

**DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION**

Water Resources Division – Kalispell Regional Office

STEVE BULLOCK, GOVERNOR



STATE OF MONTANA

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March 11, 2020

Wood Ridge Homeowners Association, Inc
857 Grand Dr
Bigfork, MT 59911

Subject: Water Right Change Application 76LJ 30125073

Dear Applicant:

The Water Resource Division has completed our preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit, found in §85-2-311, MCA. The Department preliminarily determines that the criteria are met and this Application should be granted. A copy of the Preliminary Determination to Grant your application is attached. The next step in the process is for the Water Resource Division to provide public notice of this application and an opportunity for objection. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Kathy Olsen".

Kathy Olsen
Regional Manager

Cc: Water and Environmental Technologies, PO Box 7667, Kalispell, MT 59904-7667

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Information Received after Application Filed:

- Submission from Applicant's consultant to DNRC dated February 3, 2020 received February 4, 2020 entitled "Correction for Application to Change Permit No. 76LJ 114098-00 for Wood Ridge Homeowners Association"

Information within the Department's Possession/Knowledge:

- Original file for Provisional Permit No. 76LJ 114098-00

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).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. The Applicant seeks authorization to change the place of use of unperfected Provisional Permit No. 76LJ 114098-00 to reflect the current public water supply service area which includes 51 lots and to clarify the purpose of the right to include multiple domestic, lawn and garden irrigation and irrigation uses. Table one provides a summary of the water right that is proposed to be changed.

Table 1: Water Right Proposed for Change

WR Number	Purpose	Flow Rate	Volume	Period of Diversion/Use	Point of Diversion	Place of Use	Priority Date
76LJ 114098-00	Multiple Domestic (46 households & lawn and garden) Irrigation (13.20 acres)	150 GPM	75 AF 33.0 AF	January 1 st - December 31 st May 15 th - September 15 th	N2NENE Sec 16 T29N R20W Flathead County (POD #1) N2NENE Sec 16 T29N R20W Flathead County (POD #2)	N2NENE Sec 16 T29N R20W Flathead County	January 26, 2001

2. The Applicant diverts water from the Deep Alluvial Aquifer of the Flathead Valley via two wells. The water system is a permitted public water supply (No. MT0004220) under regulation of the Montana Department of Environmental Quality (MDEQ).

CHANGE PROPOSAL

FINDINGS OF FACT

3. Application for water right No. 76LJ 114098-00 was filed in 2001 and at the time a total of 51 homes from two subdivisions (Wood Ridge and Mooring Ridge) were planned to be serviced by the public water supply system. However, only 46 lots associated with the Wood Ridge subdivision were permitted under 76LJ 114098-00; the remaining five lots associated with the Mooring Ridge subdivision were not included in the place of use legal land description. The Applicant seeks authorization to change/correct the place of use of unperfected Provisional Permit 76LJ 114098-00 located in the N2NENE, Section 16, Township 29N, Range 20W Flathead County, Montana to a place of use located in the NE, Section 16, Township 29N, Range 20W Flathead County; this new place of use encompasses all 51 lots. The Applicant seeks authorization to correct the number of lots associated with the multiple domestic purpose to 51 households up to 20.0 acre-feet (AF).

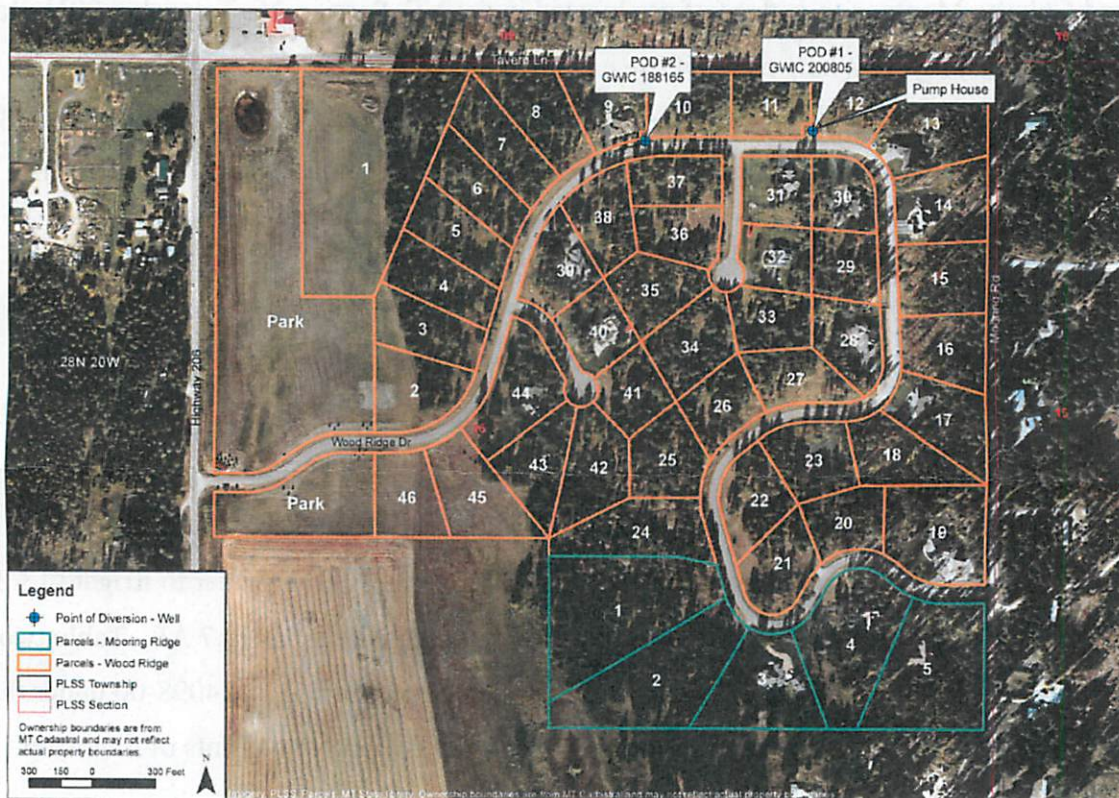
4. Lawn and garden irrigation use was originally encapsulated in the multiple domestic volume. The Applicant seeks authorization to separate out lawn and garden irrigation and divert up to 55.0 AF of water to irrigate up to 27.0 acres of lawn and garden. Proposed multiple domestic and lawn and garden volumes total 75.0 AF, which is equal to the 75.0 AF originally permitted for multiple domestic use. The Applicant proposes to revise the original volume associated with irrigation use to reflect more accurate application rates for alfalfa given local weather station data. The Applicant proposes to divert up to 24.7 AF of water to irrigate 13.2 acres of alfalfa. Total diverted volume between the three uses will equal 99.7 AF. Table two provides a summary of the proposed changes to unperfected permit 76LJ 114098-00 under this authorization. Figure one is a map of the proposed place of use and two points of diversion associated with the public water supply system.

Table 2: Summary of Proposed Changes

WR Number	Purpose	Flow Rate	Volume	Period of Diversion/Use	Point of Diversion	Place of Use	Priority Date
76LJ 114098-00	Multiple Domestic (51 households) <i>Lawn and Garden (27.0)</i> <i>Irrigation (13.2)</i>	150 GPM	20.0 AF 55.0 AF 24.7 AF	January 1 st - December 31 st <i>April 15th - October 15th</i> May 15 th - September 15 th	N2NENE Sec 16 T29N R20W Flathead County (POD #1) N2NENE Sec 16 T29N R20W Flathead County (POD #2)	<i>NE Sec 16 T29N R20W Flathead County</i>	January 26, 2001

**Italicized words identify changed water right properties*

Figure 1: Map of the two wells and proposed place of use



CHANGE CRITERIA

5. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

6. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In*

the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT:

FINDINGS OF FACT- *Historic Use*

7. Provisional Permit 76LJ 114098-00 is an unperfected permit with a project completion notice due date of December 31, 2022. Historic use was not quantified because it is an unperfected permit and per Department policy the Applicant may bring the full flow rate and volume forward under this change authorization. Groundwater will continue to be diverted from two wells and used for multiple domestic, lawn and garden and irrigation purposes.

8. There will not be an increase in the permitted amounts of 150 gallons per minute (GPM) up to 108 acre-feet (AF) under Permit 76LJ 114098-00.

FINDINGS OF FACT- *Adverse Effect*

9. Per Department policy the Applicant can bring the full flow rate and volume associated with unperfected permit 76LJ 114098-00 forward during the change process and cannot increase the total diverted volume associated with the unperfected permit. The original permit was for 108 AF; however the Applicant will only need 99.7 AF under this change authorization. Wastewater disposal practices will not change, and irrigation is expected to continue. The rate, timing and location of return flows and depletions to surface water will not change. A return flow analysis or depletion report is not warranted when a change is done on an unperfected permit.

10. The Applicant maintains two in-line flow meters with totalizers near each well head. The Applicant is required to follow the original condition place on the permit which states:

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 YEARLY 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. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

11. The Applicant has a plan that demonstrates that the Applicant's use of water can be controlled so the water rights of prior appropriators will be satisfied. If call should be made, the Applicant proposes to turn off the pump.

BENEFICIAL USE

FINDINGS OF FACT

12. Upon issuance of this change authorization the water system permitted under Provisional Permit 76LJ 114098-00 will service 51 households/lots and can irrigate up to 27.0 acres of lawn and garden and 13.2 acres of alfalfa. The well pumps are lead lag and each well pump is capable of up to 150 GPM, which is needed to meet the peak demand of the system.

13. The volume of water authorized under 76LJ 114098-00 totaled 108 AF. Lawn and garden irrigation was included in the multiple domestic volume. Per Flathead County standards, domestic water use is estimated to be 350 gallons per residence per day for single-family dwellings. This equates to 20.0 AF for 51 households. Per the USDA IWR program and assuming a 70% sprinkler efficiency rate 24.36 inches/acre is need for lawn and garden irrigation. This equates to 55.0 AF for 27 acres of lawn and garden irrigation. Per the USDA IWR program and assuming a 70% sprinkler efficiency rate for wheel lines/handlines 24.49 inches/acre is need for irrigation of alfalfa. This equates to 24.7 AF for 13.2 acres of irrigation. In combination, the three proposed uses total 99.7 AF, which is less than the originally authorized volume of 108 AF.

ADEQUATE DIVERSION

FINDINGS OF FACT

14. The public water supply system consists of Well #1 (GWIC No. 200805) and Well #2 (GWIC No. 188165), eight 119-gallon hydropneumatic pressure tanks and distribution piping. The well pumps operate lead-lag. Each well was drilled by a licensed well driller, license No. WWC-458. Well #1 is equipped with a Franklin Electric model 2822039330 15-hp motor control box. Well #2 has a Franklin Electric model 282203310 15-hp motor control box. Both wells are equipped with a 15-hp Grundfos submersible pump with a rated capacity of 150 GPM at 300 feet of total dynamic head. Each well and pump is capable of producing the permitted flow rate of 150 GPM.

15. The water system is a permitted public water supply (No. MT0004220) under regulation of the MDEQ. The system was designed by a licensed engineer and approved by the DEQ.

16. The Applicant maintains two in-line flow meters with totalizers near each well head. The Applicant is required to follow the original condition placed on the permit which states:

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 YEARLY 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. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY

POSSESSORY INTEREST

FINDINGS OF FACT

17. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. Admin. R. Mont. 36.12.1802. The applicant

has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

18. 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, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by

Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

19. 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, at ¶¶43-45.²

20. 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, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on

¹ DNRC decisions are available at:

http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

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

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

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, at ¶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

21. An applicant must also analyze the extent to which a proposed change may alter historic

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

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, at ¶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; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 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

22. 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 ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

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, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

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

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

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

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

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

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

24. 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. Admin.R.M. 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. Admin.R.M. 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. Admin.R.M. 36.12.1901 and 1903.

25. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of unperfected Provisional Permit No. 76LJ 114098-00. Per Department policy for unperfected permits the full diverted volume and flow rate of the permit can be brought forward via this change authorization. Total maximum flow rate (150 GPM) and diverted volume for unperfected perfected permit 76LJ 114098-00 is 108 AF. (FOF Nos. 7-8)

26. This water right is unperfected. The processing of waste water will not change, and irrigation will still occur under this change application. The proposed use of water will not alter return flows. A Return flow analysis was not warranted. 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. §85-2-402(2)(b), MCA. (FOF Nos. 9-11)

BENEFICIAL USE

27. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §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. Admin.R.M. 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, Montana First Judicial District Court (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, Montana Fifth Judicial District Court, Order Affirming DNRC Decision, Pg. 3 (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).

28. Applicant proposes to use water for multiple domestic, lawn and garden and irrigation purposes which are recognized beneficial uses. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence multiple domestic, lawn and garden and irrigation use is a beneficial use and that 99.7 acre-feet of diverted volume and 150 GPM flow rate of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 12-13)

ADEQUATE MEANS OF DIVERSION

58. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

65. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 14-16)

POSSESSORY INTEREST

66. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M.

36.12.1802

67. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF Nos. 17)

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. 76LJ 30125073 should be granted subject to the following.

The Applicant may change the place of use of Provisional Permit 76LJ 114098-00 to a place of use located in the NE, Section 16, Township 29N, Range 20W Flathead County, Montana. The Applicant may divert water from two wells at a rate not to exceed 150 GPM and use up to 55.0 AF of water to irrigate up to 27.0 acres of lawn and garden April 15th -October 15th, 24.7 AF of water to irrigate up to 13.2 acres of alfalfa May 15th – September 15th and 20.0 AF to service 51 households January 1st – December 31st.

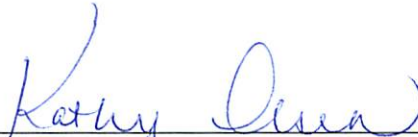
Applicant is required to follow the original condition place on the permit which states:

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 YEARLY 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. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

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

DATED this 11th day of March 2020.



Kathy Olsen, Manager
Kalispell Regional Office
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 March 2020 by first class United States mail.

WOOD RIDGE HOMEOWNERS ASSOCIATION, INC
857 GRAND DRIVE
BIGFORK, MT 59911

WATER AND ENVIRONMENT TECHNOLOGIES
PO BOX 7667
KALISPELL, MT 59904



NAME

3-11-2020

DATE