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

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APPLICATION TO CHANGE WATER RIGHT NO. 76LJ 30147503 BY THREE VP, LLC	**)** **)** **)**	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On March 9, 2020, Three VP, LLC (Applicant) submitted Application to Change Water Right No. 76LJ 30147503 to change Beneficial Water Use Permit No. 76LJ 30117109 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department held a pre-application meeting with the Applicant's consultant, Water and Environmental Technologies, on December 9, 2019. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated May 21, 2020. The Applicant's consultant responded with information dated September 16, 2020. The Application was determined to be correct and complete as of September 24, 2020. An Environmental Assessment for this Application was completed on September 23, 2020.

INFORMATION

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

Application as filed:

- Application to Change an Existing Non-Irrigation Water Right, Form 606
- Appendices
    - Certificates of Survey (COS) Nos. 21067 and 20721
    - Pump Specifications
    - System Pressure Head Calculations
    - Irrigation Water Requirement Calculations
    - Possessory Interest Documentation

- Maps:
    - Site Vicinity Map
    - Site Map
    - Historic Site Map
    - Irrigation Area Map

Information Received after Application Filed

- Letter of response (with attachments) to Department's May 21, 2020 deficiency letter received September 16, 2020 from Applicant's consultant, Water and Environmental Technologies, including:
    - Sprinkler system specifications
    - Pressure head calculations
    - Pump curve and specifications
    - Irrigation system layout figure

Information within the Department's Possession/Knowledge

- Beneficial Water Use Permit file for 76LJ 30117109.

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

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change the following unperfected Beneficial Use Provisional Permit: provisional permit 76LJ 30117109 for 24.0 gallons per minute (GPM) diverted from Whitefish Lake up to 1.29 acre-feet (AF) per year to provide 0.48 AF for Domestic use and 0.81 AF for irrigation of 0.4 acres of Lawn and Garden (L/G). Table 1 (under 'Change Proposal' section below) details the elements of this unperfected permit.

2. The permitted system has not been installed and the water has not yet been put to beneficial use. This provisional permit is unperfected.

CHANGE PROPOSAL

FINDINGS OF FACT

3. Since the issuance of provisional permit 76LJ 30117109, the subject property has been aggregated with an adjacent parcel and subsequently the size of the planned home has been increased. As a result, the domestic use volume permitted by provisional permit 76LJ 30117109 cannot provide a sufficient supply of water for the increased domestic use demand of the larger home. The provisional permit can still provide sufficient water for the L/G irrigation purpose since the amount of irrigated area has remained the same. While the acreage of irrigated area has not changed, the proposed place of use for the lawn and garden irrigation use has been reconfigured due to the parcel aggregation and the redesign of the home, and therefore the place of use must be changed to reflect this adjustment.

4. The proposed change will reflect how the Applicant plans to operate this permit given the aggregation of the subject property and the changes to the planned home size/design. The Applicant is requesting to:

i. Change the place of use for L/G irrigation to reflect the reconfigured 0.4 acres of L/G irrigation proposed on the aggregated lot;

ii. Remove the domestic purpose (which will reduce the period of diversion from 1/1 – 12/31 to 4/15 – 10/15 annually due to the removal of the domestic purpose); and,

iii. Reduce the total diverted volume from 1.29 AF to 0.81 AF due to the removal of the 0.48 AF domestic purpose.

5. The proposed changes are displayed on Figure 1 and in Table 2 below. The Applicant has filed a Surface Water Application for Beneficial Water Use Permit (76LJ 30147504) concurrently with this change application to accommodate the year-round domestic water use requirement for the planned home. The domestic water will be supplied by a pump and conveyance system completely separate from the lawn and garden pump and conveyance system.

Table 1: Summary of the Water Right Proposed for Change							
WR Number	**Priority Date**	**Purpose**	**Flow Rate (GPM)**	**Volume (AF)**	**Period of Diversion & Use**	**Point of Diversion**	**Place of Use**
Provisional Permit 76LJ 30117109 (unperfected)	April 27, 2018	Domestic; L/G irrigation (0.4 ac)	24.0	1.29 (Domestic 0.48; L/G 0.81)	1/1-12/31 (Domestic); 4/15-10/15 (L/G)	Govt. Lot 4, SWSWNE Sec 22, T31N, R22W, Flathead	Govt. Lot 4, NWNWSE & SWSWNE Sec 22, T31N, R22W, Flathead

Table 2: Summary of Proposed Changes							
WR Number	**Priority Date**	**Purpose**	**Flow Rate (GPM)**	**Volume (AF)**	**Period of Diversion & Use**	**Point of Diversion**	**Place of Use**
Provisional Permit 76LJ 30117109 (unperfected)	April 27, 2018	***L/G (0.4 ac)****	24.0	***0.81****	***4/15-10/15****	Govt. Lot 4, SWSWNE Sec 22, T31N, R22W, Flathead	Govt. Lot 4, ***NWNWSE & SWSWNE***** Sec 22, T31N, R22W, Flathead

**Bold italicized words identify changed water right properties.*

***Change to Place of Use necessary due to parcel aggregation and reconfigured irrigated area within the newly aggregated parcel. Legal land description of Place of Use remains the same as originally permitted.*

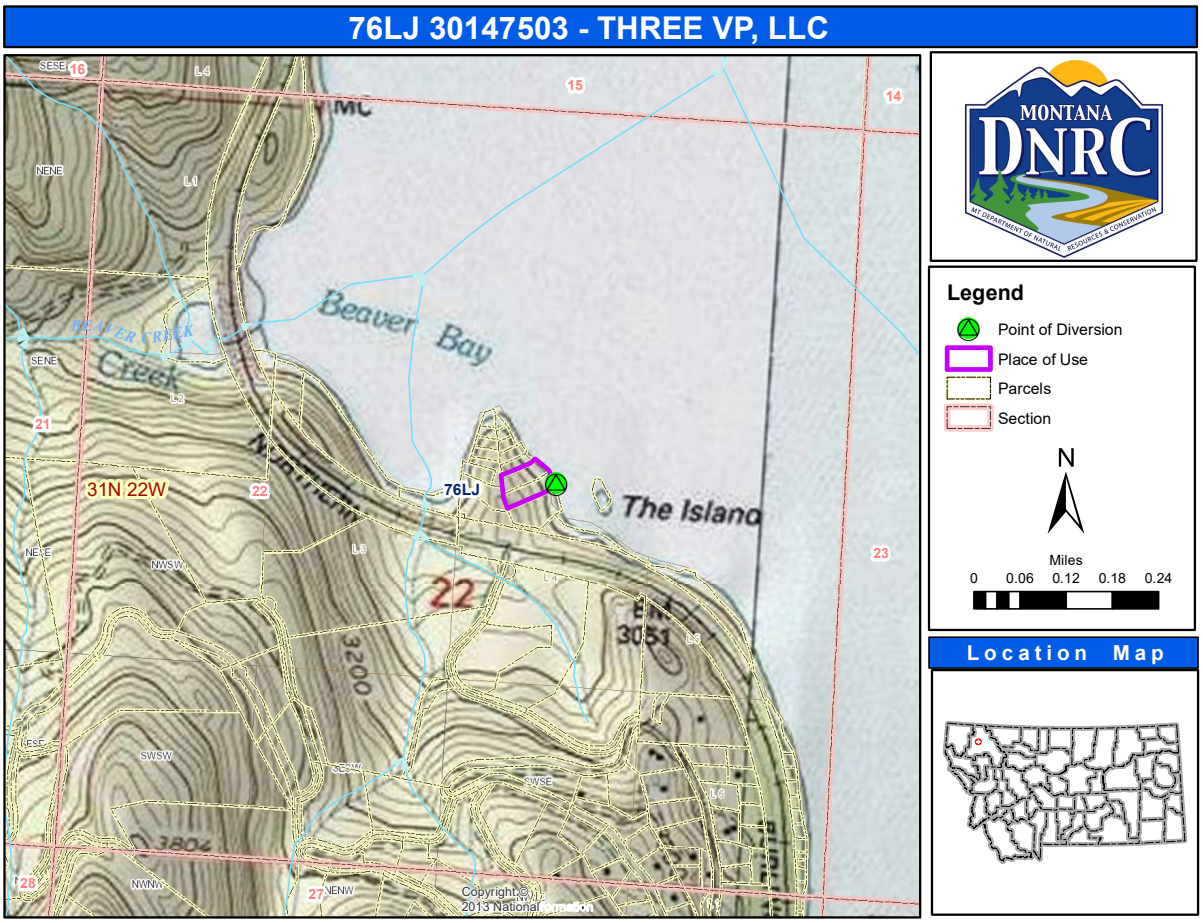

Figure 1. Point of Diversion and Place of Use

CHANGE CRITERIA

6. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

> (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that

the following criteria are met:
(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
(c) The proposed use of water is a beneficial use.
(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

7. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

8. The provisional permit (76LJ 30117109) included in this change is unperfected. The Applicant is not required to address historic use for this water right as such. A consumptive use is not assigned to this permit, and thus, the Applicant may consume and change up to the entire permitted volume.

9. The diverted flow rate of the Applicant's proposed water right to change is 24.0 GPM from Whitefish Lake by means of a submersible pump. The Applicant's volume to change is 1.29 AF (0.48 AF for Domestic use, and 0.81 AF for Lawn and Garden Irrigation use).

Table 3: (Unperfected) Permitted Diverted Volume and Flow Rate		
Water Right Number	**Flow Rate (GPM)**	**Diverted Volume (AF)**
76LJ 30117109	24.0	1.29 (0.48 Domestic; 0.81 L/G)

FINDINGS OF FACT – Adverse Effect

10. The proposed change will reflect how the Applicant plans to exercise provisional permit 76LJ 30117109 considering the aggregation of the parcel and the redesign of the planned home. The Applicant is not requesting any additional flow rate or diverted/consumed volume than originally permitted; in fact, the Applicant is proposing to reduce the total volume diverted under this permit by removing the domestic purpose of use and the volume of water (0.48 AF) associated with that use. The point of diversion and the flow rate will remain unchanged. The proposed reduction in total diverted volume under this unperfected provisional permit will not cause adverse effect to existing water users.

11. The Applicant has the ability to control and regulate the volume of water diverted to ensure the rights of senior appropriators will be satisfied and provided the following plan to implement during periods of extreme water shortage:

i. Initially reduce lawn and garden irrigation application by 50 percent;
ii. Cease irrigation application and disconnect the power from their pump if a senior appropriator makes a valid call for water.

12. The Department finds no Adverse Effect to existing water users as a result of the proposed changes.

BENEFICIAL USE

FINDINGS OF FACT

13. Applicant proposes to use up to 24.0 GPM and 0.81 AF of water for irrigation of 0.4 acres of lawn and garden within the aggregated parcel.

14. Applicant will utilize three separately operated irrigation zones to irrigate the 0.4 acres. Two zones with 18 emitters each will be equipped with Rainbird U15 sprayer sprinkler heads with U-15H nozzles and PRS Dial Valve Pressure Regulators, and a third zone will utilize 16 Rainbird 3500 rotor sprinkler heads with "1.5" nozzles. The zones with 18 sprayer sprinkler heads will require approximately 23.4 GPM each, and the zone with 16 rotor sprinkler heads will require approximately 23.7 GPM. Applicant will operate only one irrigation zone at a time.

15. Using the U.S. Department of Agriculture – Natural Resource Conservation Service's (USDA – NRCS) Irrigation Water Requirements (IWR) software, the Department's guidelines outlined in a memo entitled "DNRC Consumptive Use Methodology – Turf Grass," and assuming 70 percent sprinkler irrigation efficiency, the Applicant identified a net irrigation requirement of 24.36 inches per acre (2.03 AF) per year (24.36 inches ÷ 12 inches per foot = 2.03 AF), which is consistent with Department standards. Given this value, the irrigation demand for 0.4 acres of lawn and garden is 0.81 AF (2.03 AF per acre per year x 0.4 acres = 0.81 AF per year).

ADEQUATE DIVERSION

FINDINGS OF FACT

16. The water system permitted by 76LJ 30117109 was never installed as originally proposed. With this change request, the domestic purpose of use will be removed and the diversion and conveyance works associated with the domestic use (pressure tanks/switches, treatment system, etc.) will no longer be included in the proposed conveyance system design. Additionally, with the reconfiguration of the L/G irrigation place of use due to the parcel aggregation and home redesign, the irrigation conveyance system and irrigation layout has been redesigned.

17. The Applicant will divert water from Whitefish Lake via a Grundfos 25S10-7 (or equivalent) 1.0-hp submersible pump with a variable frequency drive at a flow rate of 24.0 GPM. The pump will be set in Whitefish Lake approximately five feet below the low water mark and will be

mounted within a five-foot section of six-inch diameter pipe affixed to a steel sled. From the pump, water will be conveyed to a pressure control point via 98-feet of 1.5-inch HDPE pipe. The variable frequency drive will be programmed to maintain a constant operating pressure of 50 pounds per square inch (PSI) at the control point during operation of the irrigation system. The total dynamic head (TDH) at 50 PSI at the control point is 138 feet.

18. From the control point, water will be distributed to three irrigation zones. A 113-foot 1.5-inch transmission line will deliver water from the control point to a distribution box from which Zones 1 and 2 will be supplied by 1.25-inch distribution lines. Zones 1 and 2 will consist of Rainbird U15 sprayer sprinkler heads with U-15H nozzles and PRS Dial Valve Pressure Regulators to reduce the operating pressure to 15 PSI (18 heads per zone). At 15 PSI, each sprayer head will deliver 1.3 GPM for a total of 23.4 GPM per zone. Zone 3 will be supplied directly from the control point by a 1.25-inch distribution line. Zone 3 will utilize Rainbird 3500 rotor sprinkler heads with "1.5" nozzles at a 45 PSI operating pressure (16 heads per zone). At 45 PSI, each rotor head will deliver 1.48 GPM for a total of 23.7 GPM.

19. The system is designed to operate each irrigation zone independently with an average duration of 20 minutes per zone per day throughout the irrigation season. These set run-time durations will be adjusted as needed to meet crop water needs. Sprinkler irrigation is assumed to be 70 percent efficient. As such, excess project water will infiltrate to the subsurface and discharge as return flows to Whitefish Lake.

20. The Department finds that the means of diversion and conveyance of water is adequate to distribute the requested flow rate and volume based upon the system TDH, design specifications, and pump/sprinkler emitter capacities.

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

22. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).[1]

23. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that

[1] DNRC decisions are available at: http://dnrc.mt.gov/divisions/water/water-rights/hearings-unit/list-of-hearing-orders

Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11,103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.[2]

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historic use" of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.[3] A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a

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

[3] A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA.

conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9,1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).[4]

25. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

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

Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).[5]

26. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

27. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

> The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern

[5] The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(*citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

> of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the "amount historically consumed" and the water that re-enters the stream as return flow. . . .
> An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator "is entitled to have the water flow in the same manner as when he located," and the appropriator may insist that prior appropriators do not affect adversely his rights.
> This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.
> We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

28. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

29. The Applicant has proven by a preponderance of the evidence that the Applicant has an unperfected permit (76LJ 30117109) that can be changed and that the change of the place of use, removal of a purpose of use, and the subsequent reduction of the total diverted volume will not increase the diverted volume granted under the original permit. The total amount the Applicant can divert and consume under the unperfected permit is 1.29 AF diverted volume and 24.0 GPM flow rate. (Finding of Fact (FOF) Nos. 8-9)

30. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. The Applicant has proven by a preponderance of the evidence that the Applicant has an unperfected permit that can be changed and that the change of the place of use, removal of a purpose of use, and the subsequent reduction of the total diverted volume will not increase the diverted volume granted in Beneficial Water Use Permit No. 76LJ 30117109. §85-2-402(2)(b), MCA. (FOF 10-12)

BENEFICIAL USE

31. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-

312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

32. Applicant proposes to use water for lawn and garden irrigation, which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that lawn and garden irrigation is a beneficial use and that 0.81 acre-feet of diverted volume and 24.0 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA. (FOF 13-15)

ADEQUATE MEANS OF DIVERSION

33. Pursuant to §85-2-402 (2)(b), MCA, the applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

34. Pursuant to §85-2-402 (2)(b), MCA, Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF 16-20)

POSSESSORY INTEREST

35. Pursuant to §85-2-402(2)(d), MCA, the applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M. 36.12.1802

36. Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF 21)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76LJ 30147503 should be granted subject to the following.

For unperfected Provisional Permit No. 76LJ 30117109, the Applicant may:

i. Change the place of use for L/G irrigation to reflect the reconfigured 0.4 acres of L/G irrigation proposed on the aggregated lot;
ii. Remove the domestic purpose (which will reduce the period of diversion from 1/1 – 12/31 to 4/15 – 10/15 annually due to the removal of the domestic purpose); and,
iii. Reduce the total diverted volume from 1.29 AF to 0.81 AF due to the removal of the 0.48 AF domestic purpose.

The Applicant is authorized to divert up to 0.81 AF at a flow rate not to exceed 24.0 GPM for lawn and garden irrigation purposes with a period of diversion and period of use from April 15 – October 15 annually. The water right details are as follows:

Summary of Proposed Changes							
WR Number	**Priority Date**	**Purpose**	**Flow Rate (GPM)**	**Volume (AF)**	**Period of Diversion & Use**	**Point of Diversion**	**Place of Use**
Provisional Permit 76LJ 30117109 (unperfected)	April 27, 2018	***L/G (0.4 ac)****	24.0	***0.81****	***4/15-10/15****	Govt. Lot 4, SWSWNE Sec 22, T31N, R22W, Flathead	Govt. Lot 4, ***NWNWSE & SWSWNE***** Sec 22, T31N, R22W, Flathead

**Bold italicized words identify changed water right properties.*

***Change to Place of Use necessary due to parcel aggregation and reconfigured irrigated area within the newly aggregated parcel. Legal land description of Place of Use remains the same as originally permitted.*

NOTICE

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

DATED this 1st day of October 2020.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 1st day of October 2020, by first class United States mail.

THREE VP, LLC
415 SHORELAND DR SE
BELLEVUE, WA 98004

WATER AND ENVIRONMENTAL TECHNOLOGIES
ATTN: JAMIE GRAHAM
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

_____ _____

NAME DATE

Kalispell Regional Office, (406) 752-2288