

Adverse Effect:

FINDINGS OF FACT

115. Calculations show historical diversion from Johnson Creek and Schmidt Creek (aka Lost Creek) on claims for this change was 1,040.7 GPM (2.32 CFS) up to 95.7 AF with 53.57 AF being consumed.

116. Proposed mitigation plan is for 175 GPM (0.39 CFS) up to 78.20 AF.

117. Proposed purpose of mitigation is completely nonconsumptive with all water eventually returning to the Swan River. The proposed point of diversion will be a 6-inch, PVC gravity-fed pipeline from Johnson Creek. The water main will have a drop of 2.25 feet over the length of approximately 450 feet with a calculated maximum capacity of 269.3 GPM (0.60 CFS). A gate valve or butterfly valve will be used to restrict the flow to the rate required. The following table shows the diversion schedule for the mitigation water.

Johnson Creek Diversion for Recharge

Month	Total Diversion (gpm)	Total Diversion (acre-feet)
January	0	0.00
February	0	0.00
March	0	0.00
April	0	0.00
May	0	0.00
June	175	23.20
July	175	23.97
August	150	20.55
September	79	10.47
October	0	0.00
November	0	0.00
December	0	0.00
Annual		78.20

118. Proposed period of diversion will not be outside of historical period of diversion.

119. There are no other diversions below the proposed point of diversion, nor are there any between the historic point of diversion and the proposed point of diversion.

120. The Application will be subject to the following measuring 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 MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 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.

CONCLUSIONS OF LAW

121. The Applicant bears the affirmative burden of proving that 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. § 85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

122. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185 Mont. 409, 605 P.2d 1060, *following Lokowich v. Helena* (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (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 (1909), 38 Mont. 302, 100 P. 222 (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); Gassert v. Noyes (1896), 18 Mont. 216, 44 P.

959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) Pg.13; *City of Bozeman* (DNRC), *supra*; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. 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. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 (1908)....

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...

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 ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo.1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” (citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

...we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

123. Consumptive use of water may not increase when an existing water right is changed. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003).

Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (application subsequently withdrawn); *In the Matter of Application to Change A Water Right No. 43B 30002710 by USA (Dept. of Agriculture – Forest Service)* (DNRC Final Order 2005); *In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

Return flows are not part of the water right of the appropriator changing their water right and an appropriator changing their water right is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. See also, Doney, p. 21.

The Montana Supreme Court also 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, ¶¶ 2, 31,43, *citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, supra.

124. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra; In the Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008) (applicant must show that significant changes in timing and location of historic return flow will not be adverse effect.) The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

125. The Applicant has proven by a preponderance of the evidence 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.(Finding Of Fact Nos. 105 - 120)

Adequate Diversion

FINDINGS OF FACT

126. A new point of diversion on Johnson Creek in the NE¹/₄NE¹/₄NW¹/₄ of Section 14, Township 26N, Range 19W, is required for the proposed change. This diversion will replace both the historic diversion on Schmidt Creek (aka Lost Creek) and Johnson Creek. Water will be diverted from Johnson Creek using an intake weir. On the back side of the weir a screen will be mounted above a Coanda sump that collects water as it flows over it. Water will then pass over an acceleration plate to distribute the flow and increase the velocity before flowing over the screen. The increase in velocity ensures that all silt and debris pass downstream and are not brought into the recharge basin. A portion of the water flowing over the screen passes through into the collection chamber below the screen where it will be sent to a 6-inch PVC mainline where an in-line flow meter with totalizer will be used to measure the instantaneous and total volume of water diverted. Flow to the discharge basin will be controlled with a 6-inch gate or butterfly valve. Water will travel through 125 feet of PVC pipe north through a pair of silt traps, which consist of buried concrete chambers with two baffles used to create 3 chambers per trap. The traps will allow the silt and other debris to settle out of the water stream. These traps can be cleaned regularly. Water is gravity fed to the recharge basin. The recharge basin is a 1,800 square foot area with approximately 480 feet of 3-inch HDPE drain tile evenly spaced throughout. The basin is backfilled with 1-inch open graded drain rock to allow the maximum amount of water to percolate into the native soils. A falling-head double ring infiltrometer test (ASTM D3385-03) was performed at the site of the proposed recharge basin. The infiltration rate was determined to be 100 inches/hour or approximately 200 feet per day. The recharge basin will accept a maximum continuous inflow of 175 GPM with a safety factor of 10. This value is used to reflect risk of the infiltration basin silting in; a higher number extends the life expectancy of the basin.

CONCLUSIONS OF LAW

127. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1) (a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 GPM, and maximum usage allowed during non-high water periods, is 144-247 GPM, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *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); *In the Matter of Application for Beneficial Water Use Permit No.*

43B-30002710 by USDA (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

128. 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. § 85-2-402 (2)(b), MCA. (Finding Of Fact No. 126).

Beneficial Use

FINDINGS OF FACT

129. Applicant proposes to use 175 GPM (0.39 CFS) up to 78.20 AF for aquifer recharge water that will be injected into the shallow substrate such that it will seep back into the Swan River at the rate and timing required for Application for Beneficial Water Use Permit No. 76K 30064113.

CONCLUSIONS OF LAW

130. Under the change statute, § 85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and 311(1)(d), MCA.

131. 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. The amount of water under a water right 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 (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Quigley; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3

(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); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, (DNRC Final Order 1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In the Matter of Application for Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); *In The Matter of Change Application No. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008) (when adding new water rights to land already irrigated by other water rights, applicant must show that all of the proposed rights together are needed to irrigate those lands);

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for

the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. 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.

132. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005).

133. Applicant proposes to use water for mitigation/aquifer recharge which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence aquifer recharge is a beneficial use and that 78.2 acre-feet of diverted volume and 175 GPM flow rate of water requested is the amount needed to sustain the beneficial use. § 85-2-402(2)(c), MCA. (Finding Of Fact No. 129)

Possessory Interest

FINDINGS OF FACT

134. The Applicant signed and had the affidavit on the application form notarized affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file)

CONCLUSIONS OF LAW

135. Pursuant to § 85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, 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 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.

136. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, 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.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

137. 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. § 85-2-402(2)(d), MCA. (Finding Of Fact No. 134)

Salvage Water

138. This Application does not involve salvage water.

Discharge Permit

FINDINGS OF FACT

139. A discharge permit from the Department of Environmental Quality is not required.

CONCLUSIONS OF LAW

140. Sections 85-2-362(3) and 85-2-364, MCA require that an Applicant receive the appropriate water quality permits for a mitigation or an aquifer recharge plan pursuant to Title 75, chapter 5 MCA, as required by §§75-5-410 and 85-2-364, MCA, prior to the grant of beneficial water use permit application as part of a combined application under § 85-2-363, MCA. Applicant has complied with this requirement.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Order, the Department preliminarily determines that this Combined Application for Beneficial Water Use Permit No. 76K 30064113 and Change 76K 30070513 should be **GRANTED**.

BENEFICIAL WATER USE PERMIT

141. The Department determines the Applicant may for the purposes of Beneficial Water Use Permit No. 76K 30064113 divert water from groundwater, by means of two wells at depths of 192 feet, from January 1 through December 31 at 297 GPM (0.66 CFS) up to 89.42 AF, from a point in the NE¹/₄NE¹/₄NW¹/₄ of Section 14, Township 26N, Range 19W, for 20.67 AF of multiple domestic use (41 hook-ups) from January 1 through December 31 and 68.75 AF for lawn and garden use on 32.12 acres from April 15 through October 15 annually. The place of use is Kootenai Lodge Estates Subdivision and is generally located in the S¹/₂SE¹/₄SW¹/₄ Section 11 and NE¹/₄NW¹/₄ and the NE¹/₄SE¹/₄NW¹/₄ Section 14, all in Township 26N, Range 19W, Lake County approximately 5 miles southeast of Bigfork, Montana.

The surface source that will be depleted is the Swan River adjacent to the proposed place of use down to Flathead Lake. Change No. 76K 30070513 will mitigate the affected reach by taking water from Johnson Creek and Schmidt Creek and injecting it into the shallow substrate such that it will seep back to the Swan River at the rate and timing required to serve as aquifer recharge for groundwater pumping depletions to the surface source.

The application will be subject to the following conditions, limitations or restrictions.

1. **DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE AQUIFER RECHARGE PLAN DESCRIBED IN THIS DECISION IS LEGALLY**

IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF THE AQUIFER RECHARGE PLAN AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES IN WHOLE OR IN PART.

2. 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 MONTHLY 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.

AUTHORIZATION OF CHANGE IN APPROPRIATION RIGHT

This change is to mitigate the impact of new groundwater pumping on the adjacent surface source of the Swan River as proposed in application 76K 30064113. Although retiring all of the Applicant's surface rights from Schmidt Creek and Johnson Creek could mitigate the full volume, it does not mitigate the exact rate and timing of those depletions. The proposed change application would divert water from Johnson Creek and inject it into the shallow substrate such that it will seep back into the Swan River at the rate and timing required providing aquifer recharge for permit application 76K 30064113. The location of this substrate is the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 26N, Range 19W and will be considered the new place of use for this change application. A new point of diversion on Johnson Creek will be used instead of the historic diversion from Schmidt Creek (aka Lost Creek) and the historic diversion on Johnson Creek approximately 2.5 miles east.

The following water rights are included in this change:

Historic Water Use at Kootenai Lodge

Purpose	WR Number	Priority Date	Period of Use	Flow Rate (gpm)	Volume Diverted (acre-feet)	Volume Consumed (acre-feet)
Stock	¹ 76K 40315 00	8/20/1896	1-1 to 12-31	30.0	1.38	1.38
	¹ 76K 40316 00	10/11/1906	1-1 to 12-31	30.0	1.38	1.38
	<i>Combined</i>			60.0	1.38	1.38
Domestic	76K 40314 00	8/1/1914	1-1 to 12-31	15.0	2.75	0.65
	76K 40313 00	8/20/1896	1-1 to 12-31	15.0	1.50	0.40
	<i>Combined</i>			30.0	4.25	1.05
Commercial	² 76K 40322 00	11/22/1923	4-1 to 10-19	100.0	6.18	0.62
	² 76K 40327 00	8/1/1914	4-1 to 10-19	250.0	6.00	0.62
	76K 40326 00	11/22/1923	1-1 to 12-31	70.0	1.14	0.87
	<i>Combined</i>			420.0	7.32	1.49
Irrigation	76K 40317 00	8/20/1896	4-15 to 10-4	196.0	32.50	19.50
	76K 40318 00	10/11/1906	4-15 to 10-4	95.0	15.00	9.00
	76K 40319 00	8/1/1914	4-15 to 10-4	170.0	25.00	15.00
	76K 40320 00	11/22/1923	4-15 to 10-4	69.7	10.25	6.15
	<i>Combined</i>			530.7	82.75	49.65
Total	<i>Combined</i>			1,040.7	95.70	53.57
¹ Claim same animals with different places of use; maximum combined diverted volume is 1.38 acre-feet per year.						
² Claim same place of use and purpose from two different sources; max combined diverted volume is 6.18 acre-feet per season.						

This change is only for 175 GPM up to 78.20 AF with 50.19 AF being consumed.

The application will be subject to the following conditions, limitations or restrictions.

1. 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 MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 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 Combined 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 Combined Application pursuant to §§ 85-2-307, and -308, MCA. If this Combined Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Combined Application as herein approved. If this Combined Application receives a valid objection, the Combined Application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to a combined application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the combined application, the department will grant the combined application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 30th day of July 2015.

/Original signed by Kathy Olsen/
Kathy Olsen, Deputy Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation