

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

APPLICATION TO CHANGE WATER RIGHT) NO. 76H 30171414 BY PEAK HEALTH) MANAGEMENT COMPANY LLC)	DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE
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On October 3, 2025, Peak Health Management Company LLC (Applicant) submitted Application to Change Water Right No. 76H 30171414 to change Provisional Permit No. 76H 62593-00 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. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 24, 2025. The Applicant responded with information dated October 24, 2025. A preapplication meeting was held between the Department and the Applicant on July 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 July 29, 2025. The Department delivered the Department-completed technical analysis on September 19, 2025. The Application was determined to be correct and complete as of November 19, 2025. An Environmental Assessment for this application was completed on January 12, 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
- Addenda:
 - Mitigation Addendum, Form 600/606-MIT
- Maps:
 - REVISED Map IR.2.E Proposed POD and POU (2023 Aerial Photo)
 - 606 Item 17. Hist Use Map (2004 Aerial Photo)
 - 606 Item 18. Proposed Use Map (2017 Aerial Photo)
 - 606 Item 18 Proposed POD and POU (2023 Aerial Photo)

- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated September 19, 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
- 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 Provisional Permit No. 76H 62593-00 in this Application. Provisional Permit No. 76H 62593-00 is authorized for a flow rate of 120 GPM, diverted volume of 3.5 AF from the groundwater aquifer via means of two wells (GWICs 67088 and 67089), for the purposes of commercial use and lawn & garden irrigation on 3 acres. The period of use for the commercial purpose is January 1 through December 31, and the period of use for the lawn & garden irrigation purpose is April 15 through October 15. The points of diversion are located in the NWNWSE and the SWNWSE of Section 2, T12N, R20W, Missoula County and water is conveyed to the place of use by means of a pipeline.

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 62593-00	120 GPM	Commercial	N/A – Flow Rate Only	Jan. 1– Dec. 31	SENE SW Section 2, T12N, R20W, Missoula County	NWNWSE & SWNWSE Section 2, T12N, R20W, Missoula County	May 5, 1986
		Irrigation (Lawn & Garden)	3.5 AF	Apr. 15 – Oct. 15			

2. Ground Water Certificate No. 76H 65902-00 is supplemental to Provisional Permit 76H 62593-00, sharing a common place of use and one well as a common point of diversion. Of the three acres of lawn & garden serviced by Provisional Permit No. 76H 62593-00, two are supplemented by Ground Water Certificate No. 76H 65902-00. Both rights also share the commercial purpose and place of use, however, the whole volume for this purpose has been supplied by the ground water certificate, with the permit only providing additional flow rate.

Table 2. Water Rights Supplemental to 76H 62593-00

Water Right Number	Flow Rate	Purpose	Volume	Period Of Use	Place Of Use	Points Of Diversion	Priority Date
76H 65902-00	96.6 GPM	Commercial	9 AF	Jan. 1– Dec. 31	SENE SW Section 2, T12N, R20W, Missoula County	SWNWSE Section 2, T12N, R20W, Missoula County	May 5, 1986
		Irrigation (Lawn & Garden)	5 AF	Apr. 15 – Oct. 15			

3. The Applicant submitted Change Application No. 76H 30150413 for Provisional Permit 76H 62593-00 on March 26, 2021. This Application was similar in scope and intent, in that the Applicant sought to provide mitigation water to Permit Application 76H 30150412 by retiring irrigation. On October 12, 2023, the Applicant requested to withdraw Change Application No. 76H 30150413. As this change was never completed and the Applicant’s plans have evolved, the Department has not relied on the findings made in the technical analysis for the previous change.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the purpose and place of use of Provisional Permit No. 76H 62593-00. Currently, the purposes for this permit are commercial use and irrigation of 3 acres

of lawn and garden. Under the proposed change, irrigation would be retired on 0.46 acres and the water previously diverted for this purpose would be given a new mitigation purpose to help offset the depletions identified in Permit Application 76H 30150412. 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 (the point where depletions from the groundwater diversion historically accrued) to the confluence of the Clark Fork and Bitterroot rivers. Map 1 shows the elements of the proposed change.

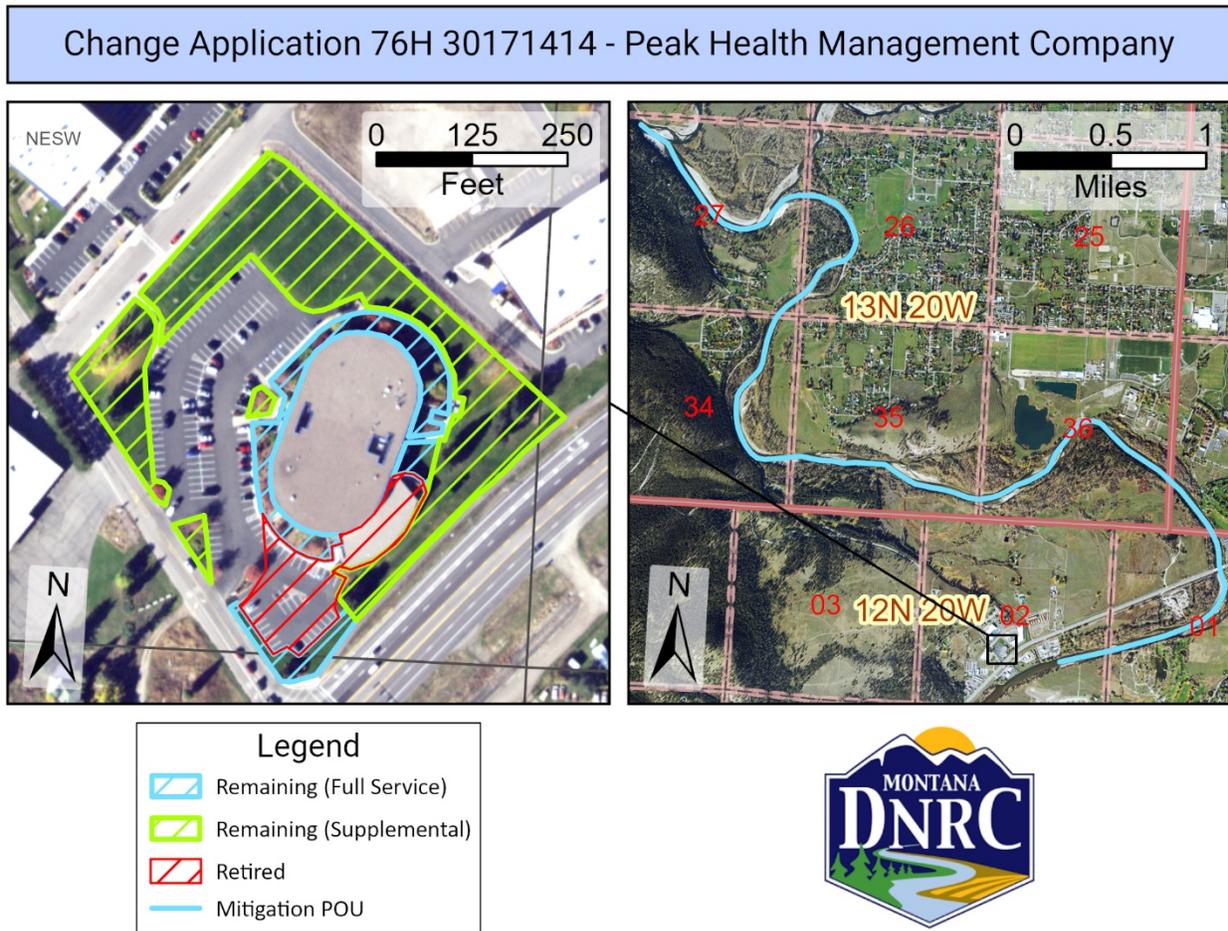


Figure 1. Map of the proposed change.

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. Provisional Permit 76H 62593-00 has a priority date of May 5, 1986, and lists a 3-acre place of use for irrigation in the SENESW Section 2, T12N, R20W, Missoula County. The project completion notice for the permit was received on December 31, 1996, and the permit was certified on October 21, 1997. The verification abstract (verifab) confirmed 3 acres of irrigation. This number was corroborated by a review of Google Earth imagery from 2002, the earliest date after certification for which aerial photos could be found.

8. The purpose of Provisional Permit 76H 62593-00 is listed in the Department's database as irrigation. This appears to be a coding error by the Department, as the original application specifies "lawn and landscaping shrubbery" as the purpose, and the notice of completion confirms lawn & garden, not irrigation, as the purpose. Historical aerial imagery confirms this classification. Therefore, to ensure a fair and accurate analysis, the Department has determined to evaluate the historical consumptive use of this Permit according to the guidelines set forth in the document *DNRC Consumptive Use Methodology – Turf Grass (New Projects)*, dated March 23, 2010, which describes Department standard practice for analyzing lawn and garden irrigation.

9. The Department calculated the historical consumptive use for Provisional Permit 76H 62593-00 following the directives of ARM 36.12.1902(16) and the aforementioned guidance document for turf grass. Using the Missoula WSO AP weather station for climate data and the USDA's Irrigation Water Requirements (IWR) program calculating water consumption for pasture grass, a net irrigation requirement of 20.38 inches (1.7 ft) per acre was found. The total consumptive use for lawn and garden irrigation on 3 acres was calculated to be 5.1 AF ($1.7 \times 3.0 = 5.1$).

10. Diverted volume for irrigation is calculated by dividing consumptive volume by an irrigation efficiency value which estimates what percentage of water applied as irrigation is actually consumed by plants. The efficiency value for sprinkler irrigation is 70%. Thus, the diverted volume required to sprinkle irrigate 1 acre of lawn and garden is 2.43 AF ($1.7 \div 70\% = 2.43$) and the total diverted volume necessary to supply the full 3 acres of lawn and garden is 7.29 AF ($2.43 \times 3 = 7.29$).

11. Provisional Permit 76H 62593-00 allows for 3.5 AF of water to be appropriated for irrigation, less than the 7.29 AF necessary to irrigate 3 acres of lawn and garden. However, of these three acres, only one is fully serviced by the subject water right; the remaining two are supplemented with water from Ground Water Certificate 76H 65902-00, a junior right. Accordingly, the Department calculated the distribution of the permit's 3.5 AF by first allocating 2.43 AF to the one acre serviced solely by the permit and then assigning the remaining 1.07 AF to the two acres supplementally serviced by 76H 65902-00, relying on water from that right to meet the full irrigation requirements. A breakdown of water on the 3 irrigated acres is shown in Table 3.

Table 3: Apportionment of Historical Consumed and Diverted Volume by Water Right

Location	Water Right No.	Apportioned Historic Consumed Volume	Apportioned Historic Diverted Volume	Percent of Volume Provided
1-acre plot	76H 62593-00	1.7 AF	2.43 AF	100%
2-acre plot	76H 62593-00	0.75 AF	1.07 AF	22%
2-acre plot	76H 65902-00	2.65 AF	3.79 AF	78%
Total		5.1 AF	7.29 AF	

12. The historical points of diversion for Provisional Permit 76H 62593-00 are two wells in the SW and NW of the NWSE Section 2, T12N, R20W, Missoula County (GWICs 67088 and 67089, respectively). The historical period of diversion for these wells is year-round. The period of use for the irrigation purpose is April 15 through October 15, which is in accordance with Department standards, while the period of use for the commercial purpose is year-round. These elements of the water right were verified when the project completion notice was filed.

13. The Department finds the following historical use, as shown in Table 4.

Table 4. Summary of Historical Use Findings for Provisional Permit No. 76H 62593-00

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose	Consumptive Use	Place of Use	Point of Diversion
76H 62593-00	May 5, 1986	3.5 AF	120 GPM	Irrigation (3 acres)	2.43 AF	SENE SW Sec. 2, T12N, R20W	SWNWSE & NWNWSE Sec. 2, T12N, R20W
				Commercial	N/A (Flow Rate Only)		

ADVERSE EFFECT

FINDINGS OF FACT

14. The Applicant proposes to reduce the irrigation place of use by 0.46 acres in the area serviced solely by Provisional Permit 76H 62593-00. The water historically consumed in this area will remain undiverted in the aquifer, resulting in the elimination of 0.78 AF and 0.5 GPM of historical depletions to the Bitterroot River. The Applicant will use this reduction in historical depletions for a new mitigation purpose to offset projected depletions from Permit Application No. 76H 30150412.

15. The historically consumed volume associated with 1 acre of lawn and garden irrigation is 1.7 AF, as calculated above. The historically consumed volume on 0.46 acres can therefore be found to be 0.78 AF ($1.7 * 0.46 = 0.78$).

16. A monthly breakdown of historical depletions associated with the 0.46 acres being retired under this change can be seen in Table 5. Historical consumption was calculated using the USDA Irrigation Water Requirements program, and depletions to the Bitterroot River were calculated by hydrologic modelling. A more complete description of the parameters used in the hydrologic model and the exact methodology used to arrive at these values can be found in the Department's Depletion and Mitigation Report, dated November 16, 2021.

Table 5: Monthly Depletions from Irrigation of 0.46 Acres by Permit No. 76H 62593-00

Month	Historical Consumption (AF)	Historical Depletion (AF)	Historical Depletion (GPM)
January	0.00	0.07	0.5
February	0.00	0.06	0.5
March	0.00	0.07	0.5
April	0.02	0.06	0.5
May	0.10	0.07	0.5
June	0.15	0.06	0.5
July	0.22	0.07	0.5
August	0.19	0.07	0.5
September	0.10	0.06	0.5
October	0.02	0.07	0.5
November	0.00	0.06	0.5
December	0.00	0.07	0.5
TOTAL	0.78	0.78	--

Note: Totals may not reflect an exact sum of displayed monthly values due to rounding.

17. The historical consumptive use for Provisional Permit No. 76H 62593-00 is 2.45 AF. The proposed change will result in 0.78 AF of historically consumed volume being left in the groundwater aquifer for the purpose of mitigation, reducing the irrigation purpose consumptive use to 1.67 AF.

18. There is no change in the historical timing or pattern of diversion, as 2.54 acres of authorized irrigation will persist. A return flow analysis was not conducted, in keeping with Department standard practice for lawn and garden irrigation.

19. The area proposed for retirement was historically irrigated only by the subject water right; no change has been proposed to the area jointly irrigated by the subject water right and Ground Water Certificate 76H 65902-00. As a result, this change is not expected to result in water consumption by the supplemental water right exceeding what was historically used.

20. The Department finds that no water rights will be adversely affected as a result of this change. There will be no change in the location or timing of depletions to the Bitterroot river, and the rate of depletions will decrease. The total consumed volume of water associated with the irrigation purpose under the subject water right will be reduced from 2.45 AF to 1.67 AF.

BENEFICIAL USE

FINDINGS OF FACT

21. 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 its depletions. The mitigation water provided by this application, when combined with the mitigation and aquifer recharge water provided by Change Application 76H 30150414, 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 6 and 7, below.

Table 6: 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 7: 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

22. The Department’s technical analysis found that the location where depletions historically 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 reduced water usage will begin to be available at this same point, which is also the location where depletions from Permit Application No. 76H 30150412 will begin to accrue. No part of the reach

depleted by the proposed Permit Application will lie outside of the reach mitigated by the proposed change.

23. The Department finds that the proposed water use is beneficial, and that the requested volume of 0.78 AF for mitigation is reasonably justified per ARM 36.12.1801(3).

24. The Applicant will be held to the following condition:

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 30150414. 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 30150414.

ADEQUATE DIVERSION

FINDINGS OF FACT

25. The proposed change of Provisional Permit No. 76H 62593-00 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.

POSSESSORY INTEREST

FINDINGS OF FACT

26. 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 mitigation per § 85-2-420, MCA.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

27. 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

28. 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

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

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

29. 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 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

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

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

30. 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); *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

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.)

subsequent water users).⁵

31. 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.

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

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

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

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

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

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

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).

33. 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.

34. 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).

35. 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 Nos. 8-9).

36. 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").

37. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Provisional Permit No. 76H 62593-00 to be a diverted volume of 3.5 AF, a historically consumed volume of 2.43 AF, and flow rate of 120 GPM. (FOF Nos. 9-13)

38. 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. 14-20)

BENEFICIAL USE

39. 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).

40. Applicant proposes to use water for mitigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that the 0.78 acre-feet of diverted volume requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 21-23).

ADEQUATE MEANS OF DIVERSION

41. 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).

42. 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.

POSSESSORY INTEREST

43. 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.

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 30171414 should be GRANTED subject to the following.

The Applicant may retire 0.46 acres of irrigated lawn and garden in the SENESW Sec. 2, T12N, R20W, Missoula County. The reduced depletions to the Bitterroot River of 0.78 AF resulting from this retirement may be used for mitigating the depletions identified in Permit Application No. 76H 30150412. The place of use for mitigation 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.

Change Application No. 76H 30171414 will be subject to the following conditions, limitations, or restrictions to meet the beneficial use criterion:

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 30150414. 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 30150414.

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 16th day of January, 2026.

/ Original signed by Jim Nave/

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

PEAK HEALTH MANAGEMENT COMPANY LLC
3565 PATTEE CANYON RD
MISSOULA, MT 59803-1826

ATTN: JULIE MERRITT
WGM GROUP
1111 E BROADWAY
MISSOULA, MT 59802

MILLER LAW, PLLC
ATTN: ROSS D. MILLER
708 LOLO ST.
MISSOULA, MT 59802

Alex Dagleish
Water Conservation Specialist
Missoula Regional Office
(406) 542-5886