

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

**APPLICATION TO CHANGE WATER RIGHT)
NO. 76H 30170801) DRAFT PRELIMINARY DETERMINATION
BY TOWN OF STEVENSVILLE) TO GRANT CHANGE**

On December 24, 2025, Town of Stevensville (Applicant) submitted Application to Change Water Right No. 76H 30170801 to change Provisional Permit 76H 89376-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on April 22, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on October 17, 2025. The Department delivered the Department-completed Technical Analysis on December 5, 2025. The Application was determined to be correct and complete as of January 8, 2026. An Environmental Assessment for this application was completed on March 9, 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 a Water Right, Form 606
- Attachments:
 - Goulds 8RJHC-5 Pump Curve.
 - Well logs for Stevensville Wells 1-3 & 5-7.
 - Well abandonment logs for Stevensville Wells 2 & 3
- Maps:
 - Figure 1. Historical and Proposed Points of Diversion and Places of Use. Undated imagery.
 - Figure 2. Municipal Water Distribution System. Undated imagery.
 - Figure 3. New Places of Use within Current Town Limits. Undated imagery.
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated December 5, 2025

Information Received after Application Filed

- Email dated March 6, 2026, Re: Response to Call Language

Information within the Department's Possession/Knowledge

- 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.
 - Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping, Dated July 6, 2018

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; PCN means Project Completion Notice; 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 and place of use of unperfected Provisional Permit No. 76H 89376-00 in this Application. Provisional Permit No. 76H 89376-00 is authorized for a flow rate of 500 GPM and a diverted volume of 919.86 AF from groundwater via means of four wells for the purpose of municipal use. The period of use is January 1 through December 31. The points of diversion are located in the SWNE, SWNWSE, and NWSWSE of Section 27; and the NWNENE of Section 35, all in Township 9 North, Range 20 West, Ravalli County. Water is conveyed to the place of use by water mains.

Table 1: Water Right Proposed for Change

Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
76H 89376-00	500 GPM	919.86 AF	Municipal	Jan 1 – Dec 31	W2 Sec. 26 E2 Sec. 27 T9N, R20W	SWNE, SWNWSE, NWSWSE Sec. 27; NWNENE Sec. 35 T9N, R20W	3/28/1994

2. The Town of Stevensville possesses 10 municipal water rights in addition to Provisional Permit 76H 89376-00. All rights contribute to a manifold distribution system and are therefore supplemental. Of the supplemental water rights, 9 have places of use overlapping the subject right’s current place of use. The remaining right, Provisional Permit 76H 30043133, has a place of use overlapping the proposed place of use of the subject water right. Three rights are currently associated with the subject water right by a shared point of diversion, and one right, Provisional Permit 76H 30043133, would be associated by a shared point of diversion under the proposed change.

3. Provisional Permits 76H 88532-00 is a duplicate right of Statement of Claim 76H 214634-00, and Provisional Permit 76H 76760-00 is a duplicate of Statements of Claims 76H 214147-00, 76H 214149-00, and 76H 214649-00 during the non-irrigation season (October 15 through April 15). Therefore, the Department does not consider these rights as contributing to the total authorized volume for the Town of Stevensville. The total authorized volume is 4762.23 AF. Table 2 describes the elements of the Applicant’s supplemental municipal water rights.

Table 2. Water Rights Supplemental to Provisional Permit 76H 89376-00

WR Number	Flow Rate (GPM)	Volume (AF)	Added Volume (AF)	Associated POD	Supplemental to POU	Priority Date
76H 7286-00	240	40	40	Well 2	Yes (Current)	1/23/1976
76H 9186-00	220	340	340	Well 3	Yes (Current)	8/13/1976
76H 76760-00	337.5	272.2	0	N/A	Yes (Current)	12/28/1990
76H 88532-00	345.3	556.97	0	N/A	Yes (Current)	2/25/1994
76H 214147-00	1122	1120	1120	N/A	Yes (Current)	6/30/1973
76H 214149-00	561	900	900	N/A	Yes (Current)	6/30/1973
76H 214634-00	345.3	555.93	555.93	N/A	Yes (Current)	6/30/1973
76H 214635-00	498.2	805	805	Well 1	Yes (Current)	6/30/1973
76H 214649-00	561	905	905	N/A	Yes (Current)	6/30/1973
76H 30043133	300	96.3	96.3	Well 5 (Proposed POD)	Yes (Proposed)	9/3/2008

4. The Town of Stevensville submitted a Project Completion Notice for Provisional Permit 76H 89376-00 to the Department on December 21, 1995, and the Department verified the Permit on October 10, 1997. On November 13, 2023, the Department received an Application for Extension of Time (Form 607) for the subject water right. On this form, the Town of Stevensville asserted that the wrong form had been filed in 1995, since the Town of Stevensville applied for 805 AF to provide for current needs and estimates of future growth. The seven months between the issuance of the permit and the filing of the PCN were clearly insufficient for the Town of Stevensville to have grown and fully put its permit to use. The water measurements received by the Department attested to this fact, only recording 79.94 AF. Nevertheless, the Department mistakenly verified the right for the full volume of 805 AF. In light of this evidence, the DNRC agreed with the Town of Stevensville that the wrong form had been filed and granted an extension of time for the project completion. As such, the DRNC will not look back to the date of the PCN filing in 1995 for its historical use analysis, as it considers that filing to be erroneous and the subject water right to be unperfected.

5. Change Application 76H 30070414 to change the point of diversion and place of use of Provisional Permit 76H 89376-00 was filed on September 29, 2014. The Department found this application deficient. The Applicant provided a deficiency response which the Department found inadequate, and the change was subsequently terminated. Therefore, there are no previous findings of fact from this change which could inform the Department's decision in this application.

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicant proposes to change Provisional Permit 76H 89376-00 by adding two new points of diversion and changing the place of use. The 430-ft Stevensville Well 5 (GWIC ID 244440) and the 435-ft Stevensville Well 7 (GWIC ID 272196) would be added as points of diversion in the NWNENE Section 35, T9N, R20W, Ravalli County. The current place of use, described as the W2 of Section 26 and the E2 of Section 27, all in T9N, R20W, would be refined and generally expanded to include portions of Sections 34, 26, 27, 34, and 35 in T9N, R20W, more particularly described in Table 3. Map 1 shows the elements of the proposed change.

Table 3. Proposed Place of Use for Provisional Permit 76H 89376-00

¼	¼	¼	Section	Township	Range
	S2	S2	23	9N	20W
			26	9N	20W
		SE	27	9N	20W
	S2	NE	27	9N	20W
	NE	NE	27	9N	20W
E2	NW	NE	27	9N	20W
SW	NW	NE	27	9N	20W
S2	NE	NW	27	9N	20W
	SW	NW	27	9N	20W
SE	NW	NW	27	9N	20W
NE	SW	NW	27	9N	20W
SE	SW	NW	27	9N	20W
	E2	SW	27	9N	20W
		NE	34	9N	20W
	E2	NW	34	9N	20W
	NE	SW	34	9N	20W
	N2	SE	34	9N	20W
		N2	35	9N	20W
	N2	S2	35	9N	20W

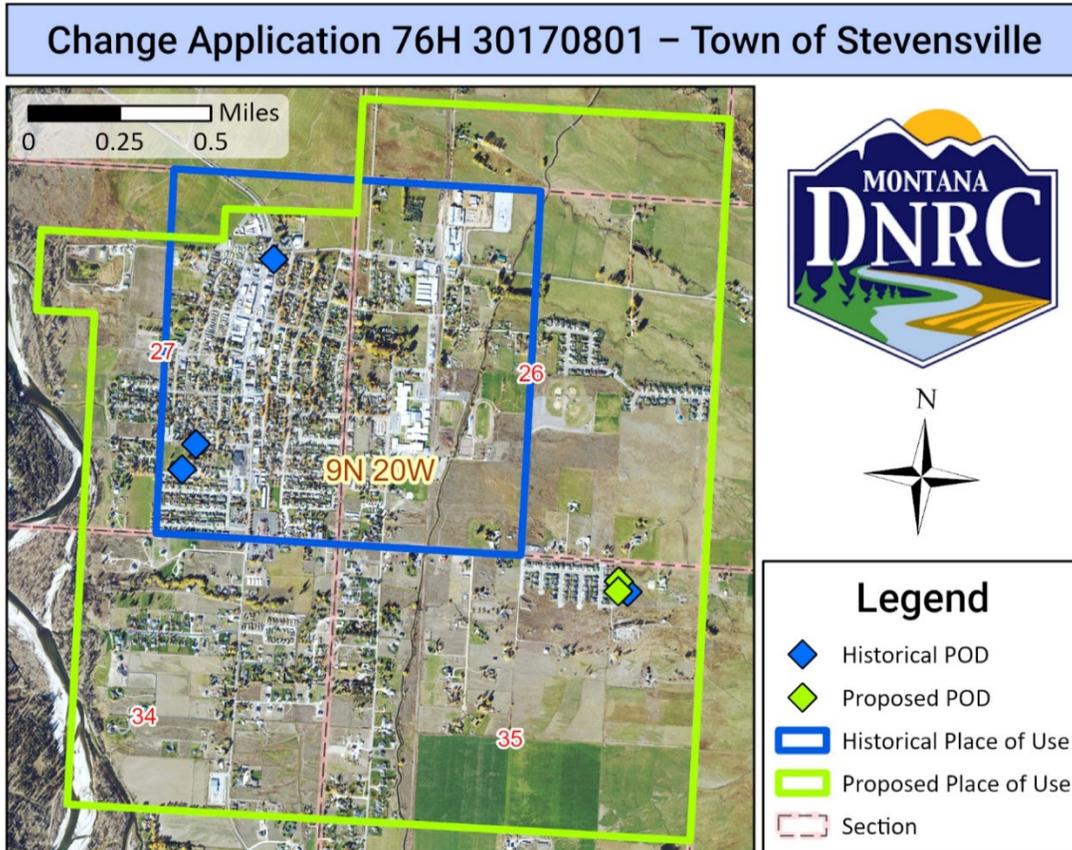


Figure 1. Map of Proposed Change

CHANGE CRITERIA

7. 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.

8. 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

9. Provisional Permit 76H 89376-00 has a priority date of March 28, 1994. This water right is unperfected and has a project completion deadline of December 31, 2034. Therefore, the Department cannot make concrete findings of fact on historical use, as the Applicant is still in the process of fully developing their permitted appropriation, and the elements of this permit have yet to be finalized. Water measurements from 2020 to 2024 show continued growth in water use towards the maximum authorized volume. Upon project completion, the authorized diverted volume, place of use, and all other elements of the subject right will be verified.

10. The historical points of diversion are Stevensville Wells 1, 2, 3, and 6 (GWIC IDs 174876, 60170, 60172, and 272191, respectively). Of these, only wells 1 and 6 are currently active, as wells 2 and 3 were abandoned in 2018.

ADVERSE EFFECT

FINDINGS OF FACT

11. The Applicant proposes to change the place of use and to add two points of diversion to Provisional Permit 76H 89376-00. Historical consumptive use was not assessed as the subject water right is an unperfected permit. For the purposes of the adverse effect analysis, the Department will compare the proposed use to the originally authorized maximum flow rate of 500 GPM and diverted volume of 919.86 AF. Although the Applicant proposes to expand their service area, the Applicant does not propose an increase in historical diverted volume beyond what was originally permitted, nor does the Applicant propose any change which would alter consumptive volume. Pumping rates for the historical and proposed points of diversion are measured and monitored and can be controlled to ensure they do not exceed the originally permitted flow rate and volume.

12. In times of water shortage, the Town of Stevensville will reduce pumping from the source of supply and implement water conservation practices for the municipal water system and its users. The Town of Stevensville will contact residents to tell them to reduce or eliminate landscaping irrigation to the extent needed to meet the call. Ultimately, it is possible for the system to be shut down and for diversion to cease.

13. When the Department processed the original application for Provisional Permit 76H 89376-00, it did not calculate drawdown in existing wells because of limited modelling capabilities at the time. To evaluate the adverse effect criterion for this change application, the DNRC's Water

Science Bureau (WSB) modelled the effects of appropriating the full volume of water under the original permit and under the proposed change. A list of wells which would experience 1 foot or more of drawdown under the original permit or the proposed change was generated from this model. This list can be found in the Department’s technical analysis.

14. Water Science Bureau identified 2645 wells experiencing 1 foot or more of drawdown as a result of the original appropriation or proposed change. For 2549 of these 2645 wells, the drawdown under the proposed change was greater than that under the original permit. Of the 2549 wells experiencing increased drawdown under the proposed change, the Department had well depth and static water level records for 1822, of which one well, authorized under Statement of Claim 76H 151021-00, was modelled as experiencing drawdown that caused the static water level to drop below the recorded depth of the well. The modelled effect of the proposed change on Statement of Claim 76H 151021-00 is shown in Table 4.

Table 4. Modelled Effect of Proposed Change on Statement of Claim 76H 151021-00

Water Right Number	Well Depth (ft)	Static Water Level (ft)	Existing Drawdown (ft)	Drawdown from Proposed Change (ft)	Change in Drawdown (ft)	Existing Available Water Column (ft)	Proposed Available Water Column (ft)
76H 151021-00	12	4	7.3	12.37	5.07	0.70	-4.37

15. According to the Department’s file for Statement of Claim 76H 151021-00, the well on this right is a shallow, dug well. Several other water rights are associated with the property on which this dug well is located, including Ground Water Certificate 76H 30120149, which is a 30-foot well with a static water level of 4 ft.

16. As displayed in Table 4, Statement of Claim 76H 151021-00 is projected to experience increased drawdown resulting from the proposed change in point of diversion and place of use that would exceed the recorded depth of the well. In the adverse effect criterion analysis, the Department evaluates how water levels in wells of prior water rights could be lowered by the proposed appropriation (using data available to the Department). Statute is clear that priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence such as the lowering of a water table or artesian pressure if the prior appropriator can reasonably exercise their right. This issue has been further discussed in previous hearing orders issued by the Department (see permit application 76LJ 81523-00). The

Department hearing order found "to hold that an appropriator is entitled to maintenance of a certain static water level or a shallow well barely penetrating the aquifer against any subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier and less costly. Both case law and statutes controvert such a result" (see proposal for decision issued August 26, 1994, on permit application 76LJ 81523-00). Based on this information, the Department finds that Statement of Claim No. 76H 151021-00 will not be adversely affected as a result of the proposed change.

17. The Department also analyzed if any water rights on hydraulically connected surface water sources would be adversely affected. WSB identified the Bitterroot River as hydraulically connected to the source aquifer. However, hydrologic modelling showed that there would be no change in location, timing, or amount of depletions to the Bitterroot River as a result of the proposed change in diversion and place of use. Therefore, no surface water rights will be adversely affected as a result of this change.

18. The Department finds that no water rights will be adversely affected by the proposed change in point of diversion and place of use.

19. Provisional Permit 76H 89376-00 was subjected to a water measurement condition when it was originally permitted. A portion of this measurement condition is now outdated. To fulfill the adverse effect criterion and ensure that the maximum permitted volume will not be exceeded as a result of the proposed change in place of use, the previous measurement condition will be replaced with the following one:

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 UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IF CONDITION IS MET THE DEPARTMENT WILL REMOVE THE CONDITION UPON VERIFICATION OF THE CHANGE AUTHORIZATION. IN THE EVENT THAT PERMITTED 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 WATER RESOURCES REGIONAL OFFICE.

BENEFICIAL USE

FINDINGS OF FACT

20. The subject water right is used to supply municipal water to the Town of Stevensville. Municipal water use is recognized as a beneficial use by the Department.

21. Currently, Stevensville's town limits extend beyond the authorized place of use for their water rights. By implementing the proposed change in place of use, the Town of Stevensville would be able to provide water to all residents within its town limits and anticipate future growth. The flow rate and volume of 500 GPM and 919.86 AF authorized under this right are not proposed for change.

22. The volume that the Town of Stevensville is authorized to appropriate for municipal purposes under all water rights is 4762.23 AF. In 2024, the Town of Stevensville's appropriation of water totaled 833 AF. The Department finds that the proposed expansion to the place of use of Provisional Permit 76H 89376-00 will not result in there being insufficient water to service residents in the current place of use, and that the Applicant will not exceed the maximum volume authorized under Provisional Permit 76H 89376-00.

23. The Department finds that the proposed water use is beneficial, and that the requested change in point of diversion and place of use are reasonably justified.

ADEQUATE DIVERSION

FINDINGS OF FACT

24. The proposed new points of diversion are two groundwater wells: the 430-ft Stevensville Well 5 (GWIC ID 244440) and the 435-ft Stevensville Well 7 (GWIC ID 272196). Both wells are fitted with a Goulds 8RJHC-5 pump with a 100 horsepower motor. The pump tests for Wells 5 and 7 were run at 1106 GPM and 807 GPM, respectively, and the pump is capable of delivering up to 600 GPM at system pressure.

25. Pumping rates for the proposed wells are monitored and controlled by a SCADA system which can ensure that the maximum permitted flow rate for Provisional Permit 76H 89376-00 is not exceeded.

26. Water is conveyed to the place of use through PVC water mains ranging from 16-inch to 2-inch diameters. The current design maximum day demand is 1.7 million gallons per day (equivalent to 1181 GPM).

27. The Department's analysis of drawdown within the Applicant's wells found that after five years of pumping, modelled drawdown in the diversionary wells would not exceed the available water column.

28. The Department finds that the proposed means of diversion and conveyance are able to appropriate the 919.86 AF and 500 GPM and that the adequate diversion criterion has been met.

POSSESSORY INTEREST

FINDINGS OF FACT

29. This application is for municipal use 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. The Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

30. 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

31. 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

32. 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

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).

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. Section 85-2-234, MCA

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*, ¶ 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

33. 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,

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.)

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; 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

34. 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.

35. 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,

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).

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).

36. 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.

37. 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. 11-18)

BENEFICIAL USE

38. 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).

39. Applicant proposes to use water for municipal use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that municipal use is a beneficial use and that 919.86 acre-feet of diverted volume and 500 GPM of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 20-23).

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. 24-28)

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 ARM 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 No. 29).

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 30170801 should be GRANTED subject to the following.

The Applicant may add two wells as new points of diversion in the NWNENE Section 35, T9N, R20W, Ravalli County. The Applicant may change the place of use to include portions of Sections 34, 26, 27, 34, and 35, all in T9N, R20W, Ravalli County.

Change Application 76H 30170801 will be subject to the following conditions, limitations, or restrictions to meet the adverse effect criterion:

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 UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IF CONDITION IS MET THE DEPARTMENT WILL REMOVE THE CONDITION UPON VERIFICATION OF THE CHANGE AUTHORIZATION. IN THE EVENT THAT PERMITTED 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 WATER RESOURCES REGIONAL OFFICE.

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 9th day of March, 2026.



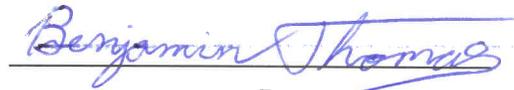
Jim Nave, Manager
Missoula Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 9th day of March, 2026, by first class United States mail.

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