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

* * * * * * *

APPLICATION TO CHANGE WATER RIGHT NO. 76H 30161876 BY MISSOULA COUNTY	)))	**PRELIMINARY DETERMINATION TO GRANT CHANGE**

* * * * * * *

On December 23, 2023, Missoula County (Applicant) submitted Application to Change Water Right No. 76H 30161876 to change Provisional Permit No. 76H 4927-00 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 the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated June 12, 2024. The Applicant filed Form 655 to amend their application, which the Department received on June 17, 2024. The application amendment was considered a major amendment, and the application timelines were reset. The Department sent the Applicant a deficiency letter per § 85-2-302, Montana Code Annotated (MCA), dated December 9, 2024. The Applicant responded with a deficiency response dated March 25, 2025. A preapplication meeting was held between the Department and the Applicant on September 28, 2023. The Application was determined to be correct and complete as of June 23, 2025. An Environmental Assessment for this application was completed on October 15, 2025.

INFORMATION

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

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606 IR
- Attachments:
    - Revised Depletion Report by Department Hydrologist Evan Norman (8/24/2021)
    - Verification Letter for Provisional Permit 76H 4927-00 (9/15/1994)
    - Verification Calculations for Provisional Permit 76H 4927-00 by Department Engineer Larry Shock (9/12/1994)
    - Variance Letter from Missoula Regional Manager Jim Nave (11/20/2019)
    - Well log for GWIC 69338 (12/11/1974)

- Maps:
    - Map IR.2.C – Historical Use Historical POD and POU (2003)
    - Map IR.2.D – Historical Use Measurement Location (2021)
    - Map IR.2.E – Proposed Use (2021)

Application Amendment:

- Application Amendment Form 655
- Addenda:
    - Change in Purpose Addendum Form 606-PA
- Attachments:
    - Missoula Fairgrounds Depletion Analysis and Fort Missoula Mitigation Change Request Pt. 2 by Department Hydrologist Evan Norman (3/6/2024)
- Maps:
    - Amended Map IR.2.E.1 – Proposed Use (2021)
    - Amended Map IR.2.E.2 – Proposed Use (2021)

Information Received after Application Filed:

- Deficiency Letter Response for Application to Change an Existing Irrigation Water Right No. 76H 30161876 by Julie Merritt (3/25/2025)
    - Revised Amended map IR.2.E.1 – Proposed Use (2021)
    - Revised Map IR.2.C – Historical use Historical POD and POU (1979)
    - Revised Map IR.2.D – Historical Use Measurement Location

Information within the Department's Possession/Knowledge

- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application, but is available upon request. Please contact the Missoula Regional Office at (406) 721-4284 to request copies of the following documents.
    - DNRC Consumptive Use Methodology – Turf Grass (New Projects) 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; FMRP means Fort Missoula Regional Park; 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 a portion of the volume under Provisional Permit No. 76H 4927-00 in this Application. This Permit is authorized for a flow rate of 705 GPM and a diverted volume of 135 AF from groundwater via means of a well for the purpose of sprinkler irrigation on 52 acres in the NW of Section 31, T13N, R19W, Missoula County. The period of use is April 15 through September 15. The point of diversion is located in the SENENW Section 31, T13N, R19W, Missoula County, and water is conveyed to the place of use by means of pipelines.

Table 1. Water Right proposed for Change

Water Right Number	Flow Rate (GPM)	Volume (AF)	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
76H 4927-00	705	135	Irrigation (Sprinkler)	4/15 – 9/15	NW Sec. 31, T13N, R19W	SENENW Sec. 31, T13N, R19W	2/25/1975

2. No water rights were historically used to supplement the water provided by Provisional Permit No. 76H 4927-00 for irrigation in the place of use.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicant proposes to change the purpose, place of use, and point of diversion of Provisional Permit 76H 4927-00. A new purpose of mitigation would be added to this permit to offset the depletions identified in pending Permit Application 76M 30151075. Although 76M 30151075 is located in basin 76M (Clark Fork River), a portion of the depletions to surface water from the proposed groundwater use occur in the Bitterroot River, which is a legislatively closed basin. To meet legal availability and adverse effect criteria, mitigation in the closed basin is required.

4. The place of use associated with the current purpose of irrigation will be reduced from 52 acres to 45 acres in the NW Section 31 T13N R19W under this proposal. The retirement of 7 irrigated acres will reduce the volume of water consumed by the irrigation purpose, making it available for the proposed mitigation purpose. The place of use for the new mitigation purpose

would be the Bitterroot River from the southern boundary of Section 31, T13N, R19W to the confluence of the Bitterroot River and the Clark Fork River in the NWNW Section 27, T13N, R20W. New points of diversion for the mitigation purpose would be added along this same reach. Figure 1 shows the elements of the proposed change.

5. The Applicant will be held to the following conditions to meet the adverse effect and beneficial use criteria:

> WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
>
> THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30151075. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30151075.

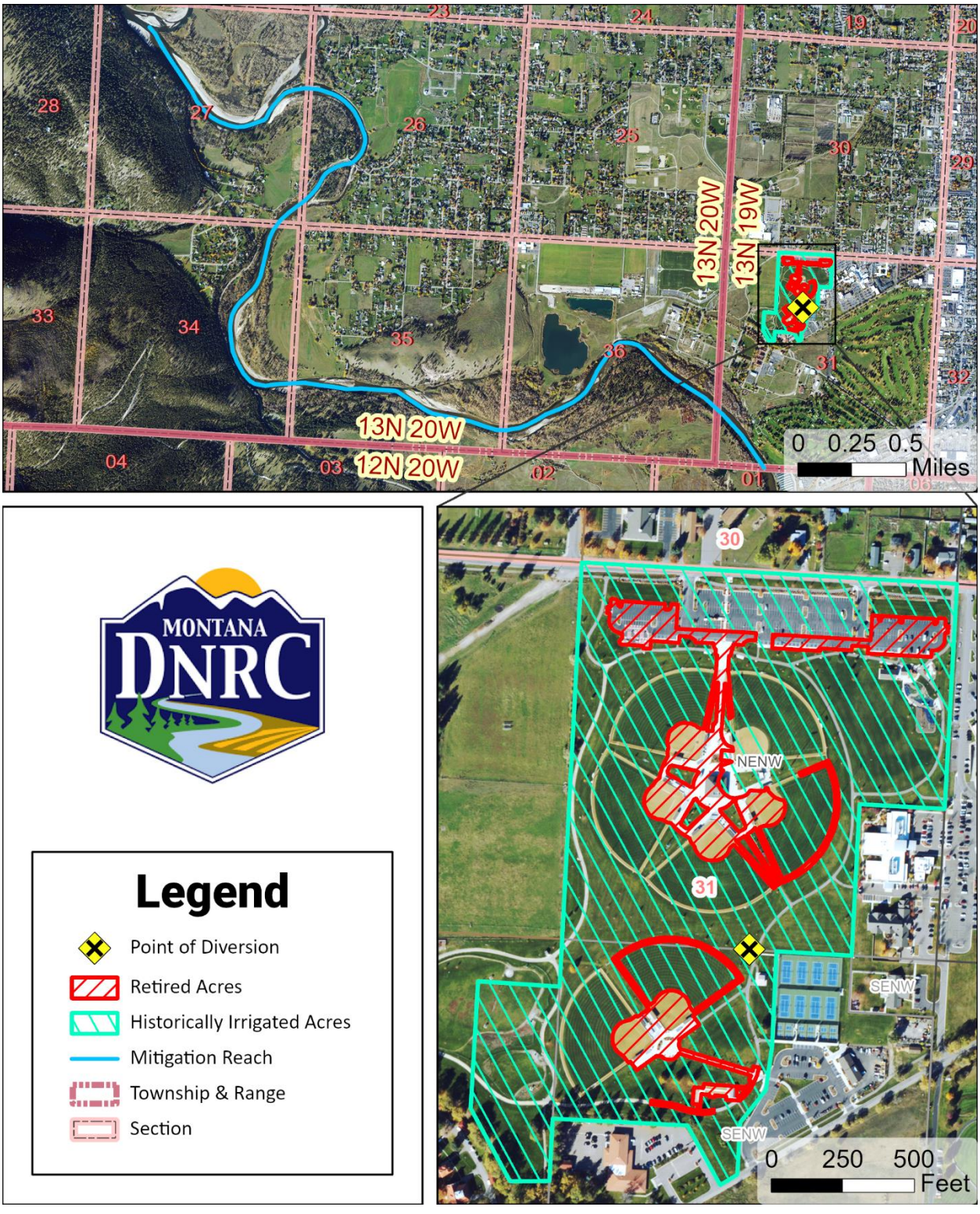


Figure 1. Map of proposed change.

CHANGE CRITERIA

6. 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.

7. 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

8. Provisional Permit 76H 4927-00 has a priority date of February 25, 1975, based on the Department's record of when the permit application form was received.

9. The historical place of use was verified by the Department on February 27, 1995 as being 52 acres located in the NW Section 31, T13N, R19W. Verification work was completed in the fall of 1994 by the Missoula Regional Office Engineer, Larry Schock. Verified water right elements were based on meetings with, and information obtained from, the Missoula Parks and Recreation Department. The place of use may be more precisely described as 36.85 acres in the NENW, 4.17 acres in the SWNW, and 10.98 acres in the NENW, all in Section 31, T13N, R19W.

10. Since the water right to be changed is a perfected Permit, the Department relied on its 1994 verification documents to determine a historical diverted volume of 135 AF. The diverted volume was calculated based on system operation including pump capacity, zones irrigated, sprinkler heads sizes and output, and a pumping schedule of eight hours per evening, five days per week from April 1 through September 15. As water for this permit is sourced from a groundwater well and applied via sprinkler, the Department found no conveyance losses. The historical consumptive volume was calculated by applying the 70% field application efficiency of sprinkler irrigation to the diverted volume, yielding a historical consumptive use of 94.5 AF. Per Department standard practice when calculating consumptive use for lawn and garden irrigation, irrecoverable losses were not considered.

11. To confirm the reasonability of the verified diverted volume and the historical consumed volume calculated from that value, the Department calculated historical consumptive use of the historically irrigated acres according to the DNRC Consumptive Use Methodology - Turf Grass Memo, dated March 23, 2010. Using the USDA's Irrigation Water Requirements (IWR) program with the parameters specified in the aforementioned memo and weather data from the Missoula WSO AP weather station, a net irrigation requirement of 20.38 inches (1.70 ft) was found. Applying this value to 52 acres resulted in a historical consumptive use of 88.3 AF (1.70 × 52 = 88.3). Dividing this value by the 70% sprinkler efficiency value resulted in a calculated diverted volume of 126.2 AF.

12. The diverted volume calculated using the method specified in the Department's Turf Grass Memo differ from the verified diverted volume by 7%. The Department considers this a reasonable variation and elected to use the ground-verified volumes over the those modeled from the IWR program.

13. No water rights were historically used to supplement Provisional Permit 76H 4927-00. Two reserved claims, 76H 111265-00 and 76H 111266-00 which are owned by the City of Missoula and the Northern Rockies Heritage Center share a general legal land description with the subject right. The place of use for these reserved claims is described as Section 31 T13N, R19W, and Section 36, T13N, R20W, Missoula County. However, these rights may be more precisely described as irrigating approximately 13 acres around the Northern Rockies Heritage Center in the SWNW and the NWSW Section 31, T13N, R19W, and the City of Missoula soccer fields lying in Section 36, T13N, R20W. These rights were not used to irrigate the FMRP softball fields that are the place of use for Provisional Permit 76H 4927-00.

14. The historical point of diversion is a 117 ft. deep groundwater well located in the SENENW Section 31, T13N, R19W. Calculations for the verification of this right by Department engineer Larry Shock describe a 60 HP pump with a flow rate capacity of 705 GPM. The verification report describes irrigation zones, each with 7 sprinkler heads sized 7/32" x 3/16" utilizing approximately 20 GPM. The report states that 5 zones are operated at once, each requiring approximately 140 GPM, which would result in a total required flow rate of approximately 700 GPM.

15. The historical period of use is April 1 through September 15. The irrigation schedule as described in the Department's verification is 8 hours per day, 5 days per week, for 26 weeks. As the diversion is a well and no storage is involved, the historical period of diversion is identical to the historical period of use.

16. The Department finds the following historical use, as shown in Table 2.

Table 2. Summary of historical use findings for Provisional Permit 76H 4927-00.

WR #	Priority Date	Diverted Volume	Flow Rate	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
76H 4927-00	2/25/1975	135 AF	705 GPM	Irrigation (52 acres)	94.5 AF	NW Sec. 31, T13N, R19W	SENENW Sec. 31, T13N, R19W

ADVERSE EFFECT

FINDINGS OF FACT

17. The proposed use of water is for mitigation to offset the depletions identified in Permit Application No. 76M 30151075. A report by DNRC hydrologist Evan Norman titled Missoula Fairgrounds Depletion Analysis and Fort Missoula Mitigation Change Request Pt. 2 identified the depletions resulting from Permit Application No. 76M 30151075 for the Missoula Fairgrounds and the number of acres it would be necessary to retire at FRMP under Provisional Permit 76H 4297-

00 to offset these depletions. Although the total volume of annual depletions under the proposed permit only amount to 4.0 AF in the Bitterroot basin, the report found that the timing of depletions to the Bitterroot River under the proposed permit and the historical depletions from the FMRP water right differed, such that it was necessary to retire 7.0 acres at FMRP (corresponding to a historical consumed volume of 12.7 AF) to offset monthly depletions from the proposed Fairgrounds permit. Mr. Norman's analysis comparing depletions from the fairgrounds permit to mitigation from the retirement of 7.0 acres at FMRP is reproduced below in Table 3.

Table 3. Net effect of mitigation from FMRP irrigation retirement on depletions from Permit Application 76M 30151075

Month	Depletions from Permit Application 76M 30151075 (AF)	Mitigation from Retirement of 7 acres under 76M 4927-00 (AF)	Net Effect (AF)
January	0.2	0.3	0.0
February	0.2	0.2	0.0
March	0.2	0.2	0.0
April	0.2	0.3	0.2
May	0.2	1.0	0.8
June	0.3	1.7	1.4
July	0.5	2.6	2.1
August	0.6	2.7	2.1
September	0.6	2.0	1.4
October	0.5	1.0	0.5
November	0.3	0.5	0.1
December	0.3	0.3	0.0
Annual	4.0	12.7	

18. The Applicant proposes to retire 7.0 acres from irrigation at FRMP to provide mitigation water to the Bitterroot River. The historically consumed volume associated with the irrigation of these acres is 12.7 AF, which depleted the Bitterroot River by pre-stream capture of tributary groundwater. By retiring 7.0 acres and reducing pre-stream capture of tributary groundwater, the mitigation plan makes this water available in the Bitterroot River in the amounts necessary to offset depletions arising from Permit Application 76H 30151075 during months in which water is not legally available.

19. The Applicant will continue to irrigate 45 acres, 86.53% of the original area. The diverted volume for the irrigation purpose under the proposed change will correspondingly be reduced to 116.8 AF (135 AF × 0.8653 = 116.8 AF).

20. As identified in FOF 16, the historical consumptive use was 94.5 AF. The consumptive volume of the irrigation purpose under the proposed change will be 81.8 AF, 86.53% of the HCU (94.5 AF × 0.8653 = 81.8 AF). The difference in historical and proposed consumptive use is 12.7 AF, as required under the mitigation plan.

21. The Bitterroot River was identified as a hydraulically connected surface water for the purpose of evaluating return flows. The historically diverted but nonconsumed volume for Provisional Permit 76H 4927-00 was 40.5 AF (135 AF diverted volume – 94.5 AF consumed volume = 40.5 AF). Under the proposed change, 35 AF of diverted but nonconsumed water will return to the Bitterroot River (116.8 AF diverted – 81.8 AF consumed = 35 AF) through the continued irrigation of 45 acres. The historical diverted volume associated with the 7 acres being retired from irrigation is 18.2 AF. With the retirement of 7 acres of irrigation, 5.5 AF of historically diverted but nonconsumed water will be left instream, for a total volume of 40.5 AF of nonconsumed water left in or returning to the Bitterroot River (35 AF return flows + 5.5 AF left instream = 40.5 AF).

22. Because the proposed change in water use results in historically diverted but not consumed water being left in the Bitterroot River, which is the source where they have historically returned, an analysis of the monthly rate and timing of return flows is not required.

23. No change in the historical timing or pattern of diversion will occur, only a reduction in the place of use and associated volume used for irrigation.

24. This change application is for the retirement of irrigated acres and does not result in an increase in consumptive use or a decrease in return flows. Thus, the Department finds that no water rights will be adversely affected as a result of this change. A summary of the proposed change and comparison to historical use is found in Table 4.

Table 4. Comparison of historical and proposed diverted and consumed volumes.

Use	Purpose	Diverted Volume (AF)	Consumed Volume (AF)
Proposed	Irrigation	116.9	81.8
	Mitigation	12.7	12.7

	Total	*129.6*	*94.5*
Historical	Irrigation	135	94.5

25. The Applicant is held to the following condition to meet the adverse effect criterion:

> WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. 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.

BENEFICIAL USE

FINDINGS OF FACT

26. This Change Application is intended to provide mitigation water for Application for Beneficial Water Use Permit No. 76M 30151075, which requires mitigation water for its depletions to the Bitterroot River. The monthly depletions from the proposed permit and the monthly mitigation water provided by this change proposal are shown in Table 3, above.

27. While the total annual volume of mitigation water exceeds that of the total annual volume of depletions associated with pending Permit Application No. 76M 30151075, 12.7 AF is the minimum necessary volume for the proposed beneficial use, as the monthly rate and timing of depletions from Proposed Permit 76M 30151075 and the rate and timing of depletions that were associated with the retired acreage of Provisional Permit 76H 4927-00 differ. While depletions associated with the pending permit are overcompensated by the proposed change in certain months, this is necessary to avoid depletions being undercompensated in other months when

mitigation is required. The proposed change in purpose and place of use for 7 acres (12.7 AF) of irrigation to mitigation is required in order to offset depletions of the pending permit in the months when depletions would otherwise result in adverse effect to existing water rights.

28. To meet the beneficial use criterion, this change authorization is subject to the following condition:

> THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30151075. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30151075.

29. The Department finds that the proposed water use is beneficial (contingent upon the issuance of Permit Application 76H 30151075), and that the requested volume of 12.7 AF is the amount required to offset depletions to surface water resulting in adverse effect from Permit Application 76H 30151075.

ADEQUATE DIVERSION

FINDINGS OF FACT

30. The proposed change of Provisional Permit 76H 4927-00 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

31. 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

32. 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]

33. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11,103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.[2]

34. 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

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

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

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 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]

[3]A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under § 85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. Section 85-2-234, MCA

[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

35. 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 subsequent water users).[5]

36. 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.

37. 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

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.)

[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).

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).

38. 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.

39. 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).

40. 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 not elected to proceed under ARM 36.12.1902. (FOF No. 10).

41. 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").

42. 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 76H 4927-00 to be a diverted volume of 135 AF, a historically consumed volume of 94.5 AF, and flow rate of 705 GPM. (FOF Nos. 8-16)

43. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(a), MCA. (FOF Nos. 17-25)

BENEFICIAL USE

44. 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).

45. 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 that mitigation is a beneficial use and that 12.7 acre-feet of diverted volume is the amount needed to sustain the beneficial use. Section 85-2-402(2)(c), MCA (FOF Nos. 26-29).

ADEQUATE MEANS OF DIVERSION

46. 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 for mitigation or marketing for mitigation. (FOF No. 30).

POSSESSORY INTEREST

47. Pursuant to § 85-2-402(2)(d), MCA, the Applicant is not required to prove that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use because this application involves a change in appropriation right pursuant to § 85-2-420 MCA for mitigation or marketing for mitigation. (FOF No. 31).

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 30161876 should be GRANTED subject to the following.

The Department determines that the Applicant may change Provisional Permit 76H 4927-00 by adding the purpose of mitigation to offset the depletions to the Bitterroot River created by Permit Application 76H 30151075. The retirement of 7.0 acres of irrigation in the E2NW Section 31, T13N, R19W, will result in 12.7 AF of historically consumed water being left in the groundwater aquifer to mitigate depletions to the Bitterroot River by reducing pre-stream capture. The Applicant may continue to irrigate 45 acres utilizing a volume of 116.8 AF diverted from a well located in the SENENW of Section 31, T13N, R19W, Missoula County.

Change Authorization 76H 30161876 will be subject to the following conditions, limitations, or restrictions to meet the adverse effect and beneficial use criteria:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE CHANGE AUTHORIZATION OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

THIS CHANGE AUTHORIZATION PROVIDES MITIGATION WATER FOR BENEFICIAL WATER USE PERMIT NO. 76H 30151075. THE BENEFICIAL USE CRITERION OF THIS CHANGE AUTHORIZATION IS CONDITIONED UPON THE AUTHORIZATION OF BENEFICIAL WATER USE PERMIT AUTHORIZATION NO. 76H 30151075.

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 21st day of October, 2025.

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 21 day of October, 2025, by first class United States mail.

MISSOULA COUNTY
200 W BROADWAY ST
MISSOULA, MT 59802-4216

ATTN: JULIE MERRITT
WGM GROUP
1111 E BROADWAY
MISSOULA, MT 59802-4909

Benjamin Thomas

Benjamin Thomas
Water Conservation Specialist
Missoula Regional Office
(406) 542-5883