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

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APPLICATION TO CHANGE WATER RIGHT NO. 76H 30161311 BY TIN CUP WATER & SEWER DISTRICT	**PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE**

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On July 31, 2023, Tin Cup Water & Sewer District (Applicant or TCWSD) submitted Application to Change a Water Right No. 76H 30161311 to change Statement of Claim 76H 111251-00 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 26, 2024. The Applicant responded with information dated May 23, 2024. A preapplication meeting was held between the Department and the Applicant on February 22, 2023. The Application was determined to be correct and complete as of August 22, 2024. An Environmental Assessment for this application was completed on December 16, 2024.

INFORMATION

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

Application as filed:

- Irrigation Application for Change of Appropriation Water Right, Form 606-IR
- Addenda:
    - Historical Water Use Addendum, Form 606-HUA
    - Change to Instream Flow Addendum, Form 606-IFA
    - Change in Purpose Addendum, Form 606-PA
    - Temporary Change Addendum, Form 606-TCA
- Attachments:
    - Storage Water Right Lease Agreement between Tin Cup Water and Sewer District and the Montana Water Trust (December 2008)
    - Amendment to Storage Right Lease Agreement between Tin Cup Water and Sewer District and the Clark Fork Coalition (May 2010)
    - Flow Rate Measurements in Lower Tin Cup Creek (2007-2010)

- Montana Department of Fish, Wildlife and Parks Inflection Point Determination for Tin Cup Creek (March 2011)
- Photos of measurement devices and measurement report for 2007-2008 (undated)
- Montana Water Trust Monitoring Report for Tin Cup Creek (2009)
- Letter from Tex Marsolek describing dam operations (November 25, 2009)
- Affidavit from Tex Marsolek describing Tin Cup Water and Sewer District's use of its water rights
- Graph of elevation-volume relationship on restored Tin Cup Dam (undated)
- Affidavit from Dale Bullen, Tin Cup Water Commissioner describing operations
- Water Commissioner Records (1985-1991; 2003- 2006)

- Maps:
  - Map IR.2.C-1: Historical Point of Diversion, Place of Storage, Place of Use and Conveyance (undated topographic basemap)
  - Map IR.2.C-2: Historical Place of Use (1958 WRS basemap)
  - Map IR.2.C-3: Historical Place of Use (1955 WRS Aerial Photograph)
  - Map IR.2.C-4: Historical Place of Use (1979 USDA Aerial Photograph)
  - Map IR.2.D: Measurement Locations (2021 Aerial Photograph)
  - Map IR.2.E: Existing Point of Diversion, Existing Place of Storage, Existing Service Area, and Proposed Tin Cup Creek POU for Instream Fishery (2021 Aerial Photograph)

Information Received after Application Filed

- Email from Andrew Gorder to DNRC dated January 25, 2024, clarifying contact status
- Email from consultant to DNRC dated March 12, 2024, Re: DNRC Deficiency Letter
- Email from consultant to DNRC dated March 19, 2024 regarding Tin Cup board meeting notes
- Deficiency Response, Dated May 22, 2024, received by DNRC on May 22, 2024
  - Supplement to Affidavit of Tex Marsolek, dated May 20, 2024
  - TCWSD Meeting Minutes for January 4, 2024
- Email from consultant to DNRC dated November 7, 2024, regarding Exhibit C Period of Diversion petition
- Email from consultant to DNRC dated November 26, 2024, regarding Exhibit C Period of Diversion petition
- Signed Exhibit C Period of Diversion petition dated November 25, 2024

Information within the Department's Possession/Knowledge

- DNRC Ravalli County Water Resources Survey Book (Published 1958, republished 1965)
- July 2, 2008 Water Court Order on Period of Diversion – Statewide
- December 11, 2008 Water Court Amended Order on Period of Diversion – Statewide
- November 10, 2014 Water Court Second Amended Order on Period of Diversion – Statewide
- Montana Department of Fish, Wildlife and Parks Dewatering Concern Areas, Revised 2005

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; TCWSD and district means the Tin Cup Water & Sewer District; CFC means the Clark Fork Coalition; FWP means the Montana Department of Fish, Wildlife and Parks; MML Ditch means the McIntosh-Morello Lowline Ditch; WRS means Water Resource Survey; 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 purpose and place of use of Statement of Claim 76H 111251-00 in this Application. Statement of Claim 76H 111251-00 is filed for a volume of 1500 AF from Tin Cup Creek diverted and stored behind Tin Cup Dam for the purpose of sprinkler and flood irrigation for 2219 acres, of which a maximum of 1607 acres are irrigated annually. The period of use is July 1 through September 30. The Montana Water Court assigned this right a period of diversion of July 1 through September 30 pursuant to the Water Court's July 2, 2008 Order on Period of Diversion – Statewide. The Applicant has filed an Exhibit C form with the Water Court, petitioning the Court to change the period of diversion to year-round in accordance with historical use. The primary point of diversion is located in the NESESE Sec. 1 T2N R23W, Ravalli County. Water released from the dam flows down Tin Cup Creek until it reaches the secondary diversion of the McIntosh-Morello Lowline Ditch (MML Ditch) in the SWSWSW Sec. 16, T3N

R21W, and various tertiary diversions take water from the MML ditch to the final places of use. The Statement of Claim also includes Ditch Name Information remarks listing three other secondary diversions for delivery of stored water, including the Ford-Hollister Highline Ditch, Chaffin-Whinnery Ditch, and the Click-Matteson Ditch (see FOF No. 27).

Table 1. Water Right Proposed for Change

Water Right Number	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
76H 111251-00	1500 AF	Irrigation (Sprinkler and Flood)	7/1 – 9/30	Secs. 3, 4, 8, 9, 10, 15, 16, 21, 22 T3N R21W	NESESE Sec. 1 T2N R23W	8/20/1906

2. Tin Cup Water & Sewer District sells water to irrigators near Tin Cup Creek. The 2219-acre place of use on Statement of Claim 76H 111251-00 does not describe the location that water is applied for irrigation each year, but rather the service area within which water may be used by TCWSD members. The maximum acreage within the service area that is irrigated by this water right annually is 1607 acres. However, the location of these acres can vary from year to year within the 2219-acre place of use based on the amount of water that different customers of TCWSD pay for.

3. In addition to the stored water on Statement of Claim 76H 111251-00, TCWSD has four supplemental direct flow rights which divert water from Tin Cup Creek into the MML ditch and service the same area: Statements of Claim 76H 111254-00, 76H 111255-00, 76H 111256-00, and 76H 111258-00.

4. TCWSD has a second water right for water stored by Tin Cup Dam: Statement of Claim 76H 111252-00. This right is for 500 AF of irrigation water, however, according to the Applicant, the place of use for this right does not overlap that of Statement of Claim 76H 111251-00, which only is used for irrigation on the north side of Tin Cup Creek, while Statement of Claim 76H 111252-00 is used only to irrigate lands on the south side of Tin Cup Creek. Thus, these water rights are associated by a shared point of diversion and place of storage but are not supplemental to each other. TCWSD has four water rights which are supplemental to Statement of Claim 76H 111251-00; these are all direct flow water rights from Tin Cup Creek which are diverted into the MML ditch and have places of use which are identical to the stored right. While each of the water rights supplemental to the subject right have a period of use from April 1 to October 15, these water rights come out of priority over the course of the summer, and none are in use by late July. Within the 2219-acre place of use of TCWSD's rights, there are also 30 supplemental irrigation rights within the TCWSD's service area that are not owned by the district. Table 2 lists all the water rights that are supplemental to the service area of Statement of Claim 76H 111251-00.

Some of these water rights are partially or fully supplemental to each other as well as TCWSD's right. To avoid double-counting supplemental acres, rights with overlapping places of use are grouped together and the maximum irrigable acreage is listed.

Table 2. Water Rights Supplemental to Statement of Claim 76H 111251-00

WR Number	Priority Date	Flow Rate (CFS)	Supplemental Acres	Ditch	Overlap Group
76H 7311-00	5/1/1884	0.13	5.02	MML Ditch	
76H 5202-00	4/1/1889	0.06	2	MML Ditch	
76H 7761-00	4/1/1889	0.03	1	MML Ditch	
76H 20028-00	4/1/1889	0.31	10	Chaffin-Whinnery Ditch	
76H 23806-00	4/1/1888	0.08	4.12	Click-Matteson Ditch	A: 29.5 acres total
76H 23807-00	4/1/1888	0.64	25.77	Click-Matteson Ditch	A: 29.5 acres total
76H 107640-00	4/1/1889	0.38	12.12	Chaffin-Whinnery Ditch	
76H 107674-00	4/1/1889	0.07	2.15	Chaffin-Whinnery Ditch	
76H 108717-00	4/1/1889	0.63	20	MML & Chaffin Whinnery	
76H 108802-00	4/1/1889	0.2	6.3	MML & Chaffin Whinnery	
76H 133449-00	4/1/1889	0.39	12.39	MML Ditch	
76H 147553-00	4/1/1889	0.74	140.7	MML, Chaffin-Whinnery, Click-Matteson	B: 140.7 acres total
76H 147555-00	4/1/1889	3.66	140	MML, Chaffin-Whinnery, Click-Matteson	B: 140.7 acres total
76H 148102-00	4/1/1889	0.33	10.49	Chaffin-Whinnery Ditch	C: 15.5 acres total
76H 148103-00	4/1/1889	0.19	6.13	Chaffin-Whinnery Ditch	C: 15.5 acres total
76H 153848-00	4/1/1889	0.05	1.6	Chaffin-Whinnery Ditch	
76H 111254-00	10/20/1889	17.5	2219	Tin Cup Creek	TCWSD
76H 111255-00	10/20/1889	2.5	2219	Tin Cup Creek	TCWSD
76H 107885-00	1/2/1893	32	120.3	Rock Creek Water Company Ditch	
76H 29207-00	6/15/1913	1.5	20	MML Ditch	
76H 3889-00	6/1/1914	0.28	11	MML Ditch	
76H 4283-00	6/1/1914	0.04	2.5	MML Ditch	
76H 5307-00	6/1/1914	0.28	11	MML Ditch	
76H 15951-00	6/1/1914	0.46	33.24	MML Ditch	
76H 111256-00	6/1/1914	8.45	2219	Tin Cup Creek	TCWSD
76H 111258-00	6/1/1914	5	2219	Tin Cup Creek	TCWSD
76H 150239-00	6/1/1917	0.19	5	Neill Ditch	
76H 157897-00	4/16/1953	0.75	7.14	Smith Ditch	

76H 150533-00	5/21/1956	0.17	3.5	Melnarik Catch Ditch	D: 4.29 acres total
76H 151987-00	5/21/1956	N/A	4	Melnarik Catch Ditch	D: 4.29 acres total
76H 149944-00	4/30/1966	0.1	4	Chaffin-Whinnery Ditch	
76H 211296-00	6/30/1973	0.67	26.7	Click-Matteson Ditch	A: 29.5 acres total
76H 100878-00	5/15/1997	0.13	3	Uncertain	
76H 108982-00	12/31/1935	0.5	1.8	Overturf Gulch	

5. Statement of Claim 76H 111251-00 has been subject to two changes prior to this proposal. Change Authorization 76H 10884099 was issued on February 22, 1999, and moved 4 acres of the place of use from the intersection of Sections 9, 10, 15, and 16, T3N, R21W to the NWNE of Sec. 21, T3N, R21W. A similar change, Change Authorization 76H 30016855, was authorized on May 25, 2006, removing 2 acres in the N2SENW and 8 acres in the N2SWNE of Sec. 9, T3N, R21W and replacing them with 10 acres in the SENE Section 8, T3N, R21W.

CHANGE PROPOSAL

FINDINGS OF FACT

6. The Applicant proposes a 10-year temporary change to Statement of Claim 76H 111251-00 changing the purpose of 400 AF of stored water from irrigation to instream fishery, with a new place of use along Tin Cup Creek from the Tin Cup Dam in the NESESE Sec. 1 T2N, R23W to the confluence of Tin Cup Creek and the Bitterroot River in the SWSWNW Sec. 14 T3N, R21W; approximately 16.2 stream miles. The proposed protection would be for up to 400 AF of water and 3.3 CFS from the Tin Cup Dam to the MML Ditch Headgate in the SWSWSW of Section 16, T3N, R21W, and up to 372 AF and 3.07 CFS from the MML Ditch Headgate to the confluence of Tin Cup Creek and the Bitterroot River. The proposed period of use for the instream fishery purpose is from August 1 to September 30th. Figure 1 shows the elements of the proposed change.

7. On December 3, 2008, the Applicant signed a 99-year lease with the Montana Water Trust, Inc. (now the Clark Fork Coalition, or CFC) wherein the Applicant agreed to release 400 AF of water from Tin Cup Dam at a flow rate of 3.3 CFS from August 1st to September 30th to be left instream, unused and undiverted from Tin Cup Creek, to benefit the fisheries resource.

8. Flow rates can be monitored at Tin Cup Dam by a stage height recorder at the reservoir headgate, and on Tin Cup Creek by two staff gauges monitored by the Clark Fork Coalition (CFC), one above and one below all diversions on Tin Cup Creek.

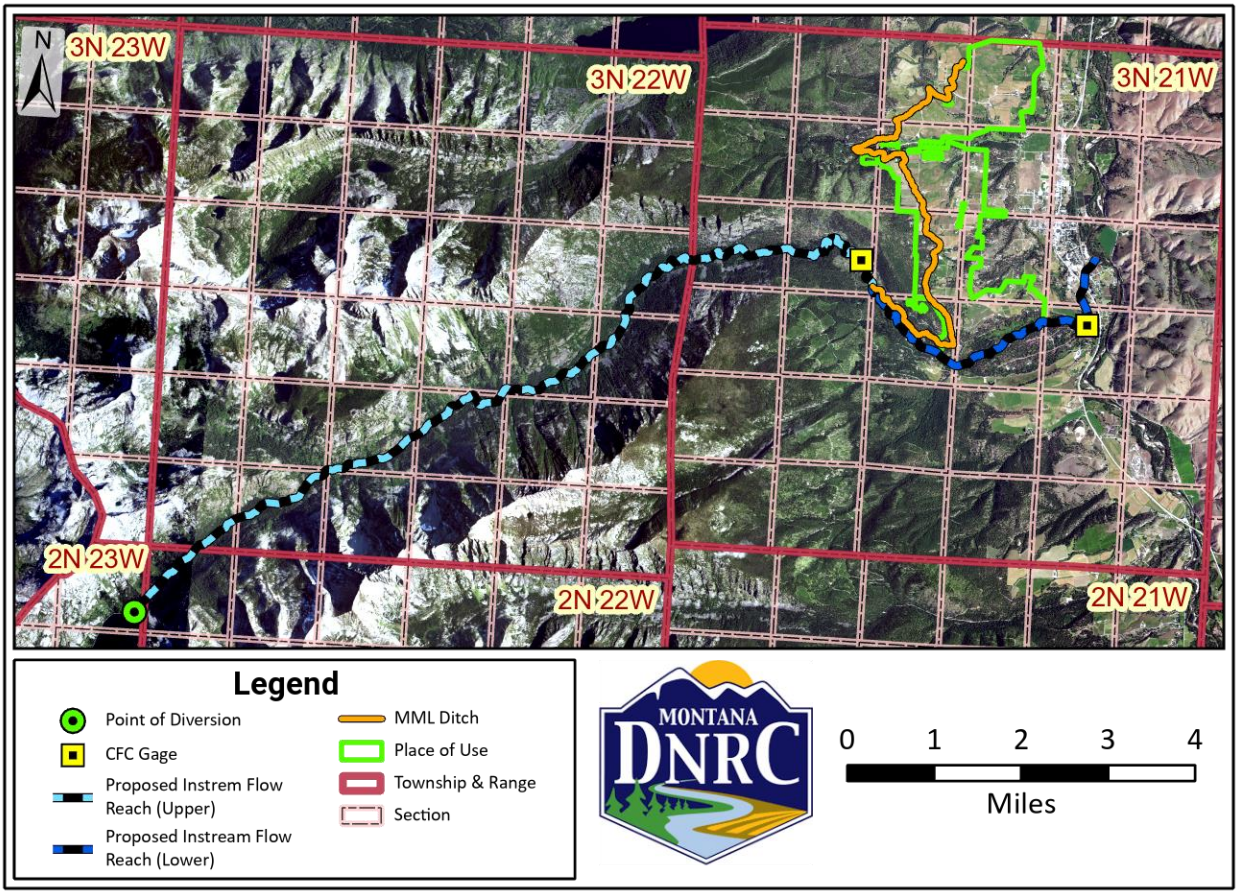

Figure 1. Map of Proposed Change

CHANGE CRITERIA

9. 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.

10. 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).

11. 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

[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.

(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.

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

HISTORICAL USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historical Use

13. Statement of Claim 76H 111251-00 lists a priority date of August 20, 1906. Tin Cup Creek was decreed in Ravalli County District Court case number 4964 on June 23, 1933. Multiple direct flow water rights were decreed to predecessors in interest to the Tin Cup Water Company, including priority dates of October 20, 1989, June 1, 1908, and June 1, 1914. These historical decreed rights were later transferred to the Tin Cup Water Company. The historical 1933 decree does not specifically decree a priority date of August 20, 1906; however, the decree does recognize the dam and storage on Tin Cup Creek. The claim file includes a USFS Special Use Permit that references that construction of the dam was initiated under a permit authorized by the USFS dated August 20, 1906, which appears to be the basis of the claimed priority date. Statement of Claim 76H 111251-00 is located in the Bitterroot River Subbasin 76HE, which is currently being re-examined by the Department. As of the date of this Preliminary Determination,

the Summary Report has not been delivered to the Montana Water Court and the priority issue remark is unresolved. For the purposes of the historical use analysis required for processing the requested change in water use, the Department finds that a priority date of August 20, 1906 is reasonable based on the evidence in the file.

14. According to the Applicant, the Tin Cup Dam was first constructed in 1906, and later enlarged in 1932 to a capacity of 2000 AF. The 1958 Ravalli County Water Resource Survey states that the maximum capacity of the Tin Cup Lake Reservoir is 2600 AF. The capacity identified in the Water Resource Survey is the amount of water that potentially could be stored if the water level in the reservoir was at the top of the dam, rather than the height of the spillway crest. In 1998, the dam was breached, reducing the capacity to 911 AF. In 2011, the dam was rehabilitated and its capacity restored to 2000 AF. Water stored at the dam is utilized by two water rights. Statement of Claim 76H 111252-00 serves water users on the south side of Tin Cup Creek with 500 AF of the stored water, while the right proposed for change, Statement of Claim 76H 111251-00, utilizes the remaining 1500 AF. The Department finds the Historical Diverted Volume for this water right to be 1500 AF.

15. Tin Cup Water and Sewer District claims a service area of 2219 acres in Sections 3, 4, 8, 9, 10, 15, 16, 21 and 22, T3N, R21W (Figure 1). The maximum area actually irrigated by TCWSD water each year is 1607 acres. The exact location of the 1607 irrigated acres may vary from year to year depending on the amount of water paid for by TCWSD's various customers. The Water Resource Survey maps for Ravalli County (1958) delineates areas irrigated by the Tin Cup Water Company, TCWSD's predecessor, in Sections 3, 4, 9, 10, 15 and 16. It also maps privately irrigated lands within the TCWSD's claimed service area, largely within Sections 16, 12, and 22. However, it is reasonable to assume that while irrigators in the southern portions of the service area might have utilized their own water rights, late-season irrigation would have had to rely on TCWSD's reserves of stored water.

16. Taken together, the irrigated areas marked out by the WRS maps amount to 1431.33 acres: 1082.75 marked as irrigated by TCWSD, and 348.58 by private irrigators. To corroborate these findings, the Department analyzed two WRS aerial photographs: CNR-1P-178 and CNR-1P-176, both dated July 21, 1955. An examination of these photos revealed actively cultivated areas that were not accounted for in the WRS maps in excess of 175.67 acres. The Department thus finds that 1607 acres can be confirmed to have been historically irrigated within the service area.

17. The Applicant provided a tabulation of flow rates and volumes diverted and/or released for their direct flow and stored irrigation rights in Revised Table IR.3.A-3 in their May 22, 2024 deficiency response. This table identified July 23 as the date when stored water is released from Tin Cup Dam. The Department analyzed water commissioner records provided by the Applicant to corroborate the data in Table IR.3.A-3 and found that the date of July 23 was neither representative of the typical date of release, nor indicative of the earliest recorded date of release, as records showed release dates ranging from July 24 (1986) at the earliest, and August 8 (1990) at the latest, with a median release date on August 1. Additionally, the Applicant's calculations in the table were based on a comparison of diverted and released flow rates of stored and direct flow rights, and the applicant did not account for the fact that the direct flow water is diverted at the MML ditch headgate, while stored water is diverted at Tin Cup Dam and suffers conveyance losses before it reaches the MML ditch headgate.

18. Due to the flaws in the Applicant's data, the Department estimated historical consumptive use with the IWR program. The application of the same volume of water for irrigation can result in different consumptive use depending on how early or late in the season the water is applied. The Department deemed that the median release date of water from Tin Cup Dam, August 1, would best represent the typical historical consumptive use.

19. According to a signed affidavit by Tex Marsolek, former general manager of TCWSD, in a typical year, TCWSD's direct flow rights are all out of priority by the end of July due to declining natural flows in Tin Cup Creek. Owing to Mr. Marsolek's 20 years of experience with TCWSD, the Department finds this statement to be accurate and reliable. Thus, the Department did not consider the District's direct flow and stored water rights to be used concurrently in its historical consumptive use estimations for a typical year.

20. There are 30 water rights not owned by TCWSD with places of use which partially or fully lie within the TCWSD service area (Table 2, above). The total number of supplemental acres is 481.55. Of this area, 258.28 acres are irrigated by water rights senior to TCWSD's rights. Even when the total supplemental acreage is used, however, it is possible for all water rights to be irrigating land that is within TCWSD's 2219-acre place of use but not within the 1607 acres irrigated in a particular year (2219 - 481.55 = 1737.45 acres not supplementally irrigated). Based on this fact, and the shortage of surface water by the month of August, the Department did not consider any supplemental water rights to be used concurrently with the stored water on Statement of Claim 76H 111251-00.

21. Based on FOFs 18-20, the Department concluded that TCWSD stored water under Statement of Claim 76H 111251-00 is the sole source of irrigation for the 1607 irrigated acres in a typical year during the months of August and September.

22. The Department calculated the required field application volume for the 1607 acres historically irrigated utilizing USDA NRCS Irrigation Water Requirements (IWR) program and the county management factor found in ARM 35.12.1902(16). A field efficiency value of 60% was used to account for the mixture of flood and sprinkler irrigated fields. The Darby weather station was used for climate data.

Table 3. Estimated Historical Field Applied Volume Requirements

Month	IWR (in/ac)	County Management Factor	Net Irrigation Requirements (AF)	Field Efficiency	Required Field Applied Volume (AF)
Aug	5.42	79.5%	577.03	60%	961.72
Sep	1.52	79.5%	161.82	60%	269.71

23. According to the aforementioned signed affidavit by Tex Marsolek, 7% of water released from Tin Cup Dam is lost in Tin Cup Creek before reaching the MML headgate, and an additional 12% conveyance loss occurs in the MML ditch. The Department estimated the amount of the Historical Diverted Volume released each month from Tin Cup Dam by adding the volume of water necessary to offset the 12% conveyance losses in the MML ditch and the 7% losses in Tin Cup Creek to the required field applied volume. The estimated volume released at the Tin Cup Dam was determined by comparing the required field application volume per IWR to the volume of stored water available at the dam. The estimated field applied volume was calculated based on the estimated releases from Tin Cup Dam and the conveyance losses in Tin Cup Creek and the MML ditch (Table 4).

Table 4. Estimated Volume Historically Released and Applied to Field

Month	Required Field Applied Volume (AF)	Volume Required at Headgate (AF)	Volume Required for Release at Dam (AF)	Estimated Volume Released at Dam (AF)	Percent Released	Estimated Field Applied Volume (AF)
Aug	961.72	1092.87	1175.13	1175.13	100%	961.72
Sep	269.71	306.49	329.56	324.87	98.58%	265.88

24. The volume available for release in September at the Tin Cup Dam is just short of the requirements for full-service irrigation of the place of use (1500 AF – 1175.13 AF = 324.87 AF, less than the 329.56 AF required for full-service irrigation). Irrecoverable losses and consumptive use were calculated from the volume estimated to be actually available for field application, and historical consumptive use was calculated as the sum of the net irrigation requirements and irrecoverable losses. The Department utilized 7.5% irrecoverable losses due to the mixture of flood and sprinkler irrigated parcels within the service area, with 7.5% being the average between 5% irrecoverable losses for flood irrigation and 10% irrecoverable losses for sprinkler irrigation. The historical consumptive use figures provided in Table 5 differ from the consumptive use found in the Department's Surface Water Change Report dated September 19, 2024 by 2.27 AF. This is due to the Surface Water Change Report assuming full-service irrigation water is available in September, while the analysis conducted to arrive at the figures in Table 5 are based on actual stored water availability, which is less than the IWR requirements for August and September.

Table 5. Estimated Historical Consumptive Use

Month	Net Irrigation Requirements (AF)	Percent Diverted	Estimated Net Irrigation (AF)	Field Applied Volume (AF)	7.5% Irrecoverable Losses (AF)	Historical Consumptive Use (AF)	Historical Non-Consumptive Use (AF)
Aug	577.03	100%	577.03	961.72	72.13	649.16	312.56
Sep	161.82	98.58%	159.53	265.88	19.94	179.47	86.41
Total						828.63	398.97

25. The historical point of diversion is the Tin Cup Dam, located in the NESESE Sec. 1 T2N R23W. Water was historically conveyed along Tin Cup Creek approximately 12.0 stream miles to the MML Ditch headgate, a secondary diversion. The maximum capacity of the MML Ditch was measured at 37.5 CFS by former TCWSD General Manager Tex Marsolek using a Parshall flume. Numerous tertiary ditches and diversions brought water from the MML ditch to the various properties within the place of use.

26. Thirteen water rights with priority dates senior to Statement of Claim 76H 111251-00 utilize the MML Ditch either wholly or partially for the conveyance of their water rights. These rights can be found in Table 1. The total flow rate claimed under these rights is 8.4 CFS. The flow rate in the MML Ditch necessary to meet the irrigation requirements for Statement of Claim 76H 111251-00 is 15.64 CFS in August and 4.47 CFS in September, as demonstrated in Table 6. In the month of

August, the maximum possible flow rate demands on the MML ditch amount to 24.04, significantly under the ditch's maximum capacity of 37.5 CFS.

Table 6. Flow Rate in MML Ditch

Month	Estimated AF Delivered	AF/day Required to Deliver Water	CFS Required to Deliver Water
August	961.72	31.02	15.64
September	265.88	8.86	4.47

27. In addition to the MML Ditch, the water right abstract for Statement of Claim 76H 111251-00 includes remarks listing the Chaffin-Whinnery Ditch, Click-Matteson Ditch, and Ford-Hollister Highline Ditch as means of conveyance. However, the Applicant states that these diversions are listed in error, and that the Chaffin-Whinnery and Click-Matteson Ditches are not used to deliver TCWSD water. The Ford-Hollister Ditch is used to deliver stored water to District customers under a different right, Statement of Claim 76H 111252-00, which has a separate place of use. As the Ford-Hollister ditch lies on the south side of Tin Cup Creek, it is impossible for it to be used for water delivery in the place of use of Statement of Claim 76H 111251-00, which lies on the north side of the creek.

28. The claimed period of use is July 1 to September 30. Nine years of water commissioner records were used to determine the date of stored water release. The recorded release dates ranged from as early as July 24 (1986) to as late as August 8 (1990), with the median release date on August 1. Water is released from the reservoir when flows in Tin Cup Creek become depleted, the Department finds the claimed period of use is reasonable and provides the irrigation district the flexibility to release their stored water earlier in the case of an abnormally dry summer.

29. As the Applicant provides irrigation water to numerous different customers, there is no one pattern of irrigation that describes the water use. Rather, water is released continuously from Tin Cup Dam, which water users utilize according to their own needs and schedules within the claimed period of use.

30. This claim was originally filed without a period of diversion. However, in 2008, a period of diversion was assigned to all Statements of Claim not listing a period of diversion per the Montana Water Court's July 2, 2008 Order on Period of Diversion - Statewide. By default, the new period of diversion was set equal to the period of use. As a result, this claim currently lists a period of diversion of July 1 to September 30. However, on November 25, 2024, the Applicant signed an

Exhibit C form to petition the Water Court to correct their period of diversion to year-round. The Exhibit C form was included in the Water Court's December 11, 2008 order amending the original July 2, 2008 order on period of diversion. This form allows for a correction to the DNRC applied period of diversion for reservoirs.

31. The Department finds the following historical use, as shown in Table 7.

Table 7. Summary of Historical Use Findings for Statement of Claim 76H 111251-00

WR #	Priority Date	Diverted Volume	Purpose (Total Acres)	Consumptive Use	Place of Use	Point of Diversion
76H 111251-00	8/20/1906	1500 AF	Flood / Sprinkler Irrigation (1607 acres)	828.63 AF	Secs. 3, 4, 8, 9, 10, 15, 16, 21, 22 T3N R21W	NESESE Sec. 1 T2N R23W

ADVERSE EFFECT

FINDINGS OF FACT

32. The Applicant proposes to change the purpose of a portion of the stored water on this right from irrigation to instream fishery. Per a contract with the Clark Fork Coalition, TCWSD agrees to release water from Tin Cup Dam at 3.3 CFS for the months of August and September, amounting to a total released volume of 400 AF for the purpose of instream fishery. This water will not be diverted into the MML ditch but allowed to remain in Tin Cup Creek to sustain a beneficial flow in the creek through the end of summer. The remaining 1100 AF will continue to be delivered to irrigators via historical practices, resulting in a total proposed diverted volume of 1500 AF between the two proposed purposes.

33. No reduction in historically irrigated acres is proposed. TCWSD will continue to provide water to its customers, who will adapt their practices to put the 1100 AF of water to use. Potential adaptations include reducing their growing season and/or number of hay cuttings, cultivating less water-intensive crops (e.g. pasture grass instead of alfalfa), and making efficiency improvements. In practice, these adaptations have already occurred. During the period between 1998 and 2011, when the dam capacity was reduced, TCWSD customers serviced by Statement of Claim 76H 111251-00 only had access to 911 AF, and this volume was shared with customers serviced by Statement of Claim 76H 111252-00. Since the rehabilitation of the dam in 2011 that brought storage capacity back up to 2000 AF, water users reliant on Statement of Claim 76H 111251-00 have had access to the 1100 AF proposed for continued irrigation in this change, while the remaining 400 AF stored under this water right has been contracted to CFC for instream flows in

compliance with TCWSD's contract. The reservoir has been operated under this management plan for several years.

34. The proposal to dedicate 400 AF of water to instream flows will not result in an increase in consumptive use. Historically the water users in the District had access to 1500 AF of stored water for irrigation. Under the new proposal, the water users will continue to irrigate the same acreage using 1100 AF of stored water. The reduction in water utilized for irrigation will necessarily result in a reduction in consumptive use, as less water will be absorbed by crops and less water will be subject to irrecoverable losses.

35. The natural flows in Tin Cup Creek can be measured at the dam and there are two staff gages for monitoring water levels in the creek. This allows TCWSD and CFC to ensure that stored water is appropriated for irrigation and instream flow as authorized while allowing senior water users to appropriate direct flow water (if any remains during the period of use of Statement of Claim 76H 111251-00).

36. The release of water from Tin Cup Dam has been controlled by TCWSD since its incorporation in 1952, and by its predecessors who established the impoundment in 1906. Since the stored water has historically only been available for TCWSD customers, no other water users will be affected by the proposed change.

37. Tin Cup Creek and the Bitterroot River are hydraulically connected surface water for the purpose of evaluating return flows. Under the proposed change in water use, 400 AF of water historically diverted and delivered for irrigation use will be left instream. Return flows were found to historically accrue in Tin Cup Creek in the NESE of Section 21, T3N, R21W, approximately 1 mile downstream from the MML headgate. Under the proposed change, historically diverted consumed and non-consumed water associated with the 400 AF being changed to instream flow will remain instream through the location where return flows historically accrued. Additionally, irrigation will continue in the historical place of use and return flows will continue to enter back into the source at the historical location. When return flows return to the source at the location that they historically did and water is left instream so historically diverted flows are available during the historical period of diversion where return flows historically returned to the source, the Department does not conduct a monthly analysis of the rate and timing of return flows.

38. Junior Tin Cup Creek water users were not reliant on return flows generated from irrigation using stored water. Two of TCWSD's direct flow rights, Statements of Claim 76H 111254-00 and 76H 111255-00, have 1889 priority dates, while the stored water right proposed for change has a

priority date in 1906. The release of water from Tin Cup Dam is linked to TCWSD's direct flow rights coming out of priority, consequently, water rights junior to the 1889 direct flow water right are out of priority when stored water is in use. Since only junior rights can claim to rely on return flows, no water users can be adversely affected by a change in return flows from the proposed change to Statement of Claim 76H 111251-00 as water is no longer physically available in Tin Cup Creek for their continued diversion.

39. The proposed place of use for the instream flow ends at the confluence of Tin Cup Creek and the Bitterroot River. Return flows historically accrued in the Bitterroot River downstream of its confluence with Tin Cup Creek. The 400 AF of water being left instream in Tin Cup Creek will flow into the Bitterroot River where it is then available for appropriation since it is out of the protected reach for instream flows, ensuring that there will be no adverse effect to the Bitterroot River from lost return flows.

40. As described above, the 2219-acre place of use for Statement of Claim 76H 111251-00 describes TCWSD's potential service area for this right, but only 1607 acres are irrigated with this right in a given year. As such, while there may be variation in which 1607 acres within the service area are put to use (as was historically the case), the historical volume consumed by the 2219-acre service area will not be exceeded under this change (see FOF 34).

41. Pursuant to MCA § 85-2-408 (1)(b), the Applicant will measure instream flow releases into Tin Cup Creek using staff gages with stage rating curves that are installed above and below all other diversions on Tin Cup Creek. The proposed measuring plan will allow water released for instream flow to be monitored and protected from diversion by other water users on Tin Cup Creek, allowing the instream flow water to be conveyed throughout the entire proposed place of use from the Tin Cup Dam in the NESESE Sec. 1, T2N, R23W to the confluence of Tin Cup Creek and the Bitterroot River in the SWSWNW Sec. 14 T3N, R21W for instream flow. Water measurement records will be required to be submitted to DNRC annually.

42. Upon granting of the proposed change in water use, the authorization will be subject to the following water measurement condition:

THE APPLICANT WILL MEASURE STREAM FLOWS TO MONITOR FOR COMPLIANCE OF THE LEASE AGREEMENT AND INSTREAM FLOWS THROUGH THE PROTECTED REACH. THE APPLICANT WILL MEASURE RELEASED STORED WATER FOR INSTREAM FLOW AT THE OUTLET OF TIN CUP DAM. FLOWS IN TIN CUP CREEK BELOW THE DAM WILL BE MEASURED USING STAFF GAGES ABOVE AND BELOW ALL IRRIGATION DIVERSIONS.

STAFF GAGES WILL BE MONITORED REGULARLY DURING THE AUGUST 1 THROUGH SEPTEMBER 30 PERIOD OF USE FOR INSTREAM FLOW. THE APPROPRIATOR SHALL REPORT TO THE DEPARTMENT THE STREAMFLOW DATA COLLECTED IN IMPLEMENTATION OF THE STREAMFLOW MEASUREMENT PLAN REQUIRED BY MCA 85-2-408(1)(B) AND DESCRIBED IN THE CHANGE APPLICATION. DOCUMENTATION OF THE LOCATION OF THE MEASURING POINTS AND MEASUREMENT METHODOLOGY MUST BE PRESENTED WITH THE FLOW MEASUREMENT RECORDS. THE MEASUREMENT REPORT SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS TEMPORARY CHANGE AUTHORIZATION.

43. Based on the information found in FOFs 32-41, the Department finds that the proposed changes in purpose and place of use will not result in adverse effect to any water rights.

BENEFICIAL USE

FINDINGS OF FACT

44. The Applicant proposes to reduce the volume for the irrigation purpose of Statement of Claim 76H 111251-00 from 1500 AF to 1100 AF, and to add an instream fishery purpose for 3.3 CFS for the months of August and September for a total of 400 AF.

45. The Applicant proposes to protect a maximum of 3.3 CFS up to 400 AF per year released from Tin Cup Dam in the NESESE Sec. 1 T2N, R23W for the purpose of instream flow for fisheries. The proposed protected reach is from the dam to the confluence of Tin Cup Creek and the Bitterroot River in the SWSWNW Sec. 14 T3N, R21W. This reach extends downstream of the secondary MML ditch diversion in the SWSWSW of Section 16, T3N, R21W and the location of where return flows accrued in Tin Cup Creek in the NESE of Section 21, T3N, R21W. Through the historical use analysis, it was found that 7 percent of the water released from the dam is lost through natural seepage in Tin Cup Creek resulting in a flow rate of 3.07 CFS reaching the secondary MML ditch diversion. Below the secondary diversion, the Department finds that the Applicant may protect a maximum flow rate of 3.07 CFS up to an annual volume of 372 AF to the confluence of Tin Cup Creek and the Bitterroot River. In this instance the Applicant may protect these amounts of water through the entire proposed protected reach of Tin Cup Creek because no water users were identified as reliant on return flows for their diversions, and no adverse effect was found to any water users on Tin Cup Creek as a result of the proposed change in water use (see FOFs 32 – 41).

46. Tin Cup Creek has been identified as chronically dewatered by the Montana Department of Fish, Wildlife and Parks (FWP). A 2011 wetted perimeter analysis conducted by FWP identified a minimum flow rate target of 9.5 CFS for Tin Cup Creek, a goal which is currently unmet. The Montana Water Trust (predecessor to CFC) reported late summer flows in Tin Cup Creek around 2 CFS through their instream flow monitoring program. Currently CFC owns four water rights on Tin Cup Creek for the purpose of instream flow with a combined flow rate of 4.32 CFS. These four rights are the senior water rights on Tin Cup Creek and were changed to instream in 1995 through Application to Change a Water Right No. 76H 9972296. The proposed additional 3.3 CFS instream fishery purpose would bring the creek closer to FWP's instream flow goal for Tin Cup Creek with a total of 7.62 CFS of instream flow during the months of August and September if this change application is approved.

47. Pursuant to § 85-2-102(5)(d), MCA, the use of a water right through a temporary change or lease to enhance instream flows to benefit a fishery resource in accordance with § 85-2-408, MCA, is considered a beneficial use of water. The Department finds the proposed temporary instream appropriation of 3.3 CFS and up to 400 AF in Tin Cup Creek for the purpose of enhancing and augmenting streamflows for the benefit of the fishery resource in Tin Cup Creek to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

48. The proposed change of Statement of Claim 76H 111251-00 to include the purpose of instream flow does not require proof of adequate 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.

49. The existing dam was rehabilitated in 2011 and can adequately store 2000 AF of water, of which Statement of Claim 76H 111251-00 accounts for 1500 AF of storage. The existing MML headgate used as a secondary diversion for stored irrigation water will not be modified as a result of the proposed change in water use and is adequate to divert continued irrigation water per historical practice.

POSSESSORY INTEREST

FINDINGS OF FACT

50. 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.

TEMPORARY PROTECTED REACH/ MEASUREMENT PLAN

FINDINGS OF FACT

51. The Applicant is proposing to temporarily change the purpose and place of use of 400 AF of water from Statement of Claim 76H 111251-00 to instream flow for the benefit of the fishery resource in Tin Cup Creek for a period of 10 years with the option to renew. During the term of this temporary change, the TCWSD will continuously release stored water from Tin Cup Dam throughout the months of August and September. Rather than diverting the entirety of this water into the MML Ditch, as was the historical practice, a portion will be left in Tin Cup Creek to sustain instream flows. The Applicant will appropriate 3.3 CFS in the proposed 16.2-mile instream place of use in Tin Cup Creek, which will extend from the Tin Cup Dam in the NESESE Sec. 1, T2N, R23W, to the confluence of Tin Cup Creek and the Bitterroot River in the SWSWSW Sec. 14, T3N, R21W. The proposed period of use is August 1 – September 30. The volume available to be appropriated instream is 400 AF.

52. The Applicant will monitor flow rates and volumes appropriated for the instream flow purpose by a stage height recorder at the Tin Cup Dam and two staff gages along Tin Cup Creek, one above all diversions on the creek, in the NWNESE Sec. 17, T2N R23W, and one below all diversions, in the N2N2 Sec. 23, T2N, R23W.

53. 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

54. 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]

55. 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]

56. 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

[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).

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 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]

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[4]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

[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

57. 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).[6]

58. 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.

59. 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

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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.)

[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).

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).

60. 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.

61. 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).

62. 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).

63. 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).

64. 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/has not elected to proceed under ARM 36.12.1902. (FOF No. X).

65. 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").

66. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim 76H 111251-00 to be a diverted volume of 1500 AF and a historically consumed volume of 828.63 AF. (FOF Nos. 15-30)

67. 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. 32-41)

BENEFICIAL USE

68. 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).

69. The Applicant proposes to use water for irrigation and temporary instream flow which are recognized beneficial uses. Section 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that temporary instream flow is a beneficial use and that 400 AF of diverted volume and 3.3 CFS of water requested is the amount needed to sustain the beneficial use. The Applicant has also proven that continued irrigation of 1607 acres with 1100 AF is a beneficial use of water. Section 85-2-402(2)(c), MCA (FOF Nos. 44-47).

ADEQUATE MEANS OF DIVERSION

70. 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 for instream flow pursuant to § 85-2-408 MCA.

71. 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. 48-49)

POSSESSORY INTEREST

72. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

73. 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.

74. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 50).

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 30161311 should be granted subject to the following.

With the granting of this change, Tin Cup Water and Sewer District (Applicant) is authorized to add a 10-year temporary purpose of instream fishery to Statement of Claim 76H 111251-00. The place of use for this purpose will be from the Tin Cup Dam in the NESESE Sec. 1, T2N, R23W to the confluence of Tin Cup Creek and the Bitterroot River in the SWSWSW Sec. 14, T2N, R23W. The volume allocated to the irrigation purpose will be reduced from 1500 AF to 1100 AF to accommodate a volume of 400 AF and a flow rate of 3.3 CFS for the temporary instream fishery purpose. The Applicant may protect a maximum of 3.3 CFS up to 400 AF annually from the Tin Cup Dam to the secondary MML ditch irrigation diversion located in the SWSWSW of Section 16, T3N, R21W and a maximum of 3.07 CFS up to 372 AF from the MML ditch diversion to the confluence of Tin Cup Creek and the Bitterroot River. The period of use for instream flow will run from August 1 to September 30 annually.

The Applicant is held to the following condition:

THE APPLICANT WILL MEASURE STREAM FLOWS TO MONITOR FOR COMPLIANCE OF THE LEASE AGREEMENT AND INSTREAM FLOWS THROUGH THE PROTECTED REACH. THE APPLICANT WILL MEASURE RELEASED STORED WATER FOR INSTREAM FLOW AT THE OUTLET OF TIN CUP DAM. FLOWS IN TIN CUP CREEK BELOW THE DAM WILL BE MEASURED USING STAFF GAGES ABOVE AND BELOW ALL IRRIGATION DIVERSIONS. STAFF GAGES WILL BE MONITORED REGULARLY DURING THE AUGUST 1 THROUGH SEPTEMBER 30 PERIOD OF USE FOR INSTREAM FLOW. THE APPROPRIATOR SHALL REPORT TO THE DEPARTMENT THE STREAMFLOW DATA COLLECTED IN IMPLEMENTATION OF THE STREAMFLOW MEASUREMENT PLAN REQUIRED BY MCA 85-2-408(1)(B) AND DESCRIBED IN THE CHANGE APPLICATION. DOCUMENTATION OF THE LOCATION OF THE MEASURING POINTS AND MEASUREMENT METHODOLOGY MUST BE PRESENTED WITH THE FLOW MEASUREMENT RECORDS. THE MEASUREMENT REPORT SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THIS 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 16th day of December, 2024.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 16th day of December, 2024, by first class United States mail.

TIN CUP WATER AND SEWER DISTRICT
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CLARK FORK COALITION
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MISSOULA, MT 59807

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_____

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