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

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINDINGS OF FACT, CONCLUSIONS OF
76LJ-30150985 BY MEADOW LAKE) LAW, AND FINAL ORDER
INVESTMENTS)**

On August 14-15, 2023, I conducted a hearing on the objections filed against the Department of Natural Resources and Conservation’s (“DNRC”) Preliminary Determination to Grant (“PDG”) the above-captioned application. For the reasons set forth below, I hereby overrule the objections filed by Objectors Clayton and Rhanda Appleton, Elizabeth Armstrong, James and Beverly Bucknell, Michelle Bulera (Winter), Mary Camuso, Loyal Chubb, Columbia Falls Rural Water Resources, Michael Deardurff, Carla Ehlers, Melody and Randy Emmert, Kurt Fitz-Randolph, Cassie and Jacob Guillory, Cheryl Laratonda (Hartz), Frank (Robert) Leftwich, Ryan and Wendy MacPherson, Gerene and John Matson, Ardis (and Tom) Miller, Sally and Trent Miller, Betty Reynolds (Personett), Bruce and Marilyn Riley, Jeanne Rosenberry, Annie Ryan, Barbara and Van Sherod, Peter and Susan Suter, Jeremy Williams (collectively “Objectors”),¹ and GRANT Meadow Lake Investments’ (“Applicant”) application on the terms and conditions set forth in the PDG, which DNRC issued on September 24, 2021. This Order must be read in conjunction with that PDG, which is incorporated herein by reference.

1. Jeanette and Randall Cheney withdrew their objections to Applicant's permit application on the second day of the hearing and I consequently terminated their objections. Hearing Video #8 at 00:10-25. (The video record of the hearing in this matter is broken into 11 distinct computer files. For the convenience of the reader, when I quote or cite hearing testimony, I will use the file number followed by the time stamp of the testimony within that file in either minute:second or hour:minute:second form as necessary, as I just did in reference to the termination of the Cheney objections which occurred at zero minutes and seconds 10-25 of Hearing Video #8.)

BACKGROUND AND PROCEDURAL HISTORY

On September 24, 2021, DNRC issued the PDG regarding Application for Beneficial Water Use Permit No. 76LJ 30150985 (“Application”) filed by Applicant. The Application seeks a new water use permit for 360 gallons per minute for up to 222.9 acre-feet (“AF”) of groundwater for irrigation and commercial uses at the Meadow Lake Golf Course from a well drilled at least 500 feet deep into the Deep Alluvial Aquifer of the Flathead Valley (“Flathead Deep Aquifer”). PDG, ¶¶ 1-2. The requested flow rate is based on the well pumping at full capacity. The irrigation purpose will use up to 189.5 AF and the commercial one will use up to 36.6 AF for filling and maintaining four water hazards. *Id.*, ¶ 2. Although the Application was for a new beneficial use permit, the underlying intent was to square Applicant’s existing and applied for water rights with its actual practice of using water on its golf course. See PDG, ¶¶ 3-9; Testimony of Kathy Olsen (“Olsen testimony”), Hearing Video #1 at 20:21-57. On September 27, 2021, DNRC publicly noticed the PDG pursuant to § 85-2-307, MCA, and Objectors timely filed functionally identical objections to the Application contesting various of the criteria set forth in § 85-2-311, MCA, that Applicant must satisfy to be entitled to its permit. See Application File at 243-248.² After reviewing the objections, DNRC determined that all Objectors filed valid objections contesting the criteria of beneficial use, physical availability, legal availability, and adverse effect to water quality. *Id.* Twenty of the Objectors also asserted valid objections on the criterion of adverse effect to water rights. *Id.*

On January 18, 2022, DNRC assigned me to be the hearing examiner presiding over this contested case. After issuing a lengthy stay of proceedings due to an unfortunate medical event experienced by Applicant’s original counsel, I conducted a pre-hearing conference on September 14, 2022, after which I set a series of discovery and pre-hearings motions deadlines. Consistent with this schedule (as subsequently modified by request of the parties), the parties filed and fully briefed cross-motions for summary judgment, which I decided on January 13, 2023. In my Order of that date, I denied Objectors’ motion for partial summary judgment and all but one portion of Applicant’s motion for summary judgment, which I granted as to the criterion of beneficial use. Order of January 13, 2023, at 4-5. The matter eventually came on for hearing at the DNRC regional office in Kalispell and via the zoom platform on August 14-15, 2023, and after the parties entered a stipulation regarding the testimony of one witness who was unable to attend the hearing

2. The application file contains nearly 700 pages of materials submitted by Objectors, consisting primarily of 26 versions of the same set of objections. For ease of reference, this citation is to the Application Party List DNRC prepared on January 13, 2022, identifying the individual Objectors and their respective grounds of valid objections.

due to a family medical situation, I issued an order regarding post-hearing briefing on November 1, 2023. Consistent with that order (as subsequently modified by request of the parties), Applicant and Objectors both timely filed proposed findings of fact and conclusions of law on December 22, 2023.

LEGAL STANDARD

Under Montana law, an applicant for a new beneficial water use permit always retains the burden of proof to demonstrate by a preponderance of the evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the permit. *Bostwick Properties v. DNRC*, 2013 MT 48, ¶ 18, 369 Mont. 150, 296 P.3d 1154 (2013). The Montana Supreme Court has defined the preponderance of the evidence standard as one that “requires proof sufficient to support a conclusion that the asserted existence, non-existence, occurrence, or non-occurrence of the subject fact or factual occurrence was, is, or will be more probable than not, i.e., more likely than not.” *Breuer v. State*, 2023 MT 242, ¶ 19 at n. 14, 414 Mont. 256, 274, 539 P.3d 1147, 1160 (2023). This a “relatively modest standard” that requires a showing only that it is “more probable than not” that the statutory criteria have been met. *Hohenlohe v. DNRC*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

In this case the criteria Applicant must prove are that:

- 1) water is physically available at the proposed point of diversion in the amount that Applicant seeks to appropriate;
- 2) water can reasonably be considered legally available during the period in which Applicant seeks to appropriate, in the amount requested;
- 3) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
- 4) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 5) the proposed use of water is a beneficial use;
- 6) 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; and
- 7) Applicant will not adversely affect the water quality of a prior appropriator.

Section 85-2-311(1)(a)-(f), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC’s PDG reflects DNRC’s preliminary determination that Applicant has proven the first six of these criteria by the requisite standard in connection with the Application. However, a permit applicant need only prove that the criteria of § 85-2-311(1)(f)-(h), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-311(2), MCA. Here, DNRC determined that Objectors each filed a valid

objection triggering Applicant's obligation to prove a lack of adverse effect to the water quality of a prior appropriator pursuant to § 85-2-311(1)(f). Because of this sequencing, DNRC's PDG does not make specific factual findings or draw any legal conclusions as to Applicant's ability to satisfy this criterion.

While the issuance of DNRC's PDG does not relieve Applicant of the burden of proving that the applicable criteria are satisfied, it does - except for the water quality criterion - have the effect of shifting the burden of production to Objectors to demonstrate that Applicant failed to satisfy its burden as to the first three criteria identified above, which were put at issue by Objectors' valid objections and not resolved on summary judgment. (Due to the absence of any findings or conclusions related to water quality in the PDG, Applicant retains both the burden of proof and the burden of production as to that criterion.) Because Applicant retains the burden of proof as to all criteria, Applicant was entitled to present evidence at the contested case hearing to rebut relevant evidence pertaining to the objections that the Objectors proffers at the hearing. See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005). In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.*, ¶ 2 (see § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")).

UNCONTESTED CRITERIA

Because no valid objections were filed challenging the adequacy of Applicant's means of diversion or Applicant's possessory interest in the place of use, and because there is no evidence in the record that would cause me to revisit DNRC's findings and conclusions in the PDG as to those two criteria, I find that Applicant has met its burden of proof in regard to those criteria for the reasons set forth in the PDG. PDG, ¶¶ 55-61, 72-75. As I have already granted Applicant

summary judgment as to the beneficial use criterion, I hereby reiterate that Applicant has met its burden of proof as to that criterion for the reasons set forth in the PDG and in my summary judgment order. PDG, ¶¶ 62-71; Order of January 13, 2023, at 4-5.

APPEARANCES AND WITNESSES

At the hearing on August 14-15, 2023, Applicant was represented by counsel Benjamin S. Sudduth, and Objectors were represented by counsel Graham J. Coppes. As stipulated at the final pre-hearing conference, Objectors presented their case first followed by Applicant. Objectors called witnesses Kathy Olsen, Nathaniel Ward, Attila Felnagy, Karen Deardurff, Jeanne Rosenberry, and Frank Leftwich. Applicant called witnesses Brad Bennett, Peter Tracy, and Tom Waters. Applicant and Objectors both cross-examined the witnesses called by the other side. Objector Van Sherod had been subpoenaed to attend the hearing but was not available for questioning due to a family health matter. The parties subsequently obviated the need for Mr. Sherod to testify by reaching a stipulation related to the source of Sherod's claim 76LJ 45173-00 (which they agreed was Garnier Creek rather than an unnamed tributary of Garnier Creek). See Stipulation for Statement of Claim 76LJ 45173-00 (filed on October 27, 2023).

EXHIBITS

In addition to the administrative records maintained by DNRC for the Application, and the video and audio recordings of the hearing, the record in this case includes the following exhibits offered by Applicant and Objectors that I admitted at the hearing:

- 1) Applicant's Exhibits A-1 through A-51;
- 2) Objectors' Exhibits O-1 through O-39;³

3. At the hearing, I noted that Objectors' proffered Exhibits O-35 to O-39 are duplicative of certain of Applicant's exhibits that were admitted pursuant to the parties' stipulation. But my discussion of the status of the admission of those exhibits at the hearing left ambiguity as to their formal inclusion in the record. Hearing Video #1 at 02:53-03:14. As Exhibit O-36, the 2019 "Technical Memorandum" regarding how DNRC approaches the analysis of the legal availability of water for the Flathead Deep Aquifer plays a significant role in this case, and as that memo is buried deep within the voluminous exhibit that is Applicant's Exhibit A-43, I choose now to construe my ambiguous hearing statement on the admission of Exhibits O-35 to O-39 as having admitted them to the record despite their redundancy with certain of Applicants exhibits, and will cite to O-36 instead of to pages 178-179 of A-43 when I reference that memo in this Final Order. I believe this approach prejudices neither party and will make the overall record of this case

- 3) Portions of Objectors' Exhibit O-41;
- 4) Objectors' Exhibit O-43;
- 5) Objectors' Exhibit O-45;
- 6) Objectors' Exhibit O-46; and
- 7) Objectors' Exhibit O-48.

During the hearing, it was also discovered while the DNRC Aquifer Test Report was present as part of the DNRC claim file for the Application (“Application File”), Appendix A to that Report had been inadvertently omitted from the Application File when that file was transmitted to the DNRC Office of Administrative Hearings for use in this contested case proceeding. Appendix A, a list of water rights of wells with depths greater than 100 feet which DNRC expected to experience drawdowns of greater than one foot due to the pumping of the well at issue in the Application, was supplied by DNRC during the hearing and I separately admitted it into the hearing record as well since it should have been part of the administrative record from the outset.

THE CONTESTED CRITERIA

Four of the criteria that Applicant must satisfy under § 85-2-311(1), MCA, remain contested at this stage of the proceedings. I will discuss each in turn below, but I make the following general observation first. If there is a single theme that runs through Objectors’ arguments, it is that the facts of this case are on all fours with those in the case that led to the Montana Supreme Court’s ruling in *Flathead Lakers v. DNRC*, 2023 MT 85, 412 Mont. 225, 530 P.3d 769 (2023) (“*Flathead Lakers II*”). In *Flathead Lakers II*, the Montana Supreme Court affirmed the district court’s decision setting aside the DNRC hearing examiner’s final order granting the permit and dismissing the objections to the permit application at issue. To reach that conclusion, the Court identified a cascading series of failures in DNRC’s analysis of whether the applicant had successfully discharged its burden under § 85-2-311, MCA, many of them stemming from a mechanistic application of a 2011 policy memo that placed the burden of identifying surface sources that might be impacted by pumping from wells drilled into the Flathead Deep Aquifer on an applicant rather than, as set forth in rule, on the DNRC itself. *Flathead Lakers II*, ¶¶ 50-51

incrementally more user friendly in the event there are future proceedings following on from entry of this order.

(citing ARM 36.12.1704 (2012)⁴). By failing to make a particularized inquiry into surface water sources potentially affected by the application, the Court concluded that DNRC did not properly reach its conclusion that water was legally available to satisfy the applicant's proposed use. *Id.*, ¶ 52. And this error in assessing legal availability was built atop the rickety foundation of a physical availability analysis that suffered from the applicant's non-compliance with ARM 36.12.121, which sets forth the aquifer testing information that an applicant must provide in connection with a groundwater permit application. *Flathead Lakers II*, ¶ 46. ARM 36.12.1703(4) authorizes DNRC to issue variances to excuse strict compliance with all of the aquifer testing requirements set forth in ARM 36.12.121, but the applicant in *Flathead Lakers II* neither sought nor received any such variance. *Flathead Lakers II*, ¶ 42. Thus, despite hearing testimony from DNRC personnel regarding their belief that DNRC had adequately discharged its duties in the analysis of the application – testimony that the hearing examiner had found sufficiently convincing so as to deny the objections and affirm DNRC's preliminary determination to grant the application – “[t]he errors of law and process [the Court identified] undermine confidence in the agency's determinations.” *Id.*, ¶ 56. In sum, the Court explained:

A significant impression drawn from the record is this: that because there is so much water in the Deep Aquifer, the agency assumed the proposed well would have little impact, and passed it along without diligent review. The agency may be right in the end, but until the proper assessment is done, the Objectors were all prejudiced by the agency's failure to complete it.

Id., ¶ 57.

In this case, Objectors assert that DNRC has repeated the same errors and that I should avoid my predecessor hearing examiner's error, sustain their objections, and deny the permit. I am not convinced. Material factors differentiate its conduct in this case from that in *Flathead Lakers II* such that a rote equation of the two situations is unwarranted. Nor have Objectors satisfied their burden of production sufficient to countermand the conclusions reached by DNRC in the PDG as to the criteria of physical availability, legal availability, and adverse effect. Moreover, while there is nothing resembling an abundance of evidence in the record pertaining to water

4. DNRC has promulgated revisions to these administrative rules effective as of January 1, 2024. My citations in this order are to the version of the rules in effect at the time the Application was processed and when this matter came on for hearing.

quality, I am satisfied that Applicant has carried its burden as to that criterion as well. I therefore make the following findings of fact and draw the following conclusions of law from them.⁵

I. Physical Availability

Findings of Fact

1. DNRC's analysis of the physical availability criterion is set forth at PDG ¶¶ 17-24. Based on this analysis, DNRC concluded that water was physically available for Applicant's proposed appropriation. PDG at ¶ 28.

2. In reaching this conclusion, DNRC was undaunted by the fact that Applicant did not strictly comply with the aquifer testing requirement of ARM 36.12.121. While full compliance would be better practice, the administrative rules confer on DNRC the discretion to excuse strict compliance with ARM 36.12.121 through the granting of a variance. ARM 36.12.1703(4). The rules do not articulate any specific criteria DNRC should apply in determining whether to grant a variance, providing only that such requests "must be submitted to the appropriate regional office manager." ARM 36.12.121(1)(b).

3. Unlike in *Flathead Lakers II*, Applicant addressed its failure to strictly comply with the aquifer testing requirements of ARM 36.12.121 by securing a variance from DNRC for each of its departures from those requirements. Application File at 186. While DNRC did not meaningfully document its rationale for granting the variance, *id.*, Applicant's consultant submitted a four-page memorandum in connection with the variance request identifying the specific points of departure from the standard requirements and proffering an explanation as to why those deviations did not compromise the utility of the test as Applicant had conducted it for purposes of DNRC's analysis of the Application. *Id.* at 187-190. At the hearing, DNRC Water Resources Division Operations

5. Section 2-4-623(4), MCA, provides that when parties submit proposed findings of fact and conclusions of law, as parties in this case have done at my request, my "decision must include a ruling upon each proposed finding." The Montana Supreme Court has held that this provision "does not require a separate, express ruling on each required finding as long as the agency's decision and order in such proposed findings are clear[.]" *State ex rel. Montana Wilderness Association v. Board of Natural Resources and Conservation*, 200 Mont. 11, 40, 638 P.2d 734, 749 (1982) (citing *Montana Consumer Counsel v. Public Service Commission and Montana Power Co.*, 168 Mont. 180, 541 P.2d 770 (1975)). Thus, while I directly address some and utilize the gravamen of others of Applicants' and Objector's specific proposed findings in this Order, there are yet others that I implicitly reject as being inconsistent with the findings I lay out and the conclusions I draw therefrom.

Manager Kathy Olsen⁶ also testified that her practice in response to requests for variances is to consult with DNRC's "sciences bureau" to ascertain whether bureau personnel believe they have received sufficient information from an applicant for DNRC to discharge its duties in evaluating an application irrespective of the applicant's failure to provide all the information required by ARM 36.12.121. Olsen Testimony, Hearing Video #1 at 1:16:12-37. If the answer from the bureau is in the affirmative, and the applicant requests a variance, she will grant one. *Id.* at 1:16:38-45. This is so, she testified, because aquifer testing is not an exact science and the form (Form 633) the ARM requires an applicant to submit asks for a large quantity of information, which can often lead to technical deficiencies in strict compliance with ARM 36.12.121. Olsen Testimony, Hearing Video #1 at 1:19:15-55.

4. In this case (as in *Flathead Lakers II*), DNRC Groundwater Hydrologist Attila Fohnagy was the DNRC employee responsible for evaluating the adequacy of the aquifer test information provided by Applicant in relation to ARM 36.12.121. Mr. Fohnagy testified that he believed he had all the information he needed to evaluate the aquifer test in order to analyze the Application. Testimony of Attila Fohnagy ("Fohnagy Testimony"), Hearing Video #4 at 39:07-40:08. Of course, Mr. Fohnagy also testified that he thinks that portions of the ARM 36.12.121 requirements are unnecessary, Fohnagy Testimony at Hearing Video #5 at 25:20-28, which suggests that the answer about whether a variance is appropriate may always be "yes." This would seem to defeat the purpose of ARM 36.12.121 in the first place, a concern potentially exacerbated by Ms. Olsen's testimony that she's never known DNRC to deny a variance request. Olsen Testimony, Hearing Video #1 at 1:28:05-21.

5. But while Objector makes much of Applicant's failure to strictly comply with ARM 36.12.121 and the reasonableness of DNRC's decision to grant a variance, a challenge to DNRC's general pattern and practice regarding variances from ARM 36.12.121 is not properly before me in this case, and there is no dispute that ARM 36.12.1703(4) authorizes DNRC to grant such variances in its discretion. Rather, the core question implicated by the aquifer test and variance – and Objectors' valid objections to the criterion of physical availability – is whether DNRC's analysis of the Application supports the conclusion in the PDG that Applicant has met its burden to prove that criterion by a preponderance of the evidence. Too, Objector's narrow focus

6. At the time the Application was processed, Ms. Olsen was serving as Regional Manager of the DNRC Water Resources Division's Kalispell Regional Office and signed the letter granting the variance at issue in this case. Application File at 186; Hearing Video #1 at 18:43-54.

ignores the fact that DNRC does not start its analysis of each application from a blank slate. Rather, DNRC has institutional experience gained through, among other things, prior permit and change decisions – and the technical and other information they provide regarding the characteristics of a given source – to draw from in assessing the question of whether an individual applicant’s aquifer test and Form 633 submission is sufficient to enable DNRC to perform its mandated duties. See Olsen Testimony, Hearing Video #1 at 25:04-45.

6. Here, both the Aquifer Test Report, Application File at 175 (Table 1), and the associated Depletion Report in the claim file, Application File at 181, specifically reference aquifer characteristics known to DNRC from information developed through its analysis of prior applications in addition to the information provided by Applicant on Form 633. (Applicant also amended its Form 633 during the application process to provide additional detail that had been absent from the Form 633 Applicant originally submitted. Bennett Testimony, Hearing Video #9 at 13:38-44.) Moreover, both before and after the formal filing of the Application, there was extensive back-and-forth between Applicant and DNRC in an effort to facilitate DNRC’s orderly review of the Application. Olsen Testimony, Hearing Video #1 at 1:06:05-35. I therefore find that neither Applicant’s failure to strictly comply with the requirements of ARM 36.12.121 nor DNRC’s granting of a variance to excuse Applicant’s non-compliance are fatal to the Application where the ultimate question the aquifer test relates to here is whether the Applicant can prove the physical availability of water to satisfy its proposed use.⁷

7. In their filed objections, Objectors indicated that their approach to meeting their burden of production would be to point to departures from aquifer testing requirements. See, e.g., Application File at 256-260. And this was indeed the approach Objectors took in their questioning of witnesses at the hearing, and in their post-hearing briefing. See Objectors’ Proposed Findings of Fact and Conclusions of Law, ¶¶ 15-44. But Objectors put on no expert witnesses of their own to suggest that these deviations actually compromised DNRC’s ability to assess whether water was physically available in the potentially affected sources or that DNRC’s conclusion that water is in fact physically available in these sources, as reflected in ¶¶ 21-24 of the PDG, is incorrect.

8. Mr. Fohnagy’s approach to analyzing physical availability in his Aquifer Test Report and Depletion Analysis in this case bears similarities to his approach that was criticized (but not

7. The Aquifer Test and associated Depletion Report are also, of course, related to the questions of whether Applicant can prove legal availability and lack of adverse effect to other water rights. I address those criteria separately below.

outright rejected) for assessing physical availability in *Flathead Lakers II*. Compare *Flathead Lakers II*, ¶ 46-47; Fohnagy Testimony, Hearing Video #4 at 1:01:12-51 (use of Neuman-Witherspoon Solution to assess potential impacts from Applicant’s pumping in the Flathead Deep Aquifer); *id.* at 47:48-57 (gaps in the recording of discharge rates); *id.* at 1:05:45-1:06:13 (potential lack of genuinely hydrostatic conditions at time of aquifer test). But in *Flathead Lakers II*, the objectors adduced specific evidence, including expert testimony, establishing a lack of hydrostatic conditions and an explanation of why the absence of such conditions compromised the validity of Mr. Fohnagy’s analysis in that case. *Flathead Lakers II*, 230 Mont. 85 at ¶ 43, 530 P.3d at 783-84. They also adduced evidence directly from Dr. Neuman, co-author of the Neuman-Witherspoon Solution, as to why the use of that Solution was inappropriate for the analysis of the application there. *Id.* at ¶¶ 44-45, 530 P.3d at 784. A particular flaw identified was that applicant’s test well was not suitable for application of the Solution because it did not “fully penetrate” the Flathead Deep Aquifer. See *id.* at ¶18 and n.17, 530 P.3d at 777.

9. Objectors have adduced no analogous evidence here. Rather, Mr. Fohnagy testified that hydrostatic conditions existed at the time of the test, Fohnagy Testimony, Hearing Video #4 at 1:05:52-1:06:03, though he also could not say for certain whether that was true for all the observation wells used to conduct the aquifer test. *Id.* at 1:06:07-13. But under questioning, both Mr. Fohnagy, as well as Mr. Bennett maintained that neither this fact, nor the other deviations from the requirements of ARM 36.12.121 (for which – unlike in *Flathead Lakers II* – DNRC had granted a variance), vitiated the utility of the test or the reliability of DNRC’s analysis. See, e.g., Fohnagy Testimony, Hearing Video #4 at 39:10-40:10 and 47:30-50:28; Bennett Testimony, Hearing Video #9 at 12:48-13:20. Objectors called no witness (expert or otherwise) to produce countervailing testimony for me to lay against those statements.

10. Objectors elicited testimony from Mr. Fohnagy that he disagrees with Dr. Neuman’s testimony in *Flathead Lakers II* regarding the inappositeness of the use of the Solution there, Fohnagy Testimony, Hearing Video #4 at 1:01:51-1:02:15, which could potentially be relevant to the weight I ought to accord Mr. Fohnagy’s testimony. But since Objectors adduced nothing going to the propriety of the use of the Solution given the physical properties of Applicant’s well, which was drilled nearly 300 feet deeper into the Flathead Deep Aquifer than the one at issue in *Flathead Lakers II*,⁸ I have no principled basis to – as Objectors would have me

8. Compare PDG, ¶ 1 (Applicant’s well is 500 feet deep); *Flathead Lakers II*, ¶ 5 (“222-foot deep well”).

do – cut-and-paste the *Flathead Lakers II* holding that use of the Neuman-Witherspoon Solution was improper or problematic.

11. In their filed objections, Objectors identified one additional angle of attack on DNRC’s physical availability analysis. That is, each Objector recited that they “intend to introduce evidence showing that water is not physically. . . available in Garnier Creek and that this source is hydrologically connected with the Deep Aquifer.” Application File at 261, 287, 313, 341, 367, 394, 420, 447, 473, 499, 525, 552, 577, 603, 629, 656, 683, 709, 735, 761, 789, 815, 841, 867, 894, and 920. Yet they have not in fact done so. Indeed, they produced no evidence regarding a potential hydrologic connection between Garnier Creek and the Flathead Deep Aquifer. On the other side of the ledger, Mr. Fohnagy specifically identified in his Depletion Report a Montana Bureau of Mines and Geology (MBMG) technical paper regarding the thickness of the confining layer between Garnier Creek and the Flathead Deep Aquifer as evidence supporting the conclusion that Garnier Creek is not in fact hydrologically connected to the local area of the Aquifer in which Applicant’s well is drilled “for the purpose of the evaluation of depletion for this application. . . .” Application File at 181. That MBMG paper estimates the thickness of the confining layer to be between 100-200 feet thick, *id.* while – as noted above – Applicant’s well is drilled into the Flathead Deep Aquifer to a depth of 500 feet.

Conclusions of Law

12. “Water is physically available if it exists at the proposed point of diversion in the amount that the applicant seeks to appropriate.” *Flathead Lakers II*, ¶ 39 (internal quotations and citation omitted).

13. DNRC evaluated the hydraulically connected sources of the Flathead River and Flathead Lake and determined that there was sufficient water physically available in both. PDG, ¶¶ 21-22. Objector has failed to satisfy its burden of production to provide credible evidence indicating that water is not physically available from those sources or that (as is discussed in greater detail regarding Legal Availability) that DNRC improperly excluded other sources from consideration of physical availability. On the record before me, therefore, I have no basis to disturb the conclusion in the PDG that Applicant has met its burden as to this criterion. See PDG, ¶¶ 25-28. I therefore conclude that Applicant has met its burden as to the criterion of physical availability.

II. Legal Availability

Findings of Fact

14. The PDG spells out the process DNRC undertook to analyze the net depletion Applicant's well might have on hydraulically connected surface water. PDG, ¶¶ 29-35. Based on this analysis, DNRC found as a matter of fact that water is legally available for the proposed new use. PDG, ¶ 40.

15. This determination in the PDG was built through a three-step process. First Mr. Folnagy prepared an Aquifer Test Report and a Depletion Report to, among other things, identify water bodies hydraulically connected to Applicant's source (the Flathead Deep Aquifer) for which legal availability needed to be analyzed. Next Nathaniel Ward, who was then serving as a program specialist in DNRC's new appropriations program and is now DNRC's water rights bureau chief,⁹ conducted a legal availability analysis limited to the sources identified by Mr. Folnagy. Olsen Testimony, Hearing Video #1 at 32:15-37. (Mr. Ward in fact authored the entire PDG. Olsen Testimony, Hearing Video #1 at 29:44-52.) Ms. Olsen is responsible for final review of the PDG before it is issued but does not conduct independent analysis herself. *See id.* at 30:03-31:14.

16. A 2019 policy memorandum ("2019 Memo"), in the record at pages 178-179 of Exhibit A-43 and as Exhibit O-36 (*see* note 3, *supra*), lies at the heart of both DNRC's approach to evaluating whether Applicant successfully met its burden to prove that water is legally available and Objectors' challenge to DNRC's conclusion that Applicant did so. That memo reflects DNRC's attempt to grapple with the unique characteristics of the Flathead Deep Aquifer that render DNRC's regular approach to physical and legal availability analysis less reliable. Exhibit O-36 at 1.¹⁰

17. DNRC first attempted to articulate an approach to this issue in a 2011 policy memorandum ("2011 Memo", in the record at Exhibit O-39). The 2011 Memo, only a paragraph in length, did two main things. First, it effectively determined that legal availability analysis for groundwater

9. Testimony of Nate Ward ("Ward Testimony"), Hearing Video #2 at 00:53-01:41.

10. "Legal availability of groundwater is often evaluated separately from surface water by delineating a zone of influence and calculating groundwater flux through an area as outlined in DNRC (2019) describing methods in calculating legal availability of groundwater. This practice does not recognize the interconnection between surface water and the shallow and deep aquifers in the Flathead Valley and therefore is not appropriate. Additionally, due to the relatively flat gradient as mapped by LaFave (2004), this method would not provide meaningful estimates of groundwater flux." *Id.*

appropriations in the Flathead Deep Aquifer would, in the absence of other evidence, be limited to the Flathead River and Flathead Lake. See *Flathead Lakers II*, ¶¶ 12-13. Second, it put the burden for identifying and supplying evidence regarding other potentially affected surface sources on applicants rather than on DNRC. O-39 at 1 (“Local areas of the deep alluvial aquifer may be hydraulically connected to other surface waters or reaches of the Flathead River. In those cases, *applicants* need to evaluate legal availability of those sources.”) (emphasis added). Although DNRC subsequently hedged on whether the 2011 Memo was in fact applied to place that burden on the Applicant, see *Flathead Lakers II*, ¶ 13, it is clear DNRC understood the 2011 Memo to allow it to mechanistically limit its consideration of potentially affected surface sources to only the Flathead River and Flathead Lake. *Id.*, ¶ 52. DNRC’s application of the 2011 Memo to its analysis of the permit at issue in *Flathead Lakers II* was roundly criticized by the Montana Supreme Court in its opinion in that case. *Id.*, ¶¶ 50-52.

18. After a detour in 2018 to attempt a wholly different methodology for analyzing legal availability for wells drilled into the Flathead Deep Aquifer, DNRC promulgated the 2019 Memo. O-36 at 1. In a linguistic choice that has caused significant disagreement in this case, the 2019 Memo recites that through its adoption DNRC intends to “revert to practices consistent with the DNRC (2011) memorandum which [sic] reworded in this document to avoid misinterpretation.” *Id.* During witness examination at the hearing, much attention was paid as to whether the 2019 Memo was simply a recapitulation of the 2011 Memo, a more substantive change, or something in between. See, e.g., Olsen Testimony, Hearing Video #1 at 35:25-48; Ward Testimony, Hearing Video #3 at 58:45-59:14; Fohnagy Testimony, Hearing Video #4 at 30:09-58.¹¹ My cumulative assessment of this testimony is that these DNRC personnel individually and collectively have some difficulty, at least on the witness stand in response to questioning from Objectors’ counsel, articulating how the 2019 Memo is or is not responsive to the deficiencies identified by the Montana Supreme Court in *Flathead Lakers II* with in the approach laid out in the 2011 Memo. But a clear difference between the 2011 and 2019 Memos is that in the 2019 Memo, DNRC explicitly accepts (as it must) responsibility for determining whether sources beyond Flathead Lake and Flathead River should be evaluated for legal availability in connection with an application to extract groundwater from the FDA. O-36 at 2 (“Local areas of the Deep Aquifer may

11. I provide these citations as representative examples. There are multiple others that could be extracted from the record, but because of how I analyze the relevant issues in the following paragraphs, a lengthy string citation here seems unnecessary.

be hydraulically connected to other surface waters or reaches of the Flathead River. In those cases, *DNRC will evaluate legal availability of those sources.*”) (emphasis added).¹²

19. Objectors would nonetheless have me find that the 2019 Memo is functionally identical to the 2011 Memo, that nothing in DNRC’s practices meaningfully changed under the different memos, that the errors that infected the processing of the application at issue in *Flathead Lakers II* were equally rife here, and that I should therefore reject the PDG here for the same reasons the Montana Supreme Court rejected the permit at issue in *Flathead Lakers II*. Objectors’ Proposed Findings of Fact and Conclusions of Law, ¶¶ 65-66, 70-71, 73, 79. I do not find the record in this case supports such findings.

20. Mr. Ward conducted the legal availability analysis for the Application based on the information provided by Mr. Fohnagy in the aquifer testing and depletion reports. See Ward Testimony, Hearing Video #2 at 56:01-53. Ms. Olsen testified that she, too, relied on Mr. Fohnagy’s analysis in performing her role in reviewing the PDG. Olsen Testimony, Hearing Video #1 at 28:54-30:09. Thus, irrespective of testimony regarding DNRC’s general patterns and practices in its application or understanding of the 2011 or 2019 Memos, the core question implicated by Objectors’ challenge to the PDG’s determination that Applicant met its burden of proof as to legal availability is whether Mr. Fohnagy’s identification of the sources that needed to be analyzed by Mr. Ward for legal availability suffers from the same flaws identified by the Montana Supreme Court in *Flathead Lakers II*.

21. The short answer is that it does not. Mr. Fohnagy did in fact conduct a more particularized inquiry here than he did in connection with the *Flathead Lakers II* permit. There, no attempt was made to identify other potentially connected surface sources than the Flathead River and Flathead Lake. *Flathead Lakers II*, ¶ 14. At first blush, Mr. Fohnagy’s Aquifer Test Report in this case looks like it might have committed the same error where it explains that “physical and legal availability for this application are evaluated for the Flathead River and Flathead Lake based on the surface water depletion analysis found in a companion Depletion Report.” Application File at 177. But in that Depletion Report, Mr. Fohnagy considered not just Flathead Lake and the Flathead River as potentially affected sources but also both Garnier and Trumbull Creeks. Application File at 181.

12. The analogous portion of the 2011 Memo reads: “[L]ocal areas of the deep alluvial aquifer may be hydraulically connected to other surface waters or reaches of the Flathead River. In those cases, *applicants* need to evaluate legal availability of those sources.” O-39 at 1 (emphasis added).

Based on prior work done by DNRC in connection with other permit applications as well as studies of hydrogeologic characteristics performed by MBMG, Mr. Fohnagy concluded that those two sources were not in fact hydrologically connected to the portion of the FDA where Applicant's well is located. *Id.* This is not the rote application of a memo (whether promulgated in 2011 or 2019) to shirk DNRC's obligation to evaluate all potentially affected surface sources.

22. It is, of course, possible that Mr. Fohnagy's analysis in the Depletion Report was *factually* incorrect, and that Garnier or Trumbull Creeks, or yet other surface sources, should have been analyzed for legal availability. But Mr. Fohnagy testified as to why he believed his analysis was accurate in this case, Fohnagy Testimony, Hearing Video #4 at 33:34-34:10, and Objectors have adduced no evidence to show that Mr. Fohnagy erred in choosing to exclude Garnier and Trumbull Creeks, including their unnamed tributaries, from his analysis in the Depletion Report. (In *Flathead Lakers II*, by contrast, objectors called witnesses who presented specific evidence about sources that should have been considered. See *Flathead Lakes II*, ¶¶ 19-21.) Thus, I have no basis on the record before me to find that those sources *are* hydraulically connected and should have been analyzed for legal availability.

23. Moreover, DNRC's PDG specifically references that the determination of which surface sources to analyze was made based on the information contained in Mr. Fohnagy's Depletion Report. PDG, ¶ 29. Even though that same paragraph references the 2019 Memo, it does not support a finding that DNRC mechanistically limited its consideration of potentially affected surface sources in the way it had in *Flathead Lakers II* under the 2011 Memo.

24. Beyond challenging Mr. Fohnagy's analysis and his application of the 2019 Memo, Objectors assert no other errors in DNRC's legal availability analysis. They assign no errors to Mr. Ward's legal availability analysis or Ms. Olsen's review of the PDG beyond a failure to consider sources beyond those identified by Mr. Fohnagy. See Objectors Proposed Findings of Fact and Conclusions of Law, ¶¶ 61-88.

Conclusions of Law

25. Montana law provides that DNRC's legal availability analysis must consider the following factors:

- a. Identification of physical water availability;
- b. Identification of existing legal demands of water rights on the source of supply throughout the area of potential impact by the proposed use; and

- c. Analysis of the evidence on physical water availability and the existing legal demands of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.

Section 85-2-311(1)(a)(ii), MCA; see also *Clark Fork Coalition v. DNRC*, 2021 MT 44, ¶¶ 40, 403 Mont 225, 481 P.3d 198 (2021) (“the question of whether the quantum of water at issue is legally available is specifically a function of only two considerations—physical availability of that quantum of water at the point of proposed diversion, based on pertinent hydrological and geological evidence, and existing legal demands on the subject source of supply throughout the potentially impacted area”) (internal quotations omitted).

26. As discussed in the Physical Availability section above, I conclude that DNRC did not commit legal error in its identification of physical water availability.

27. For the reasons set forth in my Findings of Fact regarding Legal Availability, I conclude that DNRC did not commit legal error in its identification of existing legal demands of water rights on the source(s) of supply throughout the area potentially impacted by Applicant’s proposed use. Given that the record reflects that DNRC has conducted a more particularized analysis of legal availability than the mechanistic approach it took in *Flathead Lakers II*, and that Objectors have adduced no evidence suggesting that sources not specifically considered by DNRC are hydraulically connected to Applicant’s source, I am again left to conclude that, on the record before me, Objector has failed to satisfy its burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that water is legally available at the proposed point of diversion.

28. I conclude that I have no basis to disturb the conclusion in the PDG that Applicant has met its burden as to this criterion. See PDG, ¶¶ 36-40. I therefore conclude that Applicant has met its burden as to the criterion of legal availability.

III. Adverse Effect to Water Rights

Findings of Fact

29. DNRC’s analysis of the potential for the Application to cause adverse effect to other water rights is set forth, ¶¶ 41-56 of the PDG. Specifically, DNRC found that hydraulically connected senior groundwater uses would not be adversely affected by Applicant’s exercise of the water right sought in the Application because the drawdown those senior users’ wells might experience

from the full exercise of Applicant's new permit would nonetheless leave them with ample access to the water column. *Id.*, ¶ 42. DNRC further found, based on the conclusion discussed above, that neither Garnier nor Trumbull Creeks are hydraulically connected to Applicant's well, and thus that there could be no possibility of adverse effect to senior water users on those sources. *Id.*, ¶ 43. Finally, DNRC found that there is sufficient water physically and legally available in the Flathead River and Flathead Lake to satisfy all existing water rights even with Applicant's full net depletion of water as proposed in the Application. *Id.*, ¶ 45. Thus, DNRC found, there would be no adverse effects to senior users on those sources either. *Id.*

30. Objectors' challenge to DNRC's determination regarding Applicant's ability to prove a lack of adverse effects to senior water rights is effectively three-fold. They take issue with DNRC's decision not to analyze Garnier and Trumbull Creek for legal availability, which they construe to mean that DNRC improperly failed to analyze the possibility of adverse effects to senior water rights on those sources. Objectors' Proposed Findings of Fact and Conclusions of Law, ¶ 112, 119. They also assert that DNRC's analysis of the adverse effects that could be suffered by senior groundwater right holders sharing the Flathead Deep Aquifer in proximity to Applicant's well was deficient. *Id.*, ¶¶ 107-111. And they contend that the Applicant's plan to control the use of its well is similar to a proposed plan that DNRC rejected in a different permit application, which means that it should not be allowed here. *Id.*, ¶¶ 105-106, 117-118.

31. As to the first of those arguments, for the same reasons that I found no error in DNRC's decision to exclude Garnier and Trumbull Creeks from its legal availability analysis, I find no error in DNRC's decision to exclude them from the adverse effects to water rights analysis as well.

32. I am no more persuaded that DNRC erred in its analysis of potential adverse effects to senior groundwater users. Mr. Fohnagy's Aquifer Test Report determined that 1,078 water rights would experience a drawdown greater than one foot after five years of Applicant's pumping of its well. Application File at 177-178; Fohnagy Testimony, Hearing Video #4 at 2:03:05-2:04:44; see also Aquifer Test Report Appendix A. The lowest projected remaining water column for any of these potentially affected wells is 7.4 feet. PDG, ¶ 42; see also Application File at 177 and Aquifer Test Report Appendix A. Both Mr. Fohnagy and Mr. Bennett testified that these conditions would be sufficient for these well owners to continue to make reasonable use of their water rights. Fohnagy Testimony, Hearing Video #4 at 2:05:05-25; Bennett Testimony, Hearing Video #9 at 34:49-35:47 and 1:43:51-1:49:57.

33. Objectors elicited testimony from Mr. Bennett that the accuracy of Mr. Fohnagy's calculations depended in part on the accuracy of their underlying data, including the static water levels of the potentially affected wells, and that the accuracy of the static water level data was open to question. Bennett Testimony, Hearing Video #9 at 1:48:00-1:49:57. But Objectors' have adduced only conjecture not evidence as to whether that static water level data is in fact wrong. And the type of impacts Objectors hypothesized could flow from any such errors in assessing these static water levels relate to potential changes Objectors or other existing groundwater users might need to make to their well infrastructure to be able to pump water from a lower elevation, not that they would lose the ability to reasonably exercise their water rights. *Id.* at 1:51:50-1:52:14.

34. Objectors' arguments regarding the adequacy of Applicant's plan to control its appropriation to ensure the protection of senior water rights similarly consist of mere conjecture. While Applicant's control plan is neither particularly sophisticated nor granularly defined, see PDG, ¶ 41, none of Objectors' lay witnesses could provide an example of any adverse effect from this well during the period in which this well has been in operation or that they could reasonably anticipate would be caused by Applicant's future use of the well. Testimony of Karen Deardurff ("Deardurff Testimony"), Hearing Video #6 at 32:11-19; Testimony of Frank Leftwich ("Leftwich Testimony"), Hearing Video #7 at 17:07-22; see also Testimony of Jeanne Rosenberry, Hearing Video #7 at 03:49-07:16. Nor did Objectors call an expert witness to present more technically based testimony or adduce any other evidence. I find this absence of evidence particularly notable because, while this is a new permit application, the real-world fact is that Applicant has already been utilizing this well for several years. Olsen Testimony, Hearing Video #1 at 20:48-59. Furthermore, no evidence was adduced to indicate that Applicant would not or could not implement its control plan should it become necessary – nor to explain why DNRC's decision in a separate application to disallow a particular control plan was sufficiently analogous to the facts and circumstances of this Application to call into question the propriety of DNRC's acceptance of Applicant's control plan here.

Conclusions of Law

35. Section 85-2-311, MCA, requires (among other things) an applicant for a new use permit to prove by a preponderance of the evidence that the proposed new use will not adversely affect a prior appropriator's water right(s). That subsection specifically explains that "adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that

demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied.” *Id.* at § 85-2-311(1)(b), MCA. The term “adverse effect” is not defined in the Montana Water Use Act, but DNRC has promulgated a rule guiding the discharge of its duties in administering the statutory language. ARM 36.12.1706. This rule requires a permit applicant to show that the “diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied.” *Id.* at 36.12.1706(1). The plain text of both the statute and the rule demonstrates that the primary, if not exclusive intent, of this adverse-effects analysis is to ensure that a newly permitted use will not impair the ability of a senior appropriator to obtain the water necessary to satisfy its pre-existing right(s).

36. Section 85-2-401(1), MCA, provides in relevant part:

Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

37. ARM 36.12.1706(4) requires DNRC to “evaluate how water levels in wells of prior water rights could be lowered and the rate, timing, and location of where water flow could be reduced by any amount from hydraulically connected surface waters.”

38. In the PDG, DNRC determined that Applicant had satisfied its burden to prove by a preponderance of the evidence that the Applications would not cause adverse effects to prior appropriators. PDG, ¶ 54.

39. Based on the record before me, I conclude that DNRC properly discharged its obligations under ARM 36.12.1706 to analyze potential adverse effects and evaluate the adequacy of Applicant’s control plan.

40. The record Objectors have built regarding the sort of potential consequences they theorize could flow from Applicant’s use of the well consistent with the Application also leads me to conclude that those are among the sorts of effects that § 85-2-401(1), MCA, specifically excludes from being protectable attributes of a water right.

41. Objectors have failed to satisfy their burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that the water rights of a prior appropriator will not be adversely affected by a grant of the Application. I have no basis to

disturb the conclusion in the PDG that Applicant has met its burden as to this criterion. See PDG, ¶¶ 46-54. I therefore conclude that Applicant has met its burden as to the criterion of lack of adverse effect to water rights.

IV. Adverse Effects to Water Quality

Findings of Fact

42. Section 85-2-311(2), MCA, provides that an Applicant is not required to prove a lack of adverse effect to water quality unless and until a valid objection raising that issue is filed. Therefore, DNRC did not analyze the criterion of adverse effects to water quality in the PDG, Ward Testimony, Hearing Video #2 at 1:27:13-38. As DNRC subsequently determined that Objectors had each complied with the requirements of § 85-2-311(1)(f) and (2), Applicant bears the burdens of both production and proof as to this criterion.

43. DNRC did prepare an environmental assessment (“EA”) as required by the Montana Environmental Policy Act, §§ 75-1-101, *et seq.*, MCA, using its standard form. See Ward Testimony, Hearing Video #2 at 1:25:30-1:26:05. The EA contains a section on water quality, which reads in its entirety:

*“**Water quality** -Assess whether the stream is listed as water quality impaired or threatened by DEQ, and whether the proposed project will affect water quality.*

Determination: No significant impact

The reach of the Flathead River which will be depleted by groundwater pumping of the Applicant's wells has not been assessed for any beneficial uses by DEQ. Flathead Lake has been assessed and is identified by DEQ fully supporting agriculture, primary contact recreation, and drinking water. Impairment to aquatic life has been identified. The impairments identified are mercury, total nitrogen, total phosphorus, and PCB's related to human development. It is not anticipated that pumping of the Applicant's groundwater well will have any negative impacts on the water quality of the Flathead River or Flathead Lake.”

Application File at 229.

44. Objectors have posited two potential vectors of water quality impairments that could flow from the grant of the Application. These are: 1) decreases in water quality in Garnier Creek due to stream depletion from Applicant's pumping; and 2) increased fertilizer runoff from Applicant's golf course (for which the well contemplated by the Application is intended to provide a more reliable supply of water) causing additional nutrient loading in receiving waters. O-37 at 19-22;

Application File at 272-275, 298-301, 324-327, 352-355, 378-381, 405-408, 431-434, 458-461, 484-487, 510-513, 540-539, 563-566, 588-591, 614-617, 640-643, 667-670, 694-697, 720-723, 746-749, 772-775, 800-803, 826-829, 852-855, 878-881, 905-908, and 931-934.¹³

45. As discussed above, DNRC determined that Garnier Creek is not a water body hydraulically connected to Applicant's source, and I have no basis on the record before me to gainsay that conclusion. From that finding, I can infer that any flow reductions in Garnier Creek that might cause adverse effects to water quality are physically incapable of being caused by Applicant's pumping. The discussion of water quality in DNRC's EA also constitutes the totality of the evidence in the record regarding potential water quality effects from Applicant's pumping to

13. Objectors also make a cursory reference to direct water quality impacts to domestic water rights. O-37 at 22, Application File at 274, 300, 326, 354, 380, 407, 433, 460, 486, 512, 538, 565, 590, 616, 642, 669, 696, 722, 748, 774, 802, 828, 854, 880, 907, and 933. But to be valid, an objection invoking § 85-2-311(f), MCA, must contain "substantial credible information" that the criterion may not be met. Section 85-2-102(26), MCA, defines "substantial credible information" as "probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information." Objectors' cursory and undeveloped references to effects on domestic water rights do not rise to this level, and I thus decline to address them further. To the extent DNRC viewed this as encompassed within the scope of Objectors' water quality objections when it issued its validity determination, I dismiss that portion of the objections as improvidently validated. Relatedly, I also encourage DNRC to promulgate an administrative rule to ensure uniformity in how it evaluates the validity of objections purporting to invoke § 85-2-311(f), MCA. I am unable to find any decisional law interpreting that provision, and there is virtually no extant decisional law on how § 85-2-311(2), MCA, is to be interpreted and applied either. And unlike the fairly specific and confined criteria set forth in § 85-2-311(1)(g) and (h), MCA, § 85-2-311(1)(f), MCA, is drafted broadly and provides no guidance as to what constitutes "the water quality of a prior appropriator." (Emphasis added.) This potential ambiguity could be read either narrowly – to require a valid objection to assert a direct water quality-based impact to the specific purpose for which the appropriator uses their water right (which would arguably be more consistent with narrower sideboards set forth in § 85-2-311(2), MCA, for who may assert an objection under § 85-2-311(1)(g) and (h)), MCA – or expansively to simply require (as essentially a standing issue) that the filer of an objection asserting an impact to water quality *be* a prior appropriator. Objectors embrace this latter reading. ("[E]ach of the individual Objector's [sic] in this matter are prior appropriators and have a constitutional, as well as statutory right to the preservation of the water quality they have enjoyed prior to DNRC's approval of this permit." Exhibit O-37 at 22; Application File at 274-275, 300-301, 326-327, 354-355, 380-381, 407-408, 433-434, 460-461, 486-487, 512-513, 538-539, 565-566, 590-591, 616-617, 642-643, 669-670, 696-697, 722-723, 748-749, 774-775, 802-803, 828-829, 854-855, 880-881, 907-908, and 933-934.) I am not certain it is the best one. Nor am I certain that the remainder of Objectors' water quality explanation actually rises to the level of substantial credible evidence as it seems largely untethered from the specific Application at issue here and rather directed at Applicants' operations and local conditions more generally. See O-37 at 17-22. But I decline to substitute my judgment for DNRC's as to the overall validity of Objectors' water quality objection.

prior appropriators on the surface sources that DNRC did determine are hydraulically connected to Applicant's source (that is, the Flathead River and Flathead Lake). While that is a thin reed, I find it is nonetheless capable of sustaining a finding that it allows Applicant to satisfy its burden to prove that the water quality of a prior appropriator will not be adversely affected by the pumping contemplated in the Application as the preponderance of the evidence standard is not a hugely demanding one.

46. Objectors' other theory posits that since fertilizer run-off can contribute to water quality problems, and since at least some water from the golf course runs off to Garnier Creek, and since that water is potentially carrying nutrients in it from the fertilizer, granting the permit will cause water quality problems and Applicant therefore cannot satisfy § 85-2-311(1)(f), MCA. See Objectors' Proposed Findings of Fact and Conclusions of Law, ¶¶ 120, 123-124.¹⁴

47. But there is no evidence in the record specifically tying fertilizer run-off from Applicant's golf course (which receives water pursuant to multiple water rights, not just the one sought in this Application – see PDG, ¶¶ 2-9) to any deleterious water quality effects. Objectors did call three witnesses (Ms. Rosenberry, Ms. Deardurff, and Mr. Leftwich) whose property is in relative proximity to the golf course, each of whom testified to observing recent water quality problems. Ms. Rosenberry testified that she had a specific problem with high iron levels in her well in 2021 that she speculated could somehow be related to Applicant but acknowledged that she had neither personal knowledge nor obtained any technical analysis to substantiate a connection. Rosenberry Testimony, Hearing Video #7 at 01:40-04:08, 05:39-06:01. I also note that the pollutant Ms. Rosenberry identified in her well – iron – is not one of the pollutants (namely nitrogen and phosphorus) discussed in the only exhibit Objectors rely on to substantiate their assertions about the potential environmental impacts of golf course fertilizer run-off. See Exhibit O-46.¹⁵

14. Apropos of footnote 13, I also observe that nowhere in their proposed findings of fact or conclusions of law regarding this water quality criterion do Objectors tie the “nutrient pollution” they allege will flow from Applicant's use of the well at issue in the Application to any particular prior appropriator. See Objectors Proposed Findings of Fact and Conclusions of Law at pages 25-28. (There is a formatting glitch in Objectors' Proposed Findings/Conclusions such that the paragraph numbering temporarily re-sets at the start of the water quality section, going from ¶ 119 to ¶¶ 1-5 on page 25 before resuming at ¶ 120 on page 26, which is why I cite to page numbers here rather than paragraph numbers as I otherwise do throughout.)

15. On page 26 of its Proposed Findings of Fact and Conclusions of Law, Objectors twice refer to Exhibit O-48 (at misnumbered ¶ 5 and ¶ 124), which is an excerpt from the deposition testimony of Mr. Ward. It is clear from the context, however, that Objectors intended to cite Exhibit O-46 in those paragraphs instead.

48. Ms. Deardurff, whose property abuts Garnier Creek, testified to noticing increasing buildups of sedimentation and vegetation in a nearby wetland area over the past three years. Deardurff Testimony, Hearing Video #6 at 13:38-14:21. She also explained that nutrient pollution in Garnier Creek would harm her because she has both irrigation and domestic water rights on that source. *Id.* at 21:29-22:05. But she explained that her concern was driven by recent growth in housing developments, *id.* at 16:32-16:50, and nothing in her testimony provides any evidence regarding specific pollutants or, despite her personal knowledge regarding her property going back 30 years, *id.* at 03:21-03:50, connects any sort of adverse water quality effects to Applicant's golf course. I find that such unsubstantiated assertions cannot properly enter the evidentiary calculus as to whether Applicant can meet its burden as to this criterion.

49. Mr. Leftwich also testified to observing increases in sedimentation and vegetation in Garnier Creek over the past few years. Leftwich Testimony, Hearing Video #7 at 23:20-24:19. But he also stated that he has experienced no water quality issues with his well, *id.* at 23:39-43, and provided no other information about potential water quality problems or their possible relationship to Applicant's golf course.

50. I might also be more inclined to require Applicant to build a more robust record to satisfy its burden than the one currently before me were this an application to facilitate the installation of a wholly new golf course whose potential prospective effects on water quality might be more difficult to assess. But the Applicant's golf course has been in existence since 1977 and was converted from a nine-hole course to its current configuration as an 18-hole course in 1986. Testimony of Peter Tracy ("Tracy Testimony"), Hearing Video #10 at 8:40-50 and 35:00-07. The golf course has always used fertilizer to maintain its greens. *Id.* at 21:00-22. The irrigation system used to apply water to the course has also been in place for many years, and neither the number of acres irrigated nor the pattern of water use are expected to change from current practice if the Application is granted. Bennett Testimony, Hearing Video #9 at 27:48-29:56; Application File at 115-128; Testimony of Tom Waters ("Waters Testimony"), Hearing Video #11 at 09:20-25. Rather, the motivating factor behind the Application is for Applicant to be able to *continue* current practice while adapting to the fact that different wells the golf course has previously relied on for much of its irrigation water have been increasingly dedicated to residential domestic rather than golf course use. Tracy Testimony, Hearing Video #10 at 31:57-33:30. That said, beyond general statements about trying to apply fertilizer judiciously and being concerned about environmental impacts, Applicant has adduced no evidence regarding the particulars of its fertilizer use or the

quality of the water that flows off its golf course and into Garnier Creek (or any other receiving source).

51. I am thus left with a very sparse record on which to base my decision as to this criterion. But I find there is one other factor I should consider. As noted previously, “adverse effect” is not a defined term in the Water Use Act. And, unlike with the term “adverse effect to water rights,” there are also no administrative rules to help interpret how it should be applied in connection with § 85-2-311(1)(f), MCA. But I find that inherent in the concept of an adverse effect is some alteration to the status quo. Section 85-2-401(1), MCA, is instructive here. That statute of course addresses the right to prevent changes in the *quantity* of a water source – namely when a new permit would interfere with a prior appropriator’s ability to reasonably exercise a senior water right. But I find that inherent in the concept of an adverse effect to water *quality* is interference with the ability of a prior appropriator to exercise a senior water right due to water quality changes that would be caused by the new permit.

52. Here, the evidence establishes that the golf course has been in existence for multiple decades and this permit will not alter the practice of water or fertilizer use on the course. Thus, although fertilizer runoff (whatever that may be) may persist if the permit is granted, issuance of the permit will not *alter* water quality conditions on the source. Accordingly, I find that the permit will not alter water quality on the source. As such, I find that a preponderance of the evidence establishes that granting the Application will not adversely affect the water quality of any prior appropriator as a consequence of nutrient loading/runoff from the operation of the golf course.

Conclusions of Law

53. An applicant is only required to prove that it can satisfy the criterion set forth in § 85-2-311(1)(f), MCA, if a valid objection is filed. Section 85-2-311(2), MCA. A “valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria ... may not be met.” *Id.* Substantial credible information means “probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.” Section 85-2-102(26).

54. DNRC determined that Objectors provided sufficient information to trigger § 85-2-311(1)(f), MCA, placing the burden of proof on Applicant to demonstrate by a preponderance of

the evidence that the water quality of a prior appropriator would not be adversely affected were the Application to be granted.

55. For the reasons set forth above, I conclude Applicant has carried this burden.

CONCLUSION

Objectors have failed to bear their burden of production regarding the criteria of physical availability, legal availability, and adverse effect put at issue by the valid objections they filed to the PDG. Applicant has met its burden of proof to show by a preponderance of the evidence that it has satisfied all the applicable criteria necessary to warrant a grant of the Application.

FINAL ORDER

Beneficial Water Use Permit No. 76LJ-30150985 is hereby GRANTED for the reasons set forth in this Final Order as to the criterion of adverse effect to the water quality of a prior appropriator and for the reasons set forth in the PDG as to the other applicable criteria of § 85-2-311(1), MCA.

NOTICE

This Final Order is the Department's final decision in this matter. A final order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the reviewing court.

Dated this 19th day of April 2024.

/Original signed by Jay D. Weiner/
Jay D. Weiner, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-1510

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of this FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER was served upon all parties listed below on this 19th day of April 2024 by first class United States mail and/or by electronic mail (e-mail).

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