

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

APPLICATION TO CHANGE WATER RIGHT) NO. 76H 30150414 BY PEAK HEALTH) MANAGEMENT COMPANY LLC)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On March 26, 2021, Peak Health Management Company, LLC (Applicant) submitted Application to Change an Existing Irrigation Water Right (Change application) 76H 30150414 to change Statement of Claim (Claim) 76H 30122609 to the Missoula Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The application was submitted to provide mitigation water for Peak Health Management Company, LLC's Provisional Permit Application (Permit application) 76H 30150412. The Department published receipt of Change application 76H 30150414 on its website on April 5, 2021. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated September 10, 2021. The Applicant responded with information dated January 7, 2022. The Department met with the Applicant's Representative Ross Miller and Consultant Julie Merritt on October 21, 2021. The application was determined to be correct and complete as of July 11, 2022. The Applicant requested additional time to provide information and/or meet with potential objectors. The Applicant submitted a waiver of timelines pursuant to § 85-2-307, MCA, on August 09, 2022. The Applicant submitted an amendment to the Change application on October 12, 2023. The amendment was deemed major and processing timelines were reset. The amended Change application was determined to be correct and complete on June 10, 2024 and a Technical Report and Revised Depletion and Mitigation Report was sent to the Applicant on June 10, 2024. A Draft Preliminary Determination to Deny was sent to the Applicant on January 31, 2025. The Applicant requested a second waiver of timelines for Application to Change a Water Right 76H 30150414 on February 13, 2025. A second major amendment was submitted for Change application no. 76H 30150414 on May 23, 2025 that reset the statutory timelines. Change application 76H 30150414 was determined to be correct and complete on November 19, 2025, and a new Surface Water Change Technical Analysis Report was sent to the Applicant for change application 76H 30150414 that addresses the three applications. An Environmental Assessment for this application was completed on January 16, 2026.

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 Irrigation Water Right, Form 606-IR
- Attachments
 - Baldor-Reliance Product Information Packet
- Maps
 - Water Marketing Addendum General Service Area Map (removed per October 12, 2023 amendment)
 - Map IR.2.C – 1979 Aerial Historical POD, POU, & Conveyance
 - Map IR.2.C – 7/16/1966 Aerial Historical POD, POU, & Conveyance
 - Map IR.2.E – Proposed POD and POU dated February 11, 2021
- Addendums
 - Water Marketing Addendum (removed per October 12, 2023 modification)
 - Change of Purpose Addendum (modified per October 12, 2023 modification)
- Application to Change an Existing Non-Irrigation Water Right, Form 606 IR, 76H 30150413 (now terminated by the Department per the Applicant's request)

Information Received after Application Filed

- Waiver of 120 Days Statutory Timeline for Preliminary Determination Decision from Ross Miller on behalf of Applicant, received August 10, 2022
- Consent to Approval (MCA 85-2-402(1)(c)) and (19) received by the Department on September 29, 2023
- 76H 30150412 Amended Mitigation Plan dated 10/11/2023 from Ross Miller on behalf of the Applicant, received October 12, 2023
 - Enclosures: Marked Up Form 606-PA Change in Purpose Addendum, Conditional Modification/Reduction of Provisional Permit ("Permit") 76H 62593-00 and DNRC Form 651, fully signed Peak Mitigation Agreement, and fully signed Consent to Approve
- 76H 30150412 Application Amendment Form, received on May 23, 2025

Information within the Department's Possession/Knowledge

- DNRC Depletion and Mitigation Report for Permit Application No. 76H 30150412, dated November 16, 2021
- Revised Depletion and Mitigation Report for Permit Application No. 76H 30150412, dated June 5, 2024
- Surface Water Change Technical Analysis Report for Permit Application No. 76H 30150414, dated November 3, 2025
- Surface Water Change Technical Analysis Report for Change Authorization No. 76H 30150414 sent to Applicant on November 19, 2025
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Missoula Regional Office at (406) 721-4284 to request copies of the following documents.
 - DNRC Consumptive Use Methodology – Turf Grass (New Projects), dated March 23, 2010

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).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks to change the point of diversion, place of use, and purpose of Claim 76H 30122609 for 2.5 CFS and 12.87 AF diverted volume from the Bitterroot River. Claim 76H 30122609 has a purpose of sprinkler irrigation and a priority date of June 30, 1958. The period of diversion and period of use is 04/01 to 10/31. The place of use is 8 acres in SWNENE Section 11, T12N, R20W, Missoula County. The point of diversion is a perforated pipe in the Bitterroot River in NWSESE Section 2, T12N, R20W, Missoula County, that drained water to a sump on the riverbank. The place of use for irrigation is across the river from the Peak Health Management Company facilities and wells.

Table 1: Water Right Proposed for Change

Water Right Number	Flow Rate	Purpose	Volume	Period Of Use	Place Of Use	Points Of Diversion	Priority Date
76H 30122609	2.5 CFS	Irrigation	N/A	Apr. 1 – Oct. 31	SWNESE Section 11, T12N, R20W, Missoula County	NWSESE Section 2, T12N, R20W, Missoula County	June 30, 1958

2. Claim 76H 30122609 is a split claim based on Statement of Claim 76H 105168-00. Claim 76H 105168-00 historically irrigated 100 acres. Claim 76H 30122609 covers 8 acres of the 100-acre historic place of use and is owned exclusively by Peak Health Management Company LLC. This split claim is not supplemental to any other water rights. The 8-acre historic place of use is no longer irrigated, as this split claim was severed from the historic place of use. There are no previous change authorizations on the original parent Statement of Claim nor on this child right Statement of Claim.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change the purpose, point of diversion, and place of use of Claim No. 76H 62593-00. The Applicant proposes to add an additional point of diversion located in the SENWNE of Sec. 15, T12N, R20W consisting of a pump used to divert water out of the Bitterroot River and into an aquifer recharge facility constructed in the lower Miller Creek valley. At this site the Applicant proposes to divert 46.72 GPM up to 10.1 AF of historically consumed volume into the aquifer recharge facility, providing a total of 10.1 AF of mitigation water to the Bitterroot River over 12 months per year via the aquifer recharge system. In addition to the aquifer recharge component, the Applicant will also cease all diversions at the historical diversion site, retiring all historical irrigation, and leave the remaining 2.77 AF of water in the Bitterroot River during the historical period of diversion. This will result in an additional 0.20 AF of mitigation water provided to the Bitterroot River during the months of May through August through retirement consumptive use. In total, the Applicant’s mitigation plan provides 10.30 AF of mitigation water to the Bitterroot River. The place of use for the mitigation purpose would be the Bitterroot River from the southern boundary of Section 2, Township 12 North, Range 20 West to the confluence of the

Clark Fork and Bitterroot rivers in Section 27, Township 13 North, Range 20W. Figure 1 shows the elements of the proposed change.

4. An additional Application to Change a Water Right, application 76H 30150413, was submitted in conjunction with the subject change and permit applications. Application to Change a Water Right 76H 30150413 was withdrawn by the Applicant on October 12, 2023. On October 3, 2025 the Applicant filed Application to Change a Water Right No. 76H 30171414 for additional mitigation water, replacing the previously withdrawn application.

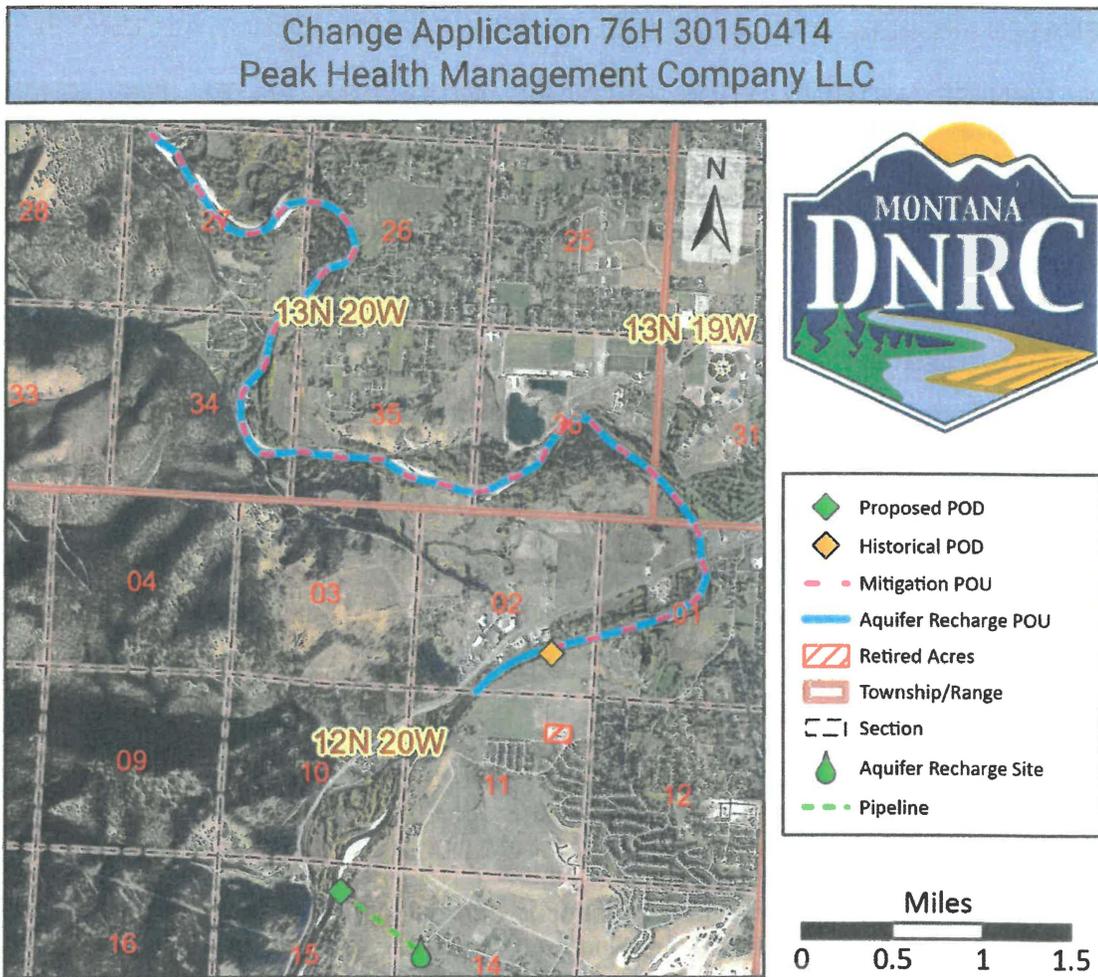


Figure 1. Map of the proposed change.

4. The Applicant is held to the following conditions to meet the adverse effect and beneficial use criteria:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: 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. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30150412 IN CONJUNCTION WITH CHANGE AUTHORIZATION NO. 76H 30171414. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30150412 AND CHANGE AUTHORIZATION NO. 76H 30171414.

CHANGE CRITERIA

5. 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 probable 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.

6. 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*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

7. The Applicant submitted information from WGM Group staff, who conducted an interview and site visit of the historical place of use on December 18, 2020, with a Mr. Rocky Ginter and Mr. Brad Weaver, both former irrigation operators on the parcel since the late 1980s. Mr. Ginter explained that he took over operation of the parcel in the late 1980s, but operated irrigation in the same manner his father-in-law did for the Maloney family since the mid-1940s, using handline irrigation and then wheeline irrigation to produce hay. Mr. Ginter explained that irrigation typically began in late April to early May and continued through mid to late August when the field was hayed. The sprinkler system was operated in 24 hour sets, and it took 20 days to make one pass across the field, skipping one riser each time. With this pattern, it took two passes, or 40 days, to complete one full irrigation of the field. During a typical irrigation season, three full irrigations would be applied before the field was hayed. The Applicant concluded from this that a typical irrigation season lasted 120 days within the period of use.

8. Water was conveyed to the place of use through a perforated pipe buried under the Bitterroot River that collected water that drained into a sump on the riverbank. A pump house adjacent to the sump had a buried 8-inch mainline pipe that ran south approximately 2,400 ft, with 40 risers located along the mainline, spaced 60 ft apart. Lateral lines of lengths between 250 to 1750 ft conveyed water to sprinkler heads every 30ft. A Baldor-Reliance motor was used for this system. The Applicant was unable to locate a performance curve due to discontinuance by the

manufacturer, so they submitted calculations based on Thomas F. Scherer, North Dakota State University Agricultural Extension Engineer, August 2017 *Irrigation Water Pumps* publication. Using 18.75 water horse power (WHP) and 69.7 ft total dynamic head (TDH), the Applicant calculated:

$$(18.75 \text{ WHP} \times 3960 \text{ constant}) / 69.7 \text{ ft TDH} = 1,065 \text{ GPM or } 2.37 \text{ CFS} \quad (1)$$

9. The sump historically used to irrigate the 8-acre parcel is visible on the riverbank in current MT Cadastral and Google Earth imagery. The Department verified the historical point of diversion in the NWSESE Sec. 2, T12N, R20W using USDA aerial photograph 1079-109, dated September 24, 1979.

10. The decreed flow rate on this claim is 2.5 CFS, and these calculations indicate the motor supported 2.37 CFS flow rate. The Water Court added an informational remark to this Claim and parent Claim 76H 105168-00 which notes these claims share and alternate the point of diversion and flow rate, so that the combined flow rate may not exceed 2.5 CFS.

11. The Department did not consider Water Resource Survey (WRS) aerial imagery, as the imagery of the parcel for the WRS was taken in August, 1955, before this Claim's June 30, 1958 priority date. The Applicant submitted aerial imagery from July 16, 1966 that indicates irrigation of the parcel pre-July 1, 1973 (see Map IR.2.C in file). The Department analyzed the 1966 aerial photograph and confirmed irrigation of 100 acres (total place of use of parent Claim 76H 105168-00), including the 8 acres of irrigation associated with this water right.

12. The Department searched the Water Resources Survey Field Notes for Missoula County, T12N, R20W. The Department found the Maloney Ranch was checked for irrigation by the State Engineers Office on August 13, 1959, after the June 30, 1958 priority date, and there was irrigation of the SWNE Sec. 11, T12N, R20W, the place of use for Claim 76H 30122609 before it was severed from the land.

13. There are no historically supplemental water rights to Claim 76H 30122609 or Claim 76H 105168-00.

14. The irrigation system was last used in 2010. The Ginters (previous owner) subdivided the parcel in April, 2017, recorded on B: 977 P:538-539, and sold the parcel underlying the 8 acres of historical irrigation to Missoula County Public Schools. Peak Health Management Company, LLC received ownership of 76H 30122609 in 2020, after this claim was severed from the historical place of use by the Montana Water Court.

15. The Applicant proposes to use the consumptive use rule, ARM 36.12.1902(14). Historic crop consumptive use (without irrecoverable losses) for 8 irrigated acres is calculated as follows:

19.45 IWR ET in x (1 ft/12 in) x 0.695 CMF x 8 historic irrigated acres = 9.01 AF historic consumptive volume excluding irrecoverable losses

(2)

The variables used are Missoula WSO AP weather station ET for wheeline irrigation (ARM 36.12.1902(16), Table 1, Column D) 19.45 inches and Missoula County Management Factor (CMF) 1964-1973 (ARM 36.12.1902(16), Table 1, Column F) 69.5%. IWR estimated evapotranspiration of 19.45 in. X Missoula CMF 0.695 = 13.51775 inches per acre. County adjusted 13.51775 in/ac X 8 ac historic POU = 108.142 historic consumptive inches. 108.142 in / 12 in = 9.01 AF historic consumptive volume (HCV minus irrecoverable losses). Irrecoverable losses for these 8 irrigated acres are calculated per ARM 36.12.1902(17).

(9.01 AF historic consumptive use volume/0.70 on-farm efficiency) x 0.10 sprinkler irrigation adjustment = 1.29 AF historical irrecoverable losses

(3)

Variables used are 9.01 AF HCV without IL as calculated above / 70% on-farm efficiency for sprinkler per ARM 36.12.1902(10) to get 12.9 AF field applied volume. Using 10% irrecoverable loss rate for historic sprinkler irrigation x 12.9 AF field applied volume results in 1.29 AF irrecoverable losses calculated. Total historical consumptive use with irrecoverable losses per ARM 36.12.1902(17) was calculated as follows:

9.01 AF HCV without irrecoverable losses + 1.29 AF irrecoverable losses = 10.30 AF Total Historic Consumptive Volume

16. The Department finds the following historic use:

Table 2. Summary of Historical Use Findings For Claim No. 76H 30122609

WR Claim #	Source	Priority Date	Flow Rate (CFS)	Purpose	Place of Use	Point of Diversion
30122609	Bitterroot River	6/30/1958	2.5	Irrigation 8 acres	SWNESE Sec. 11 T12N R20W	NWSESE Sec. 2 T12N, R20W
HCV (AF) (Excluding IL)	Historic Irrecoverable Losses (IL) (AF)	Total HCV (AF) (Including IL)	Non- Consumed Volume (Return Flows) (AF)	Historic Diverted Volume (AF)		
9.01	1.29	10.3	2.58	12.87		

ADVERSE EFFECT

FINDINGS OF FACT

17. Claim 76H 30122609 is a child right created from the original Claim 76H 105168-00. A second child right, Claim 76H 30165310 was also created from Claim 76H 105168-00. The originally claimed flow rate of 2.5 CFS was not specifically divided between the three claims when the DNRC Form 641s were processed, and the flow rate is shared between the three claims. Each of the claims has a Commissioner Remarks Flow Rate information remark that states that the combined flow of the claims may not exceed 2.5 CFS. The Form 641's contained a statement that the flow rate would be split proportionately based on place of use. Under this scenario the per acre flow rate would be 11.22 GPM per acre ($2.5 \text{ CFS} \times 448.8 \text{ GPM} / 100 \text{ acres} = 11.22 \text{ GPM per acre}$). Claim 76H 105168-00 has a place of use of 10 acres and the proportional share of the flow rate is 112.2 GPM. Claim 76H 30122609 has a place of use of 8 acres and the proportional flow rate would be 89.76 GPM. Claim 76H 30165310 has a place of use of 82 acres and the proportional flow rate would be 2.05 CFS (920.04 GPM).

18. Under the proposed change in water use, Claim 76H 30122609 will have a maximum diversion of 46.72 GPM, less than the proportional share of 89.76 GPM. Claim 76H 30165310 was changed to the purpose of Mitigation Water in Application to Change a Water Right No. 76H 30165219, which was issued by the Department on July 30, 2025. This change in water use utilizes the same aquifer recharge facility proposed for Claim 76H 30122609. The flow rate authorized for Mitigation Water for Claim 76H 30165310 is 0.81 CFS at the aquifer recharge facility point of diversion, less than the proportional flow rate of 2.05 CFS for this historical right.

19. Claim 76H 30122609 was severed from the historical place of use and is no longer being used for irrigation. The proposed mitigation plan is to cease diversion of water for irrigation of 8 acres, and to use this water for aquifer recharge and mitigation, resulting in historically diverted and consumed volumes remaining instream year-round to offset depletions to the Bitterroot River resulting from groundwater pumping proposed in Permit application 76H 30150412.

20. The total consumptive use, including irrecoverable losses, from Claim 76H 30122609 is 10.30 AF. The Applicant proposes to utilize this full consumptive use volume as mitigation water for Application No. 76H 30150412. The proposed new purposes of aquifer recharge and mitigation will not result in an expansion of the historical diverted or consumed volume that would result in adverse effect (see Technical Report dated June 10, 2024).

21. The proposed change results in the historic diverted and consumed volumes of water being left instream, with 10.1 AF of historically consumed water accreting to the Bitterroot River approximately 2 miles upstream of the historic diversion at a location in the SENWNE of Sec. 15, T12N, R20W through aquifer recharge. An additional 0.2 AF of historical consumed volume will remain instream in the Bitterroot River at the historic point of diversion in the SWNE Sec. 2, T12N, R20W. This results in a total of 10.3 AF of historically consumed water left instream by for the purposes of aquifer recharge (10.1 AF) and mitigation (0.2 AF). The remaining historically diverted but not consumed volume of 2.58 AF will also remain instream to account for the loss of historical return flows in the Bitterroot River.

22. The Applicant obtained a waiver of adverse effect, Consent to Approve, signed by MT FWP and CSKT who co-own the largest rights along that reach of the Bitterroot River. Due to this, the Department does not consider MT FWP and CSKT rights in the adverse effect analysis. Removing Statement of Claims 76H 151311-00, 76H 151312-00, and 76H 151313-00 from consideration, water is physically available in this reach of the Bitterroot River to satisfy all other existing rights, leaving no water user dependent on return flows.

23. Historically, 2.58 AF of water accreted to the Bitterroot River as return flows downstream of the southern boundary of the NW Sec. 11, T12N, R20W (see November 2025, Surface Water Change Technical Analysis Report). Under the proposed change, return flows generated from irrigation would no longer appear at that location. Per the Department's April 1, 2016 Return Flow Policy memo, a limited return flow analysis was conducted that determined that the Bitterroot River was the receiving source of return flows. The Applicant proposes to leave the historically diverted but not consumed volume of 2.58 acre-feet instream in the Bitterroot River, which is the volume of return flows historically generated through irrigation of the 8-acre place of use. The monthly rate and timing of historical return flows were not evaluated because the proposed change will leave historically diverted and not consumed water instream during the historical period of diversion and below the historical point of diversion. The Department's analysis of the proposed change in water use did not find that there would be an expansion of the historical water use.

24. The Applicant proposes to add a point of diversion approximately 2 miles upstream. The Applicant will utilize the same aquifer recharge facility that was previously authorized in Combined Application for Beneficial Water Use Permit No. 76H 30163647 and Application to Change Water Right No. 76H 30165219. The Applicant proposes an aquifer recharge pumping schedule of 27.91 GPM and 3.7 AF in August and 46.72 GPM and 6.4 AF in September, annually. Eight water rights

have points of diversion between the historical point of diversion and the proposed point of diversion (Table 3). Of these, three are senior irrigation rights, four are junior instream rights, and one is a junior irrigation right.

Table 3. Rights with Points of Diversion between Historical and Proposed POD

Water Right	Owner	Purpose	Priority Date
76H 104521-00	BOGGESS FAMILY TRUST	IRRIGATION	12/13/1932
76H 131603-00	MR RIVER PROPERTY LLC	IRRIGATION	12/31/1936
76H 120055-00	BUREAU OF RECLAMATION	IRRIGATION	12/4/1944
76H 151306-00	CSKT; MT DFWP	RECREATION	7/1/1970
76H 151311-00	CSKT; MT DFWP	RECREATION	7/1/1970
76H 151312-00	CSKT; MT DFWP	RECREATION	7/1/1970
76H 151313-00	CSKT; MT DFWP	RECREATION	7/1/1970
76H 39791-00	KHOURY INC	IRRIGATION	1/13/1982

25. In the analysis conducted for Combined Application for Beneficial Water Use Permit No. 76H 30163647 and Application to Change Water Right No. 76H 30165219 the Department found that water was legally available within this reach during the months of August and September when water will be diverted from the Bitterroot River for aquifer recharge. This analysis was used for the subject application because it is representative of the river conditions at the proposed diversion for aquifer recharge. Table 4 shows the analysis of physical and legal availability at the proposed aquifer recharge diversion.

Table 4. Physical and Legal Availability of Water at the Proposed Point of Diversion for Statement of Claim No. 76H 30122609

Month	Physical Availability at Point of Diversion (CFS)	Physical Availability at Point of Diversion (AF)	Legal Demands (CFS)	Legal Demands (AF)	Legal Availability at Point of Diversion (CFS)	Legal Availability at Point of Diversion (AF)
August	867.80	53,358.94	635.07	39,048.93	232.73	14310.01
September	826.40	49,174.21	635.07	37,789.29	191.33	11384.92

26. The Department finds that the proposed change in point of diversion will not adversely affect Bitterroot River water rights between the historical and proposed points of diversion. The Department's analysis shows that there is sufficient physical availability of water in the Bitterroot

River during the months of August and September to satisfy all water rights in this reach of the during the proposed period of diversion for aquifer recharge.

27. To ensure that the historical and proposed amount of water diverted from the Bitterroot River are not exceeded, the Applicant will be required to adhere to the following water measurement condition to report the amount of water diverted into the aquifer recharge facility:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: 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. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

28. The Department finds that there will be no adverse effect to surface water users on the Bitterroot River as a result of this change in water use.

BENEFICIAL USE

FINDINGS OF FACT

29. This change application is intended to provide mitigation water for Application for Beneficial Water Use Permit No. 76H 30150412, which requires mitigation water to be made available in the Bitterroot River in the months of January, February, May, June, and December to offset depletions resulting in adverse effect. The aquifer recharge and mitigation water provided by this application, when combined with the mitigation water provided by Change application 76H 30171414, is sufficient to offset the depletions from Permit application 76H 30150412. A comprehensive breakdown of depletions, mitigation, and aquifer recharge can be found in Tables 5 and 6, below.

Table 5: Combined Effects of Permit and Changes to the Bitterroot River (Volume).

Month	76H 30150412	76H 30171414	76H 30150414		Net Volume Change in Bitterroot River (AF)
	Volume of Depletions (AF)	Mitigation Volume (AF)	Mitigation Volume (AF)	Aquifer Recharge Volume (AF)	
January	-0.17	0.07	0	0.24	0.14
February	-0.15	0.06	0	0.17	0.08
March	-0.17	0.07	0	0.15	0.05
April	-0.16	0.06	0	0.13	0.03
May	-0.17	0.07	0.05	0.11	0.06
June	-0.16	0.06	0.05	0.1	0.05
July	-0.17	0.07	0.05	0.09	0.04
August	-0.17	0.07	0.05	0.09	0.04
September	-0.16	0.06	0	2.86	2.76
October	-0.17	0.07	0	5.17	5.07
November	-0.16	0.06	0	0.64	0.54
December	-0.17	0.07	0	0.35	0.25
Total	-1.99	0.78	0.2	10.1	9.11

Table 6: Combined Effects of Permit and Changes the Bitterroot River (Flow Rate).

Month	76H 30150412	76H 30171414	76H 30150414		Net Flow Rate Change in Bitterroot River (GPM)
	Flow Rate of Depletions (GPM)	Mitigation Flow Rate (GPM)	Mitigation Flow Rate (GPM)	Aquifer Recharge Flow Rate (GPM)	
January	1.23	0.5	0	1.7	1.0
February	1.23	0.5	0	1.4	0.6
March	1.23	0.5	0	1.1	0.4
April	1.23	0.5	0	1.0	0.2
May	1.23	0.5	0.36	0.8	0.5
June	1.23	0.5	0.38	0.8	0.4
July	1.23	0.5	0.36	0.7	0.3

August	1.23	0.5	0.36	0.6	0.3
September	1.23	0.5	0	21.6	20.9
October	1.23	0.5	0	37.8	37.1
November	1.23	0.5	0	4.8	4.1
December	1.23	0.5	0	2.5	1.8

30. The proposed mitigation and aquifer recharge plan results in water accretions to the Bitterroot River in every month of the year. In the adverse effect analysis conducted for permit application 76H 30150414, the Department found that depletions from groundwater pumping would result in adverse effect during the months of January, February, May, June, and December if left unmitigated. Although mitigation water is not required in every month of the year to offset adverse effects from groundwater pumping, the injection schedule proposed for aquifer recharge is necessary to generate sufficient volumes of mitigation water in the Bitterroot River during the months of January, February, May, June, and December when it is needed, and is a beneficial use.

31. The Department's technical analysis for Permit application 76H 30150412 found that the location where depletions from groundwater pumping began to accrue is the Bitterroot River downstream of the southern boundary of Section 2, Township 12 North, Range 20 West, Missoula County. Mitigation water resulting from aquifer recharge will be available at this same point. The 0.20 AF of mitigation water made available from ceasing diversions at the historical irrigation diversion will be available at the location of the historical headgate in the NWSESE Section 2, T12N, R20W, which is approximately 230 yards downstream from the southern boundary of Section 2, Township 12 North, Range 20 West. There are no Bitterroot River diversions within this 230 yard reach other than CSKT and DFWP instream flow water rights requiring full mitigation of depletions to offset adverse effect.

32. To meet the Beneficial Use Criterion, the Applicant will be held to the following condition:

THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30150412 IN CONJUNCTION WITH CHANGE AUTHORIZATION NO. 76H 30171414. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30150412 AND CHANGE AUTHORIZATION NO. 76H 30171414.

33. The Department finds that the proposed water use is beneficial (contingent upon the issuance of Permit Application 76H 30150414), and that the requested flow rates of up to 46.72

GPM for aquifer recharge and up to 0.38 GPM for mitigation, and annual volume of 10.3 AF for aquifer recharge and mitigation are the amounts required to offset depletions to surface water resulting in adverse effect from Permit Application 76H 30150412.

ADEQUATE DIVERSION

FINDINGS OF FACT

34. The aquifer recharge system was designed by a professional engineer. Three 30-foot sections of 12-in horizontal, slotted, HPDE infiltration pipe will be installed in a side channel to the Bitterroot River in the SENWNE Sec. 15, T12N, R20W. This influent pipe will connect to a solid 12-inch HPDE pipe extending about 800 ft to the southeast to a 5-foot diameter wet well (pump station) located adjacent to an active oxbow. The pipeline connecting the POD to the wet well is designed with a siphon so that flows from the river cannot reach the wet well without pumping. A turbine pump and 4-inch totalizing inline flow meter will be installed in a pump house located above and adjacent to the wet well. The pump will be a 20 HP 5TMH-375 Berkeley submersible turbine pump, which can convey the requested 46.72 GPM over a vertical elevation lift of about 45 feet. From the wet well, water will be conveyed through a 4-inch pipeline approximately 1820 ft to an effluent outfall at the aquifer recharge site on lower Miller Creek.

35. Miller Creek is a losing stream and frequently dry in the lower reaches where the aquifer recharge site is located. The Applicant proposes that by discharging water into the Creek, the Bitterroot River Shallow Valley Aquifer will be recharged and supplement flows to the Bitterroot River throughout the year. Department Hydrologist Melissa Brickl analyzed the Applicant's proposal for aquifer recharge using data from shallow wells local to the area and by hydrologic modeling. The Department's analysis of the Applicant's plan found that the use of Miller Creek as a natural carrier and infiltration gallery for aquifer recharge is reasonable.

36. The City of Missoula currently utilizes the aquifer recharge system in Miller Creek, for mitigation required for issuance of Beneficial Water Use Permit 76H 30063540. The mitigation plan for this permit retired irrigated acreage in the Miller Creek valley and left the water instream where it naturally recharges the groundwater aquifer through the streambed. The mitigation plan was approved in Authorization to Change a Water Right 76H 30063540, issued June 28, 2012. In the analyses conducted for that change application, the Department found Miller Creek to be a losing stream, and that water left in Miller Creek would infiltrate into the groundwater aquifer providing mitigation to the Bitterroot River. The Department corroborates this previous analysis for the purpose of this application.

37. The proposed instream mitigation portion of the proposed change in water use does not require a means of diversion or conveyance. Per § 85-2-402(2)(b)(iii), MCA, a change to mitigation pursuant to § 85-2-420, MCA, is exempt from the adequacy of diversion criterion.

38. The Department finds the means of diversion adequate for the proposed beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

39. Pursuant to § 85-2-402(2)(d)(iii), MCA, the Applicant is not required to prove they have the possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to a beneficial use because this application involves aquifer recharge and mitigation per § 85-2-420, MCA.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

40. 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*, ¶ 10 (an

appropriator's right only attaches to the amount of water actually taken and beneficially applied).¹

41. 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*, ¶¶ 43-45.²

42. 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*, ¶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 conclusion of no adverse effect because the Applicant failed to provide the

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

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. Section 85-2-234, MCA

Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, ¶¶ 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

43. 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*, ¶¶ 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; ARM 36.12.101(56) (Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

44. 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 ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

45. 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 1059-44. 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

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

past beneficial use.

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

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

46. 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).

47. 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*, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999) (Water Resources Survey used as evidence in adjudicating of water rights); *Wareing v. Schreckendgust*, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996) (Water Resources Survey used as evidence in a prescriptive

ditch easement case); *Olsen v. McQueary*, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

48. 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.*, DNRC Proposal for Decision adopted by Final Order (2005). 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. *See MacDonald*, 220 Mont. at 529, 722 P.2d at 604; *Featherman*, 43 Mont. at 316-17, 115 P. at 986; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

49. 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(16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No.15).

50. If an Applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902(16), 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.*; *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").

51. 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. 76H 30122609 to be a diverted volume of 12.87 AF, a historically consumed volume of 10.3 AF, and flow rate of 2.5 CFS. (FOF Nos. 7—16)

52. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, 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. Section 85-2-402(2)(a), MCA. (FOF Nos. 17—28)

BENEFICIAL USE

53. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, *Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (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).

54. Applicant proposes to use water for aquifer recharge and mitigation which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that the 10.3 AF of volume requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 29-33).

ADEQUATE MEANS OF DIVERSION

55. 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).

56. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this application involves a change in appropriation right pursuant to § 85-2-420, MCA, for mitigation or marketing for mitigation.

57. 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. 34—38)

POSSESSORY INTEREST

58. Pursuant to § 85-2-402(2)(d), MCA, the Applicant is not required to prove 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 because this application involves a change in appropriation right pursuant to § 85-2-420, MCA, for mitigation or marketing for mitigation. (FOF No. 39)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76H 30150414 should be GRANTED subject to the following.

The Applicant may retire 8.0 acres of irrigation SWNE Sec. 11, T12N, R20W, Missoula County. The historically consumed volume of 10.3 AF will be changed from the purpose of irrigation to the purposes of mitigation (0.2 AF) and aquifer recharge (10.1 AF) to mitigate the depletions identified in Permit Application No. 76H 30150412. The place of use for the mitigation and aquifer recharge purposes will be the Bitterroot River from the southern boundary of Section 2, Township 12 North, Range 20 West, Missoula County, to the confluence of the Clark Fork and Bitterroot rivers in the Section 27, Township 13 North, Range 20W.

Change Application No. 76H 30150414 will be subject to the following conditions, limitations, or restrictions to meet the adverse effect and beneficial use criteria:

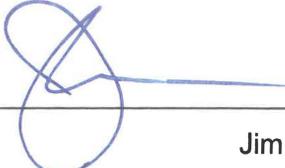
1. WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, 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. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

2. THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30150412 IN CONJUNCTION WITH CHANGE AUTHORIZATION NO. 76H 30171414. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30150412 AND CHANGE AUTHORIZATION NO. 76H 30171414.

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 16th day of January, 2026.



Jim Nave, Manager
Missoula Regional Office

Montana 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 16th day of January, 2026, by first class United States mail.

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