

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

APPLICATION TO CHANGE WATER RIGHT NO. 76M 30171923 BY LEE YELIN))	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On December 30, 2025, Lee Yelin (Applicant) submitted Application to Change a Water Right No. 76M 30171923 to change Statement of Claim 76M 30048497 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). A preapplication meeting was held between the Department and the Applicant on September 30, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. Jim Nave, Alex Dalgleish, Benjamin Thomas were all present on behalf of the Department. The Applicant returned the completed preapplication materials on October 15, 2025. The Department delivered the Department-completed technical analyses on December 5, 2025. The Department received the Application Form on December 30, 2025. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 5, 2026. The Applicant responded with information dated January 9, 2026. The Application was determined to be correct and complete as of January 12, 2026. The Department published receipt of the application on its website. An Environmental Assessment for this application was completed on January 12, 2026. The Department provided notice of opportunity to provide public comments to this application per § 85-2-307(4), MCA on April 14, 2026. The Department received three public comments. Of those three public comments received, the Department considered two comments. This Preliminary Determination to Grant incorporates the Department’s consideration and responses to, these public comments.

INFORMATION

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

Application as filed:

- Application for Change of Appropriation Water Right, Form 606
- Addenda:
 - Change to Instream Flow Addendum, Form 606-IFA
- Maps:

- Lee Yelin 606: Historic Use Map, undated
- Lee Yelin 606: Proposed Use Map, undated
- Lee Yelin 606: Project Overview Map, undated
- Department- completed technical analyses based on information provided in the Preapplication materials, dated December 5, 2025.

Information Received after Application Filed

- Deficiency response, dated January 9, 2026, received by the Department January 9, 2026

Information within the Department's Possession/Knowledge

- Prior Change Authorization 76M 30049150
- Statement of Claim File 76M 116758 00
- 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. The Department Technical Memorandum: Calculating Return Flow, can also be found in the Department's Change Manual.
 - Department Technical Memorandum: Calculating Return Flow, dated April 18, 2019

Public Comments Received

- The Department received three comments on the Preliminary Determination. One comment (Bruce and Barbara Sims) received was not considered because the submitted form did not specify which, if any, change application criteria were not adequately addressed in the draft preliminary determination, and the form was not signed by either commenter. The Department considered two comments (Siegler and Gran) on the adverse effect analysis, one comment on beneficial use (Siegler), and one comment on possessory interest (Gran). The Department determined that the public comments did not demonstrate the criteria for a change in appropriation right were not adequately addressed and did not change its determination on the criteria. The public comments received can be found in the administrative file.
 - Two public comments were received regarding adverse effect. These comments suggested that the Applicant is trying to attach their 1921 priority water right to an unadjudicated claim with an earlier priority date (1880) which would adversely affect many water rights in the Sixmile drainage, generally calling into question the historic use of water right proposed for change, that the Sixmile Creek drainage is closed to new water rights, and that approval of the change would jeopardize the

valid water use of other water right holders. The Department has considered these comments and has not modified the adverse effect criteria analyses or preliminary determination decision.

- Two public comments were received regarding beneficial use. The comments generally call into question the Applicant's beneficial use of water since they do not own land in the Sixmile Creek drainage and argues that the proposed use of water for instream flow is unsupported by existing usage, proprietary rights to support future usage, or the existence of the historic Lebert-Bisonette ditch, and that the Applicant has not demonstrated why they request to make the change. The comments further question the Applicants intent to make the proposed change to instream flow for fisheries. The Department has considered these comments and has not modified the beneficial use criteria analyses or preliminary determination decision.
- One public comment was received regarding possessory interest. This issue generally calls into question the Department's finding of possessory interest, stating that the Applicant does not own any property at the place of use. The Department has considered this comment and has not modified the possessory interest criteria analyses or preliminary determination decision.

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, POU means place of use, and POD means point of diversion.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes to temporarily change Statement of Claim 76M 30048497. In 2010, the owner of parent right 76M 116758-00 sold the Applicant 32 Miners Inches (359.04 GPM). A succeeding water right split (Form 641) was submitted to the Department in 2011 on behalf of parent right 76M 116758-00, creating the Applicant's water right 76M 30048497 (and child rights 76M 30048498 and 76M 30048499). The Water Court issued a Master's Report

detailing the ownership split of parent right 76M 116758-00. The Court assigned the Applicant's child water right 76M 30048497 with a flow rate of 359.04 GPM and a place of use (POU) consisting of 21.10 acres in the S2NE Section 23, Township 15 North, Range 22 West. Statement of Claim 76M 30048497 was included in the Preliminary Decree for Basin 76M issued October 9, 2024. The elements proposed for change are shown below:

Table 1: Water Right 76M 30048497 Proposed for Change

Water Right Number	Flow Rate	Diverted Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
76M 30048497	359.04 GPM	208.15 AF	Irrigation	April 1 – October 31	S2NE Section 23, Township 15 North, Range 22 West, Missoula County	SWSENW Section 7, Township 15 North, Range 21 West, Missoula County	April 28, 1921

2. On October 25, 2011, the Department issued Change Authorization 76M 30049150 on behalf of right 76M 30048497. This prior authorization allowed the Applicant to temporarily change the purpose, POU and point of diversion (POD) from irrigation to instream flow for fisheries in Sixmile Creek for a period of 10 years. The Department determined that the historic irrigation flow rate of 359.04 GPM and the diverted volume of 208.15 AF were authorized for instream fishery purpose in a reach of Sixmile Creek from April 1 to October 31 annually. The protected reach extended from the historic POD to a location downstream 1.2 miles in the NWSESW, Section 12, Township 15 North, Range 22 West. The Department previously authorized the Applicant to use the historically consumed volume of 19.5 AF downstream of the historic POD.

3. The Applicant failed to file a notice of renewal with the Department for prior Change 76M 30049150, and the authorization expired December 31, 2021. As a result, right 76M 300498497 reverted to the originally claimed irrigation use. The Applicant has filed this change proposal to reinstate the prior temporary instream flow purpose.

4. The right proposed for change in this application is in the Sixmile Creek drainage, which is subject to an administrative water right basin closure. The basin closure rules described in ARM 36.12.1020 do not detail restrictions to water right change applications.

CHANGE PROPOSAL

FINDINGS OF FACT

5. The Applicant proposes to temporarily change the purpose of use, POU and POD for Statement of Claim 76M 30048497 from irrigation to instream flow for the benefit of the fishery

resource in Sixmile Creek. The proposed change is temporary for a period of 10 years as described in § 85-2-408, MCA. The proposed POU is a protected reach of Sixmile Creek from this historical POD at the Lebert-Bissonette ditch headgate in the SWSENW Section 7, Township 15 North, Range 21 West, Missoula County, approximately 1.12 miles downstream to the next diversion on the creek. This protected reach would encompass the proposed PODs and POUs, more specifically being the S2NE, SESENW, E2NESW, SWNESW, and NWSESW Section 12, Township 15 North, Range 22 West.

6. The historical POU of parent right 76M 116758-00 is no longer irrigated and the once irrigated field has been subdivided with several domestic residences having been constructed. In the documents submitted by the Applicant in the prior change authorization, the Applicant stated that the historic conveyance ditch blew out in 2000 and that the ditch was also cut by road construction around the same time. The Applicant also previously stated that an earthen dam was constructed immediately behind the historic POD and the historic conveyance ditch had been decommissioned.

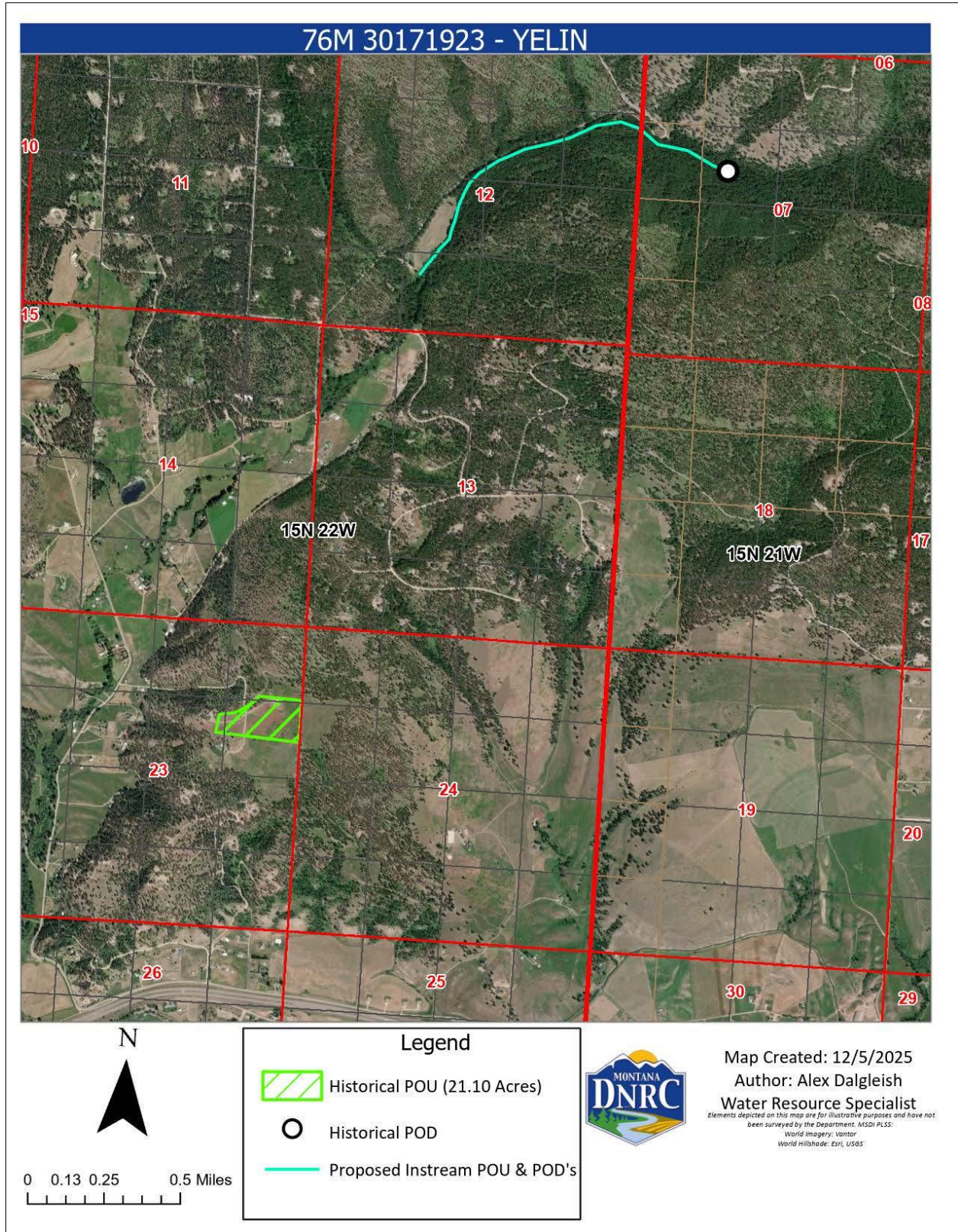


Figure 1. Historic and proposed use map

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).

9. In addition to the § 85-2-402(2), MCA,¹ an Applicant for a temporary change authorization for instream flow must comply with the requirements and conditions set forth in §§ 85-2-407 and -408, MCA. Section 85-2-408, MCA provides in part:

(1) The department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under the provisions of **85-2-402**, **85-2-407**, and this section. The application must:

(a) include specific information on the length and location of the stream reach in which the streamflow is to be maintained or enhanced; and

(b) provide a detailed streamflow measuring plan that describes the point where and the manner in which the streamflow must be measured.

(2) (a) A temporary change authorization under the provisions of this section is allowable only if the owner of the water right voluntarily agrees to:

(i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or

(ii) lease a consumptive use water right to another person for instream flow to benefit the fishery resource.

(3) In addition to the requirements of **85-2-402** and **85-2-407**, an Applicant for a change authorization under this section shall prove by a preponderance of evidence that:

(a) the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and

(b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource.

(5) The department shall approve the method of measurement of the water to maintain and enhance instream flow to benefit the fishery resource through a temporary change authorization as provided in this section.

....

(8) The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion.

10. Pursuant to §§ 85-2-407, and -408, MCA, a temporary change for authorization for instream flow is subject to special conditions which are identified above and addressed in the sections below. 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

¹ Pursuant to §§ 85-2-402 (2)(b) and -402(2)(d), MCA, the Applicant is not required to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate and is not required to prove possessory interest in the place of use because this application involves a temporary change in appropriation right for instream flow pursuant to § 85-2-408, MCA.

ability to make a different use of that existing right. *E.g., Hohenlohe*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8.

HISTORICAL USE

FINDINGS OF FACT

11. Statement of Claim 76M 30048497 was split from parent right 76M 116758-00 in 2011. Under parent right 76M 116758-00, water was historically diverted from Sixmile Creek with a headgate in the SWSEW Section 7, Township 15 North, Range 21 West, Missoula County for flood irrigation. Parent right 76M 116758-00 was decreed with a priority of 10/9/1880 and a flow rate of 2.8 CFS for flood irrigation of a maximum of 74 acres by the Water Court in the Temporary Preliminary Decree issued for Basin 76M on November 29, 1984. Water was historically diverted from Sixmile Creek using a 36-inch culvert and headgate. In the prior change application, the Applicant demonstrated that the 36-inch culvert could convey up to 5.44 CFS of water at full capacity and between 2.92 to 3.18 CFS when the water depth in the culvert was 2 feet. Water was conveyed approximately 3 miles in the Lebert-Bissonette ditch to the POU for flood irrigation.

12. Child right 76M 30048497 is a filed right and was part of the 2024 Preliminary Decree for Basin 76M. The priority date was modified from October 9, 1880 to April 28, 4/28/1921 through Water Court Case WC 2012-01. Claim 76M 30048497 was decreed without a POU pursuant to the 2011 Master's Report from the Water Court because the claimant of parent right 76M 116758-00 (and subsequently the owner of child right 76M 30048497) did not own the historic POU. However, in their Report, the Water Court ascertained the POU legal land description of child right 76M 30048497 as 21.10 acres in the S2NE Section 23, Township 15 North, Range 22 West, Missoula County.

13. Prior change authorization 76M 30049150 was granted for claim 76M 30048497, temporarily changing the POU, POD and purpose to instream flow for a period of 10 years. In this previous authorization, the Department confirmed 62 irrigated acres through the examination of the 1960 Missoula County Water Resources Survey. The Department also reviewed a 1979 aerial photo and found a maximum of 52 irrigated acres under parent right 76M 116758 00. The Applicant previously conducted a field examination and found 58 historically irrigated acres and the Department recognized these 58 acres as the maximum use under parent right 76M 116758-00.

14. For this proposal, the Applicant agreed to use the Department's prior findings of historic use determined in change authorization 76M 30049150. The Department previously calculated

the historical consumed volume for parent right 76M 116758-00 following the methods described in ARM 36.12.1902 (16). Based on 58 acres of flood irrigation, an IWR for flood irrigation at the Missoula International Airport weather station in Missoula County of 19.45 inches, and a county management factor of 69.5%, the historical consumptive volume for the irrigated acres under parent right 76M 116758-00 was 65.54 AF (58 AC x 19.45 in/12in/ft x 0.695 = 65.54 AF). The Department also previously calculated evaporative losses from the conveyance ditch and found 2.73 AF of losses. The total consumptive use for parent right 76M 116758-00 was previously calculated to be 68.27 AF (65.54 AF + 2.73 AF). In the prior change authorization, the Department did not calculate the field applied volume or irrecoverable losses for parent right 76M 116758-00. In this proposal, the Department calculated the field applied volume to be 119.16 AF using 55% field efficiency of flood irrigation with contour ditch (65.54 AF/0.55=119.16 AF). The Department also determined the applied but non-consumed volume to be 50.89 AF for this change proposal (119.16 AF – 68.27 AF = 50.89 AF). Since the Applicant is using the prior historic use analyses, the Department maintains the historic consumptive volume of 68.27 AF calculated for parent right 76M 116758-00.

15. As part of prior Change Authorization 76M 30014950, the Applicant provided a deed as evidence that he was entitled to 32 miners Inches (359.04 GPM or 0.8 CFS) and up to 39.04 AF of the parent right 76M 116758-00. The Applicant’s share of the 2.8 CFS (1,256.64 GPM) from parent right 76M 116758-00 was determined to be 28.57% (359.04 GPM /1256.64 GPM). Based on this percentage of the flow rate, the Applicant’s share of the historical consumed volume was determined to be 19.5 AF (68.27 AF * .2857). Table 1 below summarizes the historical use for right 76M 116758-00. Table 2 summarizes the historical use under child right 76M 30048497 based on the Applicants proportion of 28.57% under right 76M 30048497.

Table 1: Historical use of Parent Right 76M 116758 00

Irrigation Method	Acres	IWR (in) ¹	Mgmt. Factor ²	Field Efficiency	Crop Cons. (AF)	Applied Volume (AF)	Ditch Evap. (AF)	Total Consumed Volume (AF)	Applied but Non-Consumed Volume (AF)
Flood	58	19.45	69.5	55%	65.54	119.16	2.73	68.27	50.89

¹Missoula WSO AP IWR Weather Station

²Missoula County Historical Use Management Factor (pre-July 1, 1973)

Table 2: Historical volumes attributed to child right 76M 30048497

Crop Consumption (AF)	Applied Volume (AF)	Ditch Evap. (AF)	Total Consumed Volume (AF)	Non-Consumed Volume (AF)
18.72	34.04	0.80	19.5	14.53

16. The period of diversion for parent right 76M 116758-00 (and child right 76M 30048497) is April 1 through October 31, or 214 days. Per the previous change authorization, *“Water was only diverted into the ditch for 144 to 164 days on average due to haying and drying, a common irrigation practice in this area. The Applicant provided flow data taken during various months in 2010 and 2011 to demonstrate flows in Sixmile Creek that would typically be available at the historic point of diversion. Since no measurements were recorded regarding stream flow and diverted flow prior to 1973, it is reasonable to assume that flow measurements taken during 2010 and 2011 are representative of pre-1973 stream flows. The Applicant’s measurements show flows in Sixmile Creek ranging from 5.23 CFS in May to a low of 2.2 CFS in late August. Based on available flows and past irrigation practices, the Applicant estimates that 2.8 CFS was diverted over a period of 84 days during April, May, and June, prior to first cutting of hay, and that 2.2 CFS was diverted over a period of 60 days during July, August, and September, for a total diverted volume of 728.3 AF”*. The volume of water diverted with a flow rate of 2.8 CFS over 84 days equates to a volume of 466.5 AF ($2.8 \text{ CFS} \times 60 \text{ seconds} / 1 \text{ minute} \times 24 \text{ hours} / 1 \text{ day} \times 84 \text{ days} / 1 \text{ year} \times 1 \text{ acre} / 43,560 \text{ ft}^2 = 466.5 \text{ AF}$). During lower flow months when 2.2 CFS was diverted, this is equal to a volume of 261.8 AF ($2.2 \text{ CFS} \times 60 \text{ seconds} / 1 \text{ minute} \times 24 \text{ hours} / 1 \text{ day} \times 60 \text{ days} / 1 \text{ year} \times 1 \text{ acre} / 43,560 \text{ ft}^2 = 261.8 \text{ AF}$). The total diverted volume under parent right 76M 116758-00 was 728.3 AF (466.5 + 261.8).

17. Historical diverted volume is equal to the sum of the field application volume and the volume of conveyance losses per ARM 36.12.1902(10). The Department’s prior historical analyses did not include a calculation of conveyance losses (evaporative, seepage, vegetative) attributed to the diverted volume. Nonetheless, the Applicant requested to use the historical diverted volume figure previously determined for their right. From the diverted volume of 728.3 AF under 76M 116758-00, the portion attributed to the Applicants right was determined to be 208.15 AF ($728.3 \text{ AF} \times 0.2858 = 208.15$).

Table 3. Summary of historical use findings for 76M 30048497

Water Right	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
76M 30048497	4/28/1921	208.15 AF	359.04 GPM	21.10	19.5 AF	S2NE Sec. 23, T15N, R22W, Missoula County	SWSEnw Sec. 7, T15N, R21W, Missoula County

ADVERSE EFFECT

FINDINGS OF FACT

18. The Applicant proposes to temporarily change Statement of Claim 76M 30048497 to instream flow to benefit fishery resources for water from Sixmile Creek. The protected reach proposed for this purpose is from the historical headgate in the SWSEnw Section 7, Township 15 North, Range 21 West, to a point downstream at the next diversion on the creek in the NWSEw Section 12, Township 15 North, Range 21 West. The full diverted volume of 208.15 AF and the flow rate of 359.04 GPM will be left in stream. The historically irrigated acres will no longer be irrigated as the historic conveyance ditch has been decommissioned through the construction of an earthen dam just down-gradient from the headgate. This dam blocks water from flowing in the ditch. The requested change will not adversely affect downstream users because water is now being left in the creek, resulting in higher flows that will be available for appropriation below the protected reach. During the time the prior change was authorized (2011-2021), the Department did not receive any documented calls for water on behalf of right 76M 30048497.

19. In the Technical Analyses Report – Part B, the Department calculated the historical return flows of Statement of Claim 76M 30048497 to be 14.53 AF. Of this volume, 11.62 AF returned to Sixmile Creek, and 2.91 AF accrued to the Clark Fork River. The Department determined that the point where return flows entered Sixmile Creek is the SWNEw of Section 23, Township 15 North, Range 22 West. This location is downstream from the lower end of the protected reach. Since water is left instream, the historically diverted flows are available below the point of diversion during the historic period of diversion. The Department did not find that junior users on Sixmile Creek were historically depending on return flows from irrigation under 76M 30048497.

20. Those return flows entering the Clark Fork River began in the NWSwNE Section 26, Township 15 North, Range 22 West. The Applicant is leaving the entire historically diverted volume in Sixmile Creek, which is tributary to the Clark Fork River. There are no diversion on the

local reach of the Clark Fork River that have benefited or relied on the Applicant's return flows that could be adversely affected.

21. Return flows are evaluated by determining the volume of water that infiltrates past the root zone and identifying the likely receiving stream(s). The assumption is made that water applied for irrigation that is not consumed by a crop infiltrates to groundwater becoming return flow and does not runoff. The amount of water consumed is the difference between the amount of water consumed and the amount of water applied to the field. The receiving waterways for return flows are determined by their proximity to and evidence of hydraulic connection to groundwater and generally does not depend on groundwater flow direction or land slope.

22. For the purposes of this Application, a limited return flow analysis was performed to determine whether water left instream so that historically diverted flows are available during the historic period of diversion either below the point of diversion or where return flows historically returned to the source. The Department determined that the Applicant will protect the entire historically diverted volume of 208.15 AF for their water right, as it will be left instream below the historical POD and that there are no existing rights on the affected reach of the Clark Fork River.

23. Per the Department's Policy Memorandum on Return Flows, dated April 18, 2019, no further return flow analyses will be undertaken by the Department unless a valid objection is received, provided there will be no enlargement of the amounts of water historically diverted or consumed.

24. The Department considered an area of potential adverse effect on the source of supply. This reach was determined by accounting for the location of the historical point and proposed points of diversion. The area of potential adverse effect is the proposed protected reach. This reach extends from the historical POD on Sixmile Creek in the SWSEW of Section 7, Township 15 North, Range 21 West, downstream approximately 1.12 miles to the next diversion on the creek (located in the NWSEW of Section 12, Township 15 North, Range 21 West. There are no rights diverting water from Sixmile Creek within the proposed protected reach.

25. During the term of this proposed temporary change, the 21.10-acre historical POU will be retired from irrigation and the total flow rate and historical diverted volume of up to 359.04 GPM and 208.15 AF will be left instream at the historical POD at the Lebert-Bissonnette ditch headgate in Sixmile Creek. The proposed instream fishery period of use is April 15 to October 31 annually. The Applicant proposes to continue measuring water at the historical POD headgate in the SWSEW Section 7, Township 15 North, Range 21 West, as required by § 85-2-408 (1)(b), MCA.

The Applicant also states that they will continue measuring water in the E2SW Section 12, Township 15 North, Range 22 West, where Sixmile Creek crosses the State land property boundary. Staff gages are present at the historic POD and State land boundary location, and the Applicant proposes to measure water using a Marsh McBirney flow meter. Once the meter is used and a stage rating curve is developed, the Applicant can visually read the staff gages to obtain measurements. If the flow rate is unknown, the Applicant states they will provide rating charts to the Department. Finally, the Applicant states that staff gage readings will occur quarterly to verify compliance and more often during extreme low flow periods if a call for water is implemented.

26. Under the prior change authorization, the Applicant was required to measure the flow rate of Sixmile Creek at the historic POD. Continued flow rate monitoring and measurements at the historic POD will ensure that water rights within the protected reach are not adversely affected. This application will be subject to the following measurement condition:

THE APPLICANT OR IT'S DESIGNEE SHALL MEASURE THE PROTECTED REACH OF SIXMILE CREEK BY TAKING FLOW MEASUREMENTS AT THE LEBERT – BISSONETTE DITCH HEADGATE WHICH IS LOCATED IN THE SWSNW, SEC 7, TWP 15N, RGE 21W, MISSOULA COUNTY. MEASUREMENTS WILL BE TAKEN MONTHLY FROM JUNE THROUGH SEPTEMBER. THIS CHANGE AUTHORIZATION, ALLOWS FOR A CALL FOR WATER FROM UPSTREAM JUNIOR SIXMILE CREEK WATER USERS WHEN THE STREAM FLOW MEASURED ON SIXMILE CREEK BY THE APPLICANT OR IT'S DESIGNEE FALLS BELOW 2.05 CFS WITHIN THE AFOREMENTIONED TIMEFRAME. THE RECORDED FLOW RATE MEASUREMENTS MUST BE SENT TO THE DNRC MISSOULA REGIONAL OFFICE BY NOVEMBER 30 EACH YEAR DURING THE TEMPORARY CHANGE AUTHORIZATION.

27. The Department may approve a change in appropriation right if the Applicant proves by a preponderance of evidence that the proposed change will not adversely affect the use of existing water rights pursuant to 85-2-4023(2)(a). The Applicant must also demonstrate that “the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons.” § 85-2-408(3)(a), MCA. If any water right holder believes they will be adversely affected by a change in timing and the amount of return flows resulting from this proposal, they may file an objection to the proposed project pursuant to 85-2-307(3), and § 85-2-308, MCA.

28. The Department finds that the Applicant’s proposal will not result in adverse effects to other water rights.

ISSUES RAISED BY PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSE

29. The Department considered two public comments regarding the adverse effect criterion (Siegler and Gran). These comments raised three issues.

30. Issue 1: The commenter (Siegler) finds issue with the Applicant's priority date, stating that *"the Applicant is trying to attach his water right standing to 76M 116758-00, an unadjudicated claim with an 1880 priority date"*.

31. Response 1: Applicant's right, 76M 30048497, and its parent Claim 76M 116758-00, were both included in the most recent adjudication of Basin 76M Preliminary Decree. These rights have a priority date of April 28, 1921. Previously in 2013, through Water Court case WC-2012-01, the Water Court determined the validity and priority date of parent Claim 76M 116758-00 and associated child rights, which includes the Applicant's right 76M 30048497 proposed for change. The parties in case WC-2012-01 filed an executed settlement agreement with the Court which modified the priority date for parent Claim 76M 116758-00 and its three child rights (76M 30048497, 76M 30048498 and 76M 30048499) from October 9, 1880, to April 28, 1921. The Applicant is not, and cannot, proposing to change the decreed priority date of 76M 30048497.

32. Issue 2: Commenters (Siegler and Gran) find issue with the Department findings of historic use of the Applicant's water right and the overall use of the Lebert-Bisonette ditch. They (Siegler) questions the historic use of the Applicant's right 76M 30048497 and assert it has not been put to beneficial use in 49 years. Further Siegler states that the Applicant does not have a right to the flow from the Levert-Bisonette ditch. Commenter Gran questions the validity of the right since they contend that water has never been successfully transported from Sixmile Creek to the historically listed place of use.

33. Response 2: The Department's historical use analysis was based on findings of fact in prior Change Authorization 76M 30049150, issued on October 25, 2011, which provided evidence of historical use. Regarding past periods of non-use, Section 85-2-309(2), MCA, provides that the Department may certify all factual and legal issues involving abandonment to the proper court for adjudication. Under the statute, certification occurs after the Department determines that there is a valid objection to an application, not at the public comment stage.

34. Issue 3: The Commenter (Siegler) states that approval of the change application would jeopardize the valid water use of other water right holders.

35. Response 3: The commenter did not elaborate how the proposed change for instream flow would jeopardize other water users. The Department found that the Applicant's proposal would not result in adverse effects to other water rights.

36. Considering the public comments and the original analysis conducted, the Department finds that the Applicant's proposal to leave the diverted volume of 208.15 AF and the flow rate of 359.04 GPM instream will not have a known adverse effect because water will remain in Sixmile Creek, resulting in higher flows that will be available for appropriation below the protected reach. The proposed change in water use has been occurring since at least 2011, when the previous change in purpose to instream flow was authorized under Change No. 76M 30049150, and there have been no known calls for water in the last 15 years.

37. The public comments received regarding the Departments analysis of the adverse effect criterion has been addressed in FOF 29-36. The information supplied by the commenters does not demonstrate that the adverse effect criterion was inadequately addressed and the Department will not reevaluate this criterion.

38. Considering the public comment and the original analysis conducted, the Department finds that the proposed use of 359.04 GPM and 208.15 AF will not cause adverse effect and the Applicant's plan to prevent adverse effects to existing water rights is considered adequate.

BENEFICIAL USE

FINDINGS OF FACT

39. The Applicant proposes to temporarily change water right 76M 30048497 to instream flow purpose to protect, maintain or enhance stream flows to benefit the fishery resource of Sixmile Creek. Instream flow to benefit fishery resource is a recognized beneficial use of water in the State of Montana under § 85-2-102, MCA. The Applicant proposes to protect 359.04 GPM up to 208.15 AF at the historic POD and 359.04 GPM and 19.5 AF below the POD for a length of 1.12 miles down to the next downstream junior user.

40. In prior change authorization 76M 30049150, the Applicant provided a letter from Montana Fish, Wildlife and Parks (FWP) biologist Ladd Knotek in support of the proposed change to instream flow. According to Mr. Knotek, the reach of stream proposed for instream use supports a viable aquatic community, including Westslope Cutthroat Trout with high genetic purity, and that the proposed change to instream flow would assist in maintaining flows in this critically dewatered reach. While this letter was not resubmitted as part of the materials for this application, it is reasonable that FWP will continue supporting the proposal to maintain additional instream flows in Sixmile Creek. Re-establishing the temporary instream flow will continue to support the aquatic community in the creek.

41. The Sixmile Creek basin is closed to new appropriations of surface water for consumptive use from June 1- September 15 each year. The Applicant's proposal to leave 359.04 GPM and up to 208.15 AF diverted volume in the proposed protected reach would benefit Sixmile Creek. The Department finds the Applicant's proposal is reasonable to accomplish fisheries, habitat, and streamflow improvements through the irrigation season in Sixmile Creek

42. The Department finds the proposed temporary appropriation of 359.04 GPM up to a volume of 208.15 AF for the purposes of enhancing and augmenting streamflows for the benefit of the fishery resource in the instream place of use in Sixmile Creek to be a beneficial use of water.

ISSUES RAISED BY PUBLIC COMMENTS AND THE DEPARTMENTS RESPONSE

43. The Department considered two public comments (Siegler and Gran) regarding beneficial use. These comments raised three issues.

44. Issue 1: Commenter Siegler assert that the Applicant does not own land in the Sixmile drainage and therefore, should have no claim to beneficial use of water other than the generic instream flow for fisheries in Sixmile Creek.

45. Response 1: The proposal to change the purpose to instream flow for fisheries is recognized as a beneficial use pursuant to § 85-2-102, MCA. Additionally, possessory interest of the place of use in an instream flow change is not a statutory requirement per 85-2-402(2)(d)(ii), MCA.

46. Issue 2: The commenter (Siegler) stated that the *"historic flow rate and diverted volume of 359.04 GPM and 208.15 AF will be protected in a reach of Six Mile Creek from the original headgate to a location downstream 1.2 miles in the NWSESW Sec. 12, T15N, R22W. The Township map clearly shows the Lebert-Bisonette ditch terminating in Section 23, not Section 12. Again, the purported "beneficial use" of fisheries is unsupported by either existing usage, proprietary rights to support future usage, or the existence of the Lebert-Bisonette ditch..."*.

47. Response 2: The Applicant's proposed instream flow reach extends from the historic point of diversion to a point on Sixmile Creek in Section 12. The Applicant is not proposing to continue use of the historic ditch. Rather, they are requesting to leave their historic diverted flow rate and diverted volume instream in Sixmile Creek. Pursuant to § 85-2-102, MCA, the proposed use of water for instream flow to benefit fishery resource is a recognized beneficial use of water in the State of Montana.

48. Issue 3: Commenter (Gran) states that the Applicant "has not demonstrated why he wishes to make this change, other than to state that the change is for fisheries in Sixmile Creek.

On these grounds, he has not demonstrated that a flow measurement of below 2.05 CFS would be detrimental to Sixmile Creek fisheries, that Sixmile Creek flows fall to a level which threatens fisheries, or... that the measurements utilized in the application are reflective of the current flows of Sixmile Creek. The most recent measurements submitted in his application are from 2010-2011. This is a full fifteen years ago. Creek flows can change markedly within a period of sixteen years”.

49. Response 3: The Department finds instream flow for fisheries to be a beneficial use per 85-2-102(5)(d), MCA. As part of the previous instream flow authorization, the Applicant submitted flow measurements in 2014 and 2015, and has collected measurements as recently as 2017.

50. The public comment received regarding the Department’s analysis of the beneficial use criterion have been addressed in FOF 43-49. The information supplied by the commenters does not demonstrate that the beneficial use criterion was inadequately addressed and the Department will not reevaluate this criterion.

51. Considering the public comments received and the original analyses conducted, the Department finds that the proposed use of 359.04 GPM and 208.15 AF for the purpose of instream flow for fisheries to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

52. The proposed change of 76M 30048497 does not require a means of diversion or conveyance. Per § 85-2-402(2)(b), MCA, a change in appropriation right for instream flow pursuant to § 85-2-408, MCA, is exempt from the adequacy of diversion criterion.

POSSESSORY INTEREST

FINDINGS OF FACT

53. Pursuant to § 85-2-402(2)(d), MCA, the Applicant is not required to prove that they have 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 for instream flow per § 85-2-408, MCA.

ISSUES RAISED BY PUBLIC COMMENTS AND THE DEPARTMENTS RESPONSE

54. The Department considered one comment regarding possessory interest (Gran). This comment raised one issue.

55. Issue 1: The commenter states that “the PD does not adequately address how the applicant has possessory interest in the place of use. His possessory interest is not addressed at

all. He does not own any of the property at the place of use. He has not demonstrated why he wishes to make this change, other than to state that the change is for fisheries in Six Mile Creek”.

56. Response 1: The Applicant is the listed owner of 76M 30048497 proposed for change in the Department’s water right database. Per MCA 85-2-402(2)(d)(ii), the Applicant is not required to prove that they have possessory interest since the application proposes to temporarily change the right to instream flow purposes. The other items discussed by the commenter are not relevant to the possessory interest criteria. The Department did not update the criteria analysis in response to comments about possessory interest.

57. The public comment received regarding the Department’s analysis of the possessory interest criterion have been addressed in FOF 54-56. The information supplied by the commenter does not demonstrate that the possessory interest criterion was inadequately addressed and the Department will not reevaluate this criterion.

TEMPORARY PROTECTED REACH/ MEASUREMENT PLAN

FINDINGS OF FACT

58. The Applicant is proposing to temporarily change the purpose and place of use of 76M 30048497 to instream flow for the benefit of the fishery resource in Sixmile Creek for a period of 10 years with the option to renew. During the term of this temporary change, the Applicant proposes to cease diversion at the historical POD. A flow rate of 359.04 GPM and up to 208.15 AF of diverted volume will be available in the protected reach. After this change, the Applicant will appropriate 359.04 GPM in the proposed 1.12-mile instream place of use in Sixmile Creek, which will extend from the SWSEW of Section 7, Township 15N, Range 21 West, to the NWSEW of Section 12, Township 15 North, Range 21 West. The proposed period of use is April 1 through October 31. The volume available to be appropriated instream is 208.15 AF.

59. The Applicant will monitor flow rates and volumes appropriated for the instream flow purpose by measuring flow in Sixmile Creek at the historic headgate/POD with staff gages and if necessary, a Marsh McBirney flow meter. A staff gage is currently present at this location and streamflow measurements will continue to be taken by the Applicant (as required by prior change authorization 76M 30049150). A rating chart can be supplied to DNRC upon completion of several measurements.

60. The Applicant proposes to protect 359.04 GPM up to 208.15 AF at the historic POD and 359.04 GPM and 19.5 AF below the POD for a length of 1.12 miles down to the next downstream junior user.

61. If authorized, the following condition will be added to the water right to satisfy the additional measurement plan criterion described in § 85-2-408, MCA for temporary change to instream flow:

THE APPLICANT OR IT'S DESIGNEE SHALL MEASURE THE PROTECTED REACH OF SIXMILE CREEK BY TAKING FLOW MEASUREMENTS AT THE LEBERT – BISSONETTE DITCH HEADGATE WHICH IS LOCATED IN THE SWSNW, SEC 7, TWP 15N, RGE 21W, MISSOULA COUNTY. MEASUREMENTS WILL BE TAKEN MONTHLY FROM JUNE THROUGH SEPTEMBER. THIS CHANGE AUTHORIZATION, ALLOWS FOR A CALL FOR WATER FROM UPSTREAM JUNIOR SIXMILE CREEK WATER USERS WHEN THE STREAM FLOW MEASURED ON SIXMILE CREEK BY THE APPLICANT OR IT'S DESIGNEE FALLS BELOW 2.05 CFS WITHIN THE AFOREMENTIONED TIMEFRAME. THE RECORDED FLOW RATE MEASUREMENTS MUST BE SENT TO THE DNRC MISSOULA REGIONAL OFFICE BY NOVEMBER 30 EACH YEAR DURING THE TEMPORARY CHANGE AUTHORIZATION.

62. The Department finds the Applicant has met the additional criteria for a temporary change in appropriation right to maintain or enhance instream flow to benefit a fishery resource under the provisions of § 85-2-408, MCA.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

63. 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).²

64. 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*, ¶¶ 43-45.³

65. 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.⁴ 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

² DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

³ 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).

⁴A 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

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 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).⁵

66. 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

⁵ 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.)

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 subsequent water users).⁶

67. 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.

68. 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

⁶ 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).

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).

69. 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.

70. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In *McDonald v. State*, the Montana Supreme Court explained:

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

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

71. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in

water right disputes and have long been relied on by Montana courts. *In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties*, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999) (Water Resources Survey used as evidence in adjudicating of water rights); *Wareing v. Schreckendgust*, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996) (Water Resources Survey used as evidence in a prescriptive ditch easement case); *Olsen v. McQueary*, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

72. 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).

73. 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.14-15).

74. 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").

75. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 76M 30048497 to be a diverted volume of

208.15 AF, a historically consumed volume of 19.5 AF, and flow rate of 359.04 GPM. (FOF Nos. 14-17).

76. 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. 18-38).

BENEFICIAL USE

77. 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).

78. The Applicant proposes to use water for instream flow which is a recognized beneficial use. Section 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence instream flow is a beneficial use and that 208.15 AF of diverted volume and 359.04 GPM flow

rate of water requested is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 39-51).

ADEQUATE MEANS OF DIVERSION

79. 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 temporary change in appropriation right for instream flow pursuant to § 85-2-408 MCA.

POSSESSORY INTEREST

80. 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 temporary change in appropriation right for instream flow pursuant to § 85-2-408 MCA.

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. 76M 30171923 should be GRANTED subject to the following.

The Department determines the Applicant may temporarily change the POD, POU and purpose of use for Statement of Claim 76M 30048497. The Applicant proposes to retire the historical POD and POU. The proposed change is temporary for a period of ten years as described in § 85-2-408, MCA. The proposed purpose is instream flow to benefit fishery resources. The proposed POU is a protected reach of Sixmile Creek from this historical POD in the SWSNW Section 7, Township 15 North, Range 21 West, Missoula County, approximately 1.12 miles downstream to the next diversion on the creek. This reach would encompass the proposed POD's and POU's, more specifically being the S2NE, SESENW, E2NESW, SWNESW, and NWSESW Section 12, Township 15 North, Rane 22 West. The period of use will remain April 1 through October 31 annually.

If granted, the following conditions would be added to the water right to satisfy the additional criteria for a temporary change to instream flow:

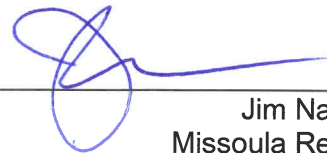
THE APPLICANT OR IT'S DESIGNEE SHALL MEASURE THE PROTECTED REACH OF SIXMILE CREEK BY TAKING FLOW MEASUREMENTS AT THE LEBERT – BISSONETTE DITCH HEADGATE WHICH IS LOCATED IN THE SWSNW, SEC 7, TWP 15N, RGE 21W,

MISSOULA COUNTY. MEASUREMENTS WILL BE TAKEN MONTHLY FROM JUNE THROUGH SEPTEMBER. THIS CHANGE AUTHORIZATION, ALLOWS FOR A CALL FOR WATER FROM UPSTREAM JUNIOR SIXMILE CREEK WATER USERS WHEN THE STREAM FLOW MEASURED ON SIXMILE CREEK BY THE APPLICANT OR IT'S DESIGNEE FALLS BELOW 2.05 CFS WITHIN THE AFOREMENTIONED TIMEFRAME. THE RECORDED FLOW RATE MEASUREMENTS MUST BE SENT TO THE DNRC MISSOULA REGIONAL OFFICE BY NOVEMBER 30 EACH YEAR DURING THE TEMPORARY CHANGE AUTHORIZATION.

NOTICE

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

DATED this 11th day of June, 2026.



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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 11th day of June, 2026, by first class United States mail.

LEE YELIN
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MISSOULA, MT 59803



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