

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

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APPLICATION TO CHANGE WATER RIGHT) NO. 76LJ 30149103 BY LAKESIDE COUNTY) WATER AND SEWER DISTRICT)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On June 11, 2020, Lakeside County Water & Sewer District (LCWSD) (Applicant), submitted Application to Change Water Right No. 76LJ 30149103 to change Statement of Claim No's. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No's. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, and 76LJ 30062687 and Groundwater Certificate No. 76LJ 9256-00 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. A minor amendment was received September 28, 2020 that added one additional unperfected permit (76LJ 30147909) to the change application. The Application was determined to be correct and complete as of October 30, 2020. An Environmental Assessment for this Application was completed on December 21, 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 NIR
- Change in Purpose Addendum
- Attachments to Application
 - Historic and current water system specifications for all rights: pump make and models, pumps curves, storage tank information
 - Current and proposed water system distribution maps
 - Well logs
 - MTDEQ sanitary surveys

- Lakeside Water and Sewer District May 2020 Annexations
- List of privately-owned water rights within district boundaries
- 2014-2018 Water use records
- Water right abstracts for all rights proposed to be changed
- Eight-hour pump test results

Information Received after Application Filed:

- Amendment from Applicant submitted by their consultant signed September 15, 2020 and received September 28, 2020. Amendment was minor and added additional water right to the change application (unperfected permit No. 76LJ 30147909).

Information within the Department’s Possession/Knowledge:

- Original files for water right Statement of Claim No’s. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No’s. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, 76LJ 30062687, 76LJ 30147909 and Groundwater Certificate No. 76LJ 9256-00

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 authorization to 1.) change the place of use of Statement of Claim No’s. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No’s. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, and 76LJ 30062687 and Groundwater Certificate No. 76LJ 9256-00 to reflect district boundaries as of May 15, 2020, after two properties were annexed into the District by Flathead County and 2.) add three points of diversion (Brass well GWIC No. 79812, Lakeside Estates well GWIC No. 156694, and one well yet to be drilled) to unperfected permit 76LJ 30147909. The place of use of 76LJ 30147909 already incorporates the May 2020 annexation. Table one provides a summary of the eight water rights that are proposed to be changed.

2. The water system is a permitted public water supply (No. MT0000266) under regulation of the Montana Department of Environmental Quality (MTDEQ).

3. 153 additional water rights are within the District boundaries. However, these water rights are privately held and not associated with the Applicant's water system.

Table 1: Water Rights Proposed to be Changed

WR Number	Priority Date	Purpose	Flow Rate (GPM)	Volume (AF)	Period of Diversion & Use	Point of Diversion	Place of Use
Statement of Claim 76LJ 129007-00	July 30, 1957	Municipal	65	12.15	1.1-12.31	POD #1 (Brass well): SWSESE Sec 7, T26N, R20W, Flathead POD #2 (Tank well): SWSWSW Sec 7, T26N, R20W, Flathead POD #3 (Redundant well-YTBD): SWSWSW Sec 7, T26N, R20W, Flathead POD #4 (Hall well): NENWNW Sec 18, T26N, R20W, Flathead POD #5 (Troutbeck Rise well): SESWSE Sec 12, T26N, R21W, Flathead POD #6 (Lakeside Estates well): SENWSE Sec 12, T26N, R21W, Flathead	NE & N2N2SE Sec 13, the SE & E2SESW Sec 12, T26N, R21W, Flathead County N2 & NWNENE Sec 18, the W2W2SW Sec 17, the SW, E2E2NW & W2W2NE Sec 7, T26N, R20W, Flathead County
Statement of Claim 76LJ 129006-00	March 22, 1982	Municipal	60	2.2	1.1-12.31		
Groundwater Certificate 76LJ 9256-00	August 20, 1976	Municipal	40	1.1	1.1-12.31		
Provisional Permit 76LJ 61905-00	November 18, 1985	Municipal	100	42.67	1.1-12.31		
Provisional Permit 76LJ 103956-00	February 26, 1998	Municipal	90	61.00	1.1-12.31		
Provisional Permit 76LJ 105373-00	September 9, 1998	Municipal	300	353.56	1.1-12.31		
Provisional Permit 76LJ 30062687	August 31, 2012	Municipal	40	162.54	1.1-12.31		

Provisional Permit 76LJ 30147909	June 11, 2020	Municipal	146	0.0	1.1-12.31	POD #2 (Tank well): SWSWSW Sec 7, T26N, R20W, Flathead POD #4 (Hall well): NENWNW Sec 18, T26N, R20W, Flathead POD #5 (Troutbeck Rise well): SESWSE Sec 12, T26N, R21W, Flathead	NE & N2N2SE Sec 13, the SE & E2SESW Sec 12, T26N, R21W, Flathead County N2 & NWNESE Sec 18, the W2W2SW Sec 17, the SW, E2E2NW & W2W2NE Sec 7, T26N, R20W, Flathead County
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CHANGE PROPOSAL

FINDINGS OF FACT

4. The Department issued Change Authorization 76LJ 30122044 on April 14, 2020. This authorization 1.) changed the place of use of Statement of Claim No’s. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No’s. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, and 76LJ 30062687 and Groundwater Certificate No. 76LJ 9256-00 to District boundaries as of May 2019, 2.) included (added) all six points of diversion to each of the seven rights and 3.) changed the purpose of each right to municipal. Change authorization 76LJ 30122044 is unperfected.

5. On May 15, 2020 the District’s petition for annexation of two additional properties (geocode 07-3704-12-4-23-15-0000 and 07-3704-12-4-23-10-0000) was authorized by Flathead County. The legal land description for the place of use for the seven water rights recently changed under Authorization 76LJ 30122044 will be updated to include these two properties. The two annexed properties are located in the SE of Section 12, Township 26N, Range 21W, Flathead County. The legal land description is currently listed as a place of use on the seven water rights but will now incorporate the two specific parcels listed above (see Figure 1).

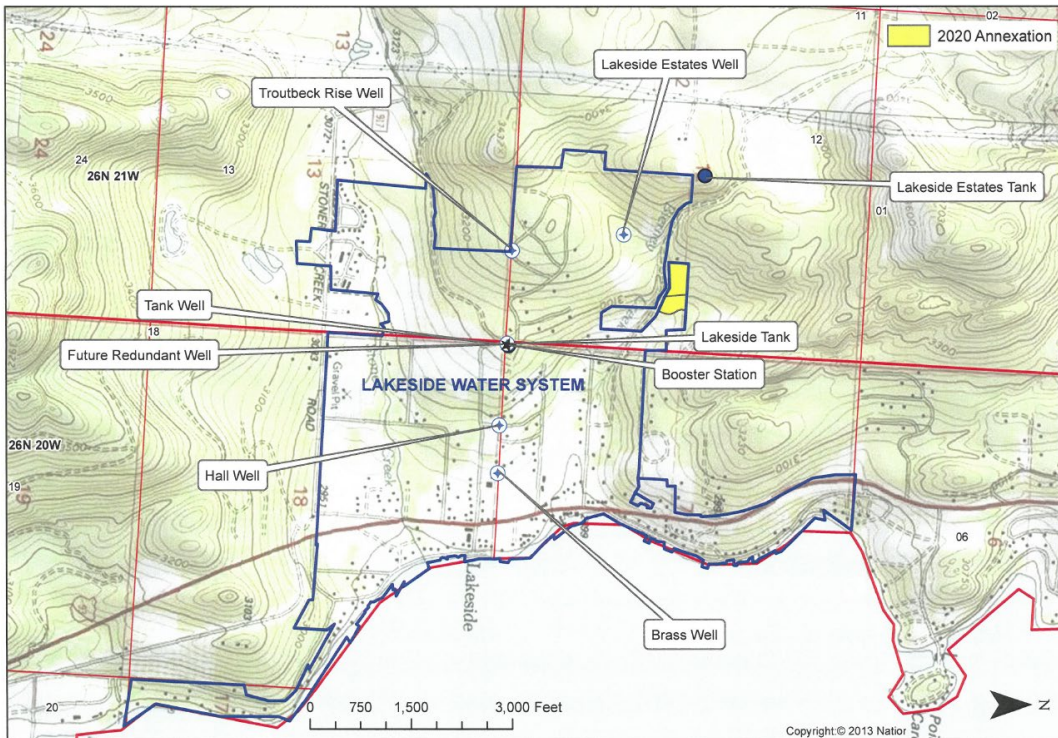


Figure 1: Map of existing and proposed place of use and well locations

6. Permit 76LJ 30147909 was granted in 2020 (issuance pending) and is for increased flow but no additional volume from the Troutbeck Rise well GWIC No. 79933 (11 GPM additional flow), Hall well GWIC No. 79859 (95 GPM additional flow) and Tank well GWIC No. 160594 (40 GPM additional flow). In this change application, the Applicant seeks authorization to add three additional points of diversion (Brass well GWIC No. 79812, Lakeside Estates well GWIC No. 156694, and one yet to be drilled) to permit 76LJ 30147909 to reflect how the system works as whole. Six manifold wells divert water from the same source aquifer. Water is comingled and distributed to patrons within the District boundaries. The redundant well is not drilled yet and will be redundant to the Tank well. The redundant well and Tank well will not operate at the same time.

7. Upon issuance of this change authorization, unperfected Permit 76LJ 30147909 will list a point of diversion in the SWSESE and SWSWSW (2) of Section 7, Township 26N, Range 20W, the NENWNW of Section 18, Township 26N, Range 20W and the SESWSE and SENWSE of Section 12, Township 26N, Range 20W, Flathead, Montana.

8. Upon issuance of the change authorization, Statement of Claim No's. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No's. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, 76LJ 30062687, 76LJ 30147909 and Groundwater Certificate No. 76LJ 9256-00 will be associated and supplemental to each other. All eight rights will have the same points of diversion, place of use and purpose. The eight water rights in combination will not exceed 806 gallons per minute (GPM) or 1.8 cubic feet per second (CFS) up to 635.22 AF (Table 2).

Table 2: Summary of authorized flow rates and volumes

Well	Underlying Water Right No.	Current Authorized Flow Rate (GPM)	Volume (AF)
Troutbeck Rise	76LJ 9256-00 76LJ 103956-00 76LJ 30147909	51	76LJ 9256-00 = 1.1 AF 76LJ 103956-00 = 61.0 AF (unperfected) 76LJ 30147909 = zero volume authorized, added flow only
Hall	76LJ 61905-00 76LJ 30147909	195	76LJ 61905-00 = 42.67 AF 76LJ 30147909 = zero volume authorized, added flow only
Tank & Redundant (YTBD)	76LJ 105373-00 76LJ 30062687 76LJ 30147909	380	76LJ 105373-00 = 353.56 AF (unperfected) 76LJ 30062687 = 162.54 AF (unperfected) 76LJ 30147909 = zero volume authorized, added flow only
Lakeside Estates	76LJ 103956-00	50	76LJ 103956-00 = 61.0 AF (only count once for right)
Brass	76LJ 129007-00	65	12.15
Williams (off-line)	76LJ 129006-00	65	2.2
Total Flow		806	635.22

CHANGE CRITERIA

9. 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.

10. 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*

11. The Department issued Change Authorization 76LJ 30122044 on April 14, 2020. The change authorization added six points of diversion to Statement of Claim No's 76LJ 129007-00 and 76LJ 129006-00, Groundwater Certificate 76LJ 9256-00 and Provisional Permit No's 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00 and 76LJ 30062687. The authorization also clarified the purpose as municipal and corrected the place of use of all seven rights to match District boundaries as of May 2019. Historic use of each right was addressed by the Applicant and validated by the Department under Change Authorization 76LJ 30122044.

12. The previous change authorization was issued post-2012 and historic use was thoroughly analyzed. The Change Authorization remains unperfected. Per Department policy the historic use values (flow, volume) quantified under Change Authorization 76LJ 30122044 for the seven rights (Table 1) will be brought forward and used in this change application. Based on Change Authorization 76LJ 30122044, a total maximum flow rate of 265 GPM and diverted volume and consumptive use volume for Statement of Claim No. 76LJ 129006-00 and 76LJ 129007-00, Certificate 76LJ 9256-00, and Provisional Permit 76LJ 61905-00 is 58.12 AF and 43.98 AF, respectively. The remaining three permits were unperfected at the time of the previous change authorization; historic use was not addressed per Department policy. The full flow rate and volume of each unperfected permit was brought forward in the previous change and again in this change authorization, because those three permits remain unperfected.

13. Provisional Permit 76LJ 30147909 is unperfected; the full flow rate and volume of this right is brought forward per Department policy.

14. Statement of Claim No's 76LJ 129007-00 and 76LJ 129006-00, Groundwater Certificate 76LJ 9256-00 and Provisional Permit No's 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, 76LJ 30062687, and 76LJ 30147909 are associated and supplemental. The eight water rights in combination will not exceed 806 GPM or 1.8 CFS up to 635.22 AF.

FINDINGS OF FACT- *Adverse Effect*

15. The Applicant is requesting to 1.) change the place of use of seven rights to reflect district boundaries as of May 15, 2020, after two properties were annexed into the District by

Flathead County and 2.) add three points of diversion (Brass well GWIC No. 79812, Lakeside Estates well GWIC No. 156694, and one well yet to be drilled) to unperfected permit 76LJ 30147909. Upon issuance of this change authorization, all eight water rights will have the same points of diversion, place of use and purpose.

16. The Department issued Change Authorization 76LJ 30122044 on April 14, 2020; this change application is unperfected. Flow rate and both diverted and consumed volumes for each of the rights quantified under Change Authorization 76LJ 30122044 are brought forward and used in this change application (Table 3).

17. The Applicant will not increase the total diverted volume associated with each of the unperfected permits and will not exceed the historic diverted volumes quantified in Change Authorization 76LJ 30122044. Depletions to surface water will not change; a depletion report was not warranted.

18. In Change Authorization 76LJ 30122044, the Applicant identified that wastewater collection and treatment was taken over by the LCWSD in December 1988. The LCWSD system collects all waste and transports it to a treatment facility that consists of two 2.5-acre aerated treatment lagoons, two large winter storage ponds of treated effluent, and a 160-acre field for land applying treated effluent. Prior to this, individual septic systems were used. House Bill 52, passed in 2011, allows for an increase in consumptive use over that of the historical amount without filing an additional water right, given that the water use involves disposal or discharge of effluent from a public sewage system as defined in § 75-6-102, MCA, is part of the method of treatment, and is employed in response to state or federal regulatory requirements. This set of criteria is met in the case of Statement of Claim 76LJ 129007-00 and 76LJ 129006-00 and Groundwater Certificate 76LJ 9256-00 where individual septic systems were originally used (Table 2). Water diverted under Provisional Permit 76LJ 61905-00 was always treated by LCWSD. The remaining four permits are unperfected; historic use was not addressed per Department policy. The full flow rate and volume of each unperfected permit was brought forward in the change.

Table 3: Change Authorization 76LJ 30122044 comparison of annual historic and proposed consumptive use brought forward to use in this change application

Water Right No.	Historic Consumptive Use Domestic/Residential (AF)	Historic Consumptive Use Lawn & Garden (AF)	Proposed Consumptive Use (Domestic/Residential (AF)	Proposed Consumptive Use Lawn & Garden (AF)
76LJ 129006-00	0.10	0.81	1.04	0.81
76LJ 129007-00	0.66	3.89	6.66	3.89
76LJ 9256-00	0.05	0.41	0.52	0.41
76LJ 61905-00	27.31	10.75	27.31	10.75
TOTAL	28.12	15.86	35.53	15.86

19. The location of wells will not change, and the volume diverted from the aquifer will not surpass what has already been appropriated via the eight rights. The annual volume that will return to Flathead Lake and the location/timing of return flows will not change because wastewater will continue to be treated and land applied. A return flow analysis report was not warranted.

20. The Applicant has a plan for the water rights proposed to be change under this authorization that demonstrates that the Applicant’s use of water can be controlled so the water rights of prior appropriators will be satisfied. If call should be made, the Applicant proposes the following steps:

- a. Reduce irrigation by 25%
- b. Reduce irrigation by 50%
- c. Cease irrigation

21. The Applicant maintains in-line flow meters with totalizers near each well head. The records will be recorded and made available to the Department. The Applicant is held to the condition originally put on Provisional Permit No. 76LJ 30062687,76LJ 105373-00, 76LJ 30147909 and 76LJ 103956-00 which states:

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 1 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.

BENEFICIAL USE

FINDINGS OF FACT

22. The Applicant connected the Lakeside water system to the adjacent Troutbeck Rise/Lakeside Estates water system. The connection of these two systems provides additional redundancy and allows for water to be distributed throughout the expanded system (Change Authorization 76LJ 30122044). Based on supplied pump curves and pump specifications each well is capable of diverting its permitted flow rate.

23. The eight water rights in combination will not exceed 806 GPM or 1.8 CFS up to 635.22 AF. To date, 58.12 AF is associated with perfected rights (Claim 76LJ 129007-00, 76LJ 129006-00, Certificate 76LJ 9256-00, and Permit 76LJ 61905-00). The current service population is estimated to be 1,000; at a two-percent growth rate the population in 2043 is projected to be 1,610. The remaining 577.1 AF of unperfected water is sufficient to meet the projected growth over the next 24 years or more. In the future, the Applicant will submit additional water right applications to increase flow and volume demands if deemed necessary.

ADEQUATE DIVERSION

FINDINGS OF FACT

24. At full build-out, the public water supply system will consist of six wells (Brass well GWIC No. 79812, Hall well GWIC No. 79859, Tank well GWIC No.160594, Troutbeck Rise well GWIC No. 79933, Lakeside Estates Well GWIC No. 156694, and a redundant well yet to be

drilled), two storage tanks (186,000-gallon and 120,000-gallon), one booster station and approximately 19.5 miles of various sized distribution piping ranging from 1.0 to 10.0 inches in diameter. All wells divert water from a bedrock aquifer and are manifold together into the same distribution system. Based on supplied pump curves and pump specifications each well is capable of diverting its permitted flow rate.

25. Each well was drilled by a licensed well driller. The water system is a permitted public water supply (No. MT0000266) under regulation of the MTDEQ. The system was designed by a licensed engineer and approved by the MTDEQ.

26. The Applicant maintains in-line flow meters with totalizers near each well head. The records will be recorded and made available to the Department. The Applicant is held to the condition originally put on Provisional Permit No. 76LJ 30062687, 76LJ 105373-00, 76LJ 30147909 and 76LJ 103956-00 which states:

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 1 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.

POSSESSORY INTEREST

FINDINGS OF FACT

27. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802. The applicant

has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

28. 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

29. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

30. 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

¹ DNRC decisions are available at:

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

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

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For 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

of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶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

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.)

31. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 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

32. 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

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).

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).

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

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

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

34. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. 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.

35. 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 with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

36. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim No. 76LJ 129006-00 and 76LJ 129007-00, Groundwater Certificate 76LJ 9256-00, and Provisional Permit 76LJ 61905-00. Four permits are unperfected (76LJ 103956-00, 76LJ 105373-00, 76LJ 30062687, 76LJ 30147909); per Department policy the full diverted volume and flow rates of these permits are brought forward via this change authorization. Based on Change Authorization 76LJ 30122044, a total maximum flow rate of 265 GPM and diverted volume and consumptive use volume for Statement of Claim No. 76LJ 129006-00 and 76LJ 129007-00, Certificate 76LJ 9256-00, and Provisional Permit 76LJ 61905-00 is 58.12 AF and 43.98 AF, respectively. Between the eight rights flow will not exceed 806 gallons per minute (GPM) or 1.8 cubic feet per second (CFS) up to 635.22 AF. (FOF Nos. 11-14)

37. Based upon the analysis of historic water use carried out under previous Change Authorization 76LJ 30122044, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 15-21)

BENEFICIAL USE

38. 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).

39. Applicant proposes to use water for municipal purposes which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence municipal use is a beneficial use and that 635.22 acre-feet of diverted volume and 1.8 CFS (806 GPM) flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 22-23)

ADEQUATE MEANS OF DIVERSION

40. 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).

41. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 24-26)

POSSESSORY INTEREST

42. 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

43. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 27)

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 30149103 should be granted subject to the following.

The Applicant may change the place of use of Statement of Claim No's. 76LJ 129007-00 and 76LJ 129006-00, Beneficial Water Use Permit No's. 76LJ 61905-00, 76LJ 103956-00, 76LJ 105373-00, and 76LJ 30062687 and Groundwater Certificate No. 76LJ 9256-00 to a place of use located in the NE & N2N2SE of Section 13, the SE & E2SESW of Section 12, Township 26N, Range 21W, and the N2 & NWNESE of Section 18, the W2W2SW of Section 17, and the SW, E2E2NW & W2W2NE of Section 7, Township 26N, Range 20W, Flathead, Montana. The new place of use incorporates two parcels annexed on May 15, 2020 (geocode 07-3704-12-4-23-15-0000 and 07-3704-12-4-23-10-0000). The Applicant may add three points of diversion (Brass well GWIC No. 79812, Lakeside Estates well GWIC No. 156694, and one well yet to be drilled) to unperfected permit 76LJ 30147909. Unperfected Permit 76LJ 30147909 will list a point of diversion in the SWSESE and SWSWSW (2) of Section 7, Township 26N, Range 20W, the NENWNW of Section 18, Township 26N, Range 20W and the SESWSE and SENWSE of Section 12, Township 26N, Range 20W, Flathead, Montana. All wells are manifold together into the same distribution system. Between the eight rights/six wells the flow rate will not exceed 806 GPM (1.8 CFS) up to 635.22 AF/year.

The Applicant is held to the condition originally put on Provisional Permit No. 76LJ 30062687, 76LJ 105373-00, 76LJ 30147909 and 76LJ 103956-00 which states:

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 1 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

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

DATED this 4th day of January 2021.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 4th day of January 2021 by first class United States mail.

LAKESIDE COUNTY WATER & SEWER DISTRICT
253 BIERNEY CREEK RD
LAKESIDE, MT 59922

WATER AND ENVIRONMENTAL TECHNOLOGIES
102 COOPERATIVE WAY, SUITE #100
KALISPELL, MT 59901

NAME

DATE