



**Exhibit 4** – is a copy of the “Final Order” for Application for Beneficial Water Use Permit No. 76D-30045578 issued by DNRC on February 9, 2011. (GBCI’s four wells for the Wilderness Club development located approximately 3.5 miles west of Indian Springs.)

**Exhibit 5** – consist of a three page memorandum entitled “Synopsis of Indian Springs Ranch/DNRC meeting held January 19, 2016 regarding Water Right Application 76D-30071039” from Ray Halloran, Water Core Consulting to Melissa Brickl, DNRC, dated January 25, 2016.

**Exhibit 6** – is a map entitled “Surficial Geologic Map of the Tobacco and Upper Stillwater River Valleys, Northwestern Montana.”

### **PRELIMINARY MATTERS**

On November 20, 2014, Indian Springs Ranch and Sewer LLC submitted Application for Beneficial Water Use Permit No. 76D 30071039 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation for 360 gallons per minute (GPM) up to 136.83 acre-feet (AF). The Department published receipt of the Application on its website. The Application was amended (minor) on December 31, 2014; the flow rate was reduced to 301.1 GPM and the volume to 126.01 AF. The Department sent Applicant a deficiency letter under § 85-2-301, MCA dated May 8, 2015. A request for a 15-day extension was received June 8, 2015. The Application was amended (major) on June 17, 2015, which reset the priority date. The flow rate was reduced to 215 GPM and the volume to 66.5 AF. The Application was determined to be correct and complete as of December 10, 2015. The Department met with the Applicant (Fred Schickendanz), Troy Truman, Core Water Consulting employees Mikel Siemens and Ray Halloran PE, the Applicants’ attorney Abigail J. St. Lawrence, and DNRC employees Kathy Olsen, Melissa Brickl, Nate Ward and Russell Levens on January 19, 2016. Applicant provided additional data to the Department on January 25, 2016 which was reviewed and relied upon for a revised depletion report. The revised depletion report was sent out on March 1, 2016. An Environmental Assessment for this Application was completed on April 7, 2016. (PDD)

Upon review of Department File 76D 30071039, a “Preliminary Decision to Deny” was issued by the Kalispell Water Resources Regional Office on April 12, 2016. That “Preliminary Decision to Deny” was based upon the Department’s determination that the Applicant had failed to prove by a preponderance of the evidence that “water in the amount of the depletion to the Tobacco River is legally available and failed to prove by a preponderance of the evidence that

those depletions will not adversely affect existing water users on the Tobacco River.” (PDD @ pp. 32)

“If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307 . . . the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause . . . as to why the permit or change in appropriation right should not be denied.” § 85-2-310, MCA.

The Applicant was given the opportunity to show cause why Application for Beneficial Water Use Permit No. 76D 30071039 should not be denied. A show cause hearing was scheduled and held on June 14, 2016, before this Hearing Examiner.

The Department has followed the proper procedure as provided in §§ 85-2-307, 85-2-310 and 2-4-604, MCA in this matter.

Having fully reviewed the record in this matter and the testimony and evidence produced at the show cause hearing, the Hearing Examiner makes the following Findings of Fact and Conclusions of Law.

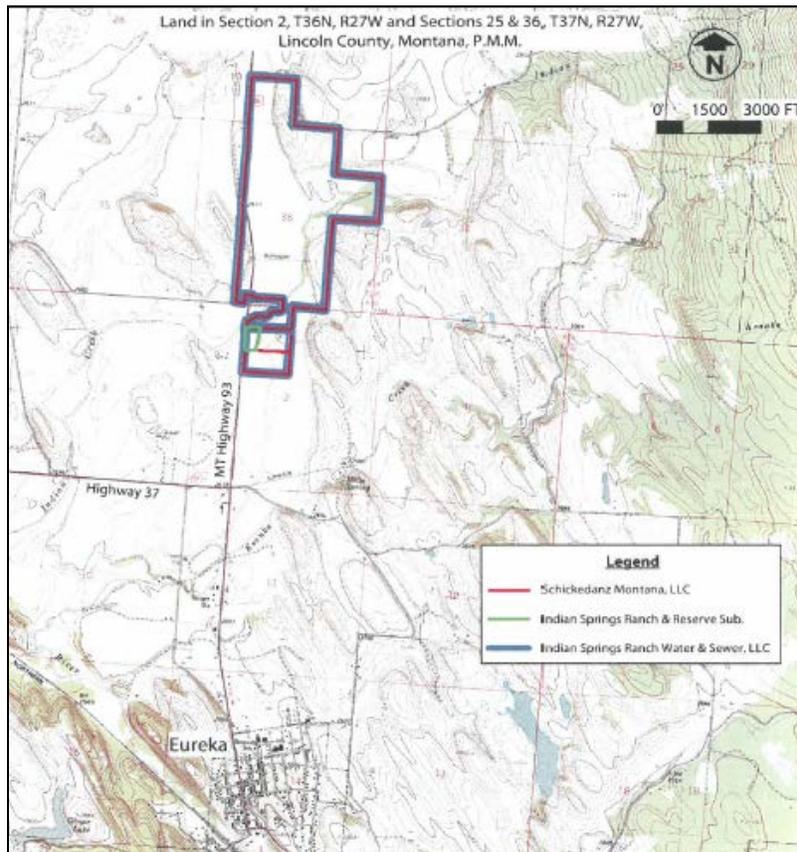
This Order only addresses the Department’s findings and conclusions, and the Applicant’s argument why those findings and conclusions should be reversed, related to legal availability and adverse effect of depletions to the Tobacco River. All other Findings of Fact and Conclusions of Law in the PDD, including the legal availability of groundwater and the legal availability and potential adverse effect of surface water depletions related to Tetrault Lake and the Kootenai River (Lake Koocanusa) are adopted and incorporated by reference in this Order. This Order must be read in conjunction with the Department’s “Preliminary Decision to Deny” dated April 12, 2016.

## **PROPOSED APPROPRIATION**

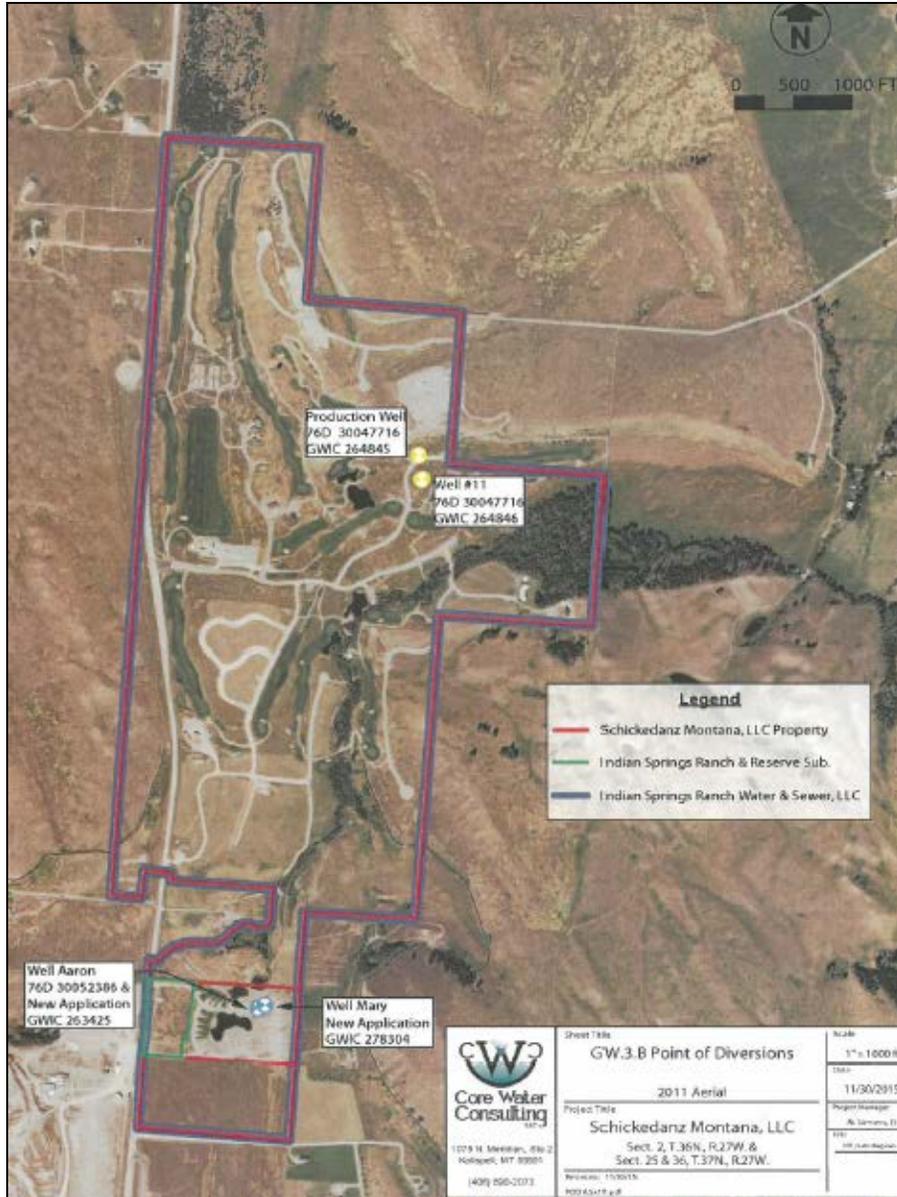
### **FINDINGS OF FACT**

1. The Applicant, who holds all the water rights associated with Schickedanz Montana, LLC properties, proposes to divert groundwater for multiple domestic, commercial and other purposes (RV lots) January 1 thru December 31 at a rate of 215 GPM up to 66.5 AF from two wells (GWIC # 263425, GWIC # 278304) in the SENENW Section 2, Township 36N, Range 27W Lincoln County, Montana. (PDD)

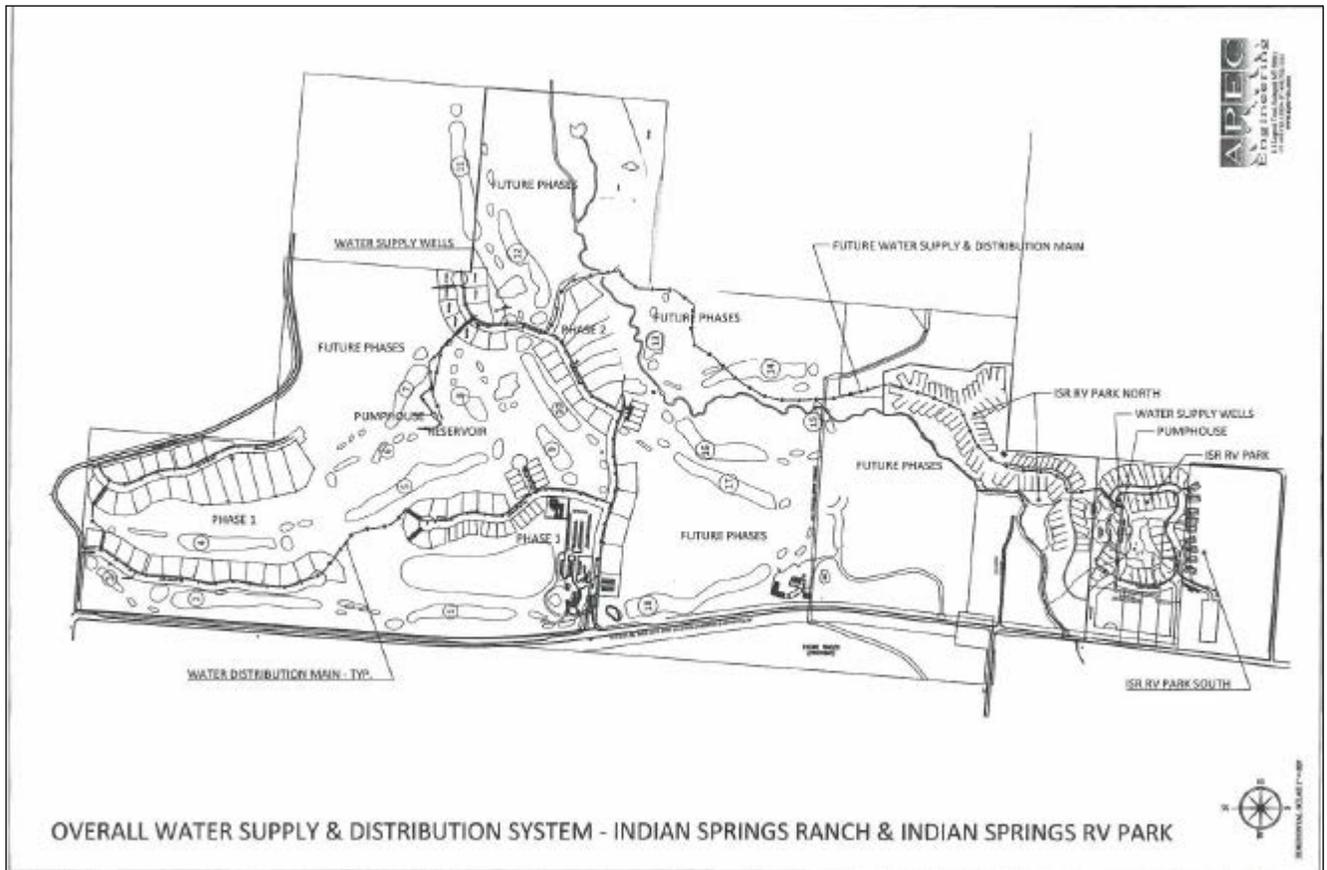
2. The place of use is generally located in the SESW Section 25 and the E2NW, E2SW, W2NE, W2SE, SENE of Section 36 Township 37N Range 27W and the NENW, N2SENW of Section 2, Township 36N, Range 27W Lincoln County, Montana (Figures 1 thru 3). The following three developments exist within the 435.79 acre place of use: 1) Indian Springs Ranch Subdivision (Phase 1 and 2); 2) Indian Springs RV Parks (north and south); and 3) Indian Creek Ranch and Reserve Commercial Complex (Figures 1 thru 3). At full build out the proposed public water supply system will consists of 4 manifold wells. The two existing wells (GWIC # 264845, GWIC # 264846) associated with Provisional Permit 76D 30047716 (Indian Springs Ranch Subdivision (Phase 1 and 2)) will be manifold together with the two proposed wells. In conjunction with a 35,000 gallon storage reservoir, water will be distributed throughout the whole 435.79 acre place of use. Irrigation water is provided from a different source via a separate distribution system. (PDD)



**Figure 1:** Location map of proposed place of use



**Figure 2:** Location map of proposed place of use and points of diversion associated with Provisional Permit 76D 30047716 (GWIC # 264845, GWIC # 264846) and this water right permit (GWIC # 2634525, GWIC # 278304).



**Figure 3:** Zoomed in map of Indian Springs Ranch Subdivision (Phase 1 and 2) and Indian Springs RV Parks (north and south). Indian Creek Ranch and Reserve Commercial Complex not shown to the south.

3. The Applicant requested additional volume and a greater pumping rate to service all developments within the proposed place of use at full build out. Unperfected Provisional Permit 76D 30047716 and Groundwater Certificate 76D 30052386 are supplemental rights associated with the proposed public water supply system. Permit 76D 30047716 is for multiple domestic and commercial uses associated with Indian Springs Ranch Subdivision (Phase 1 and 2). Water is supplied via two wells that operate as lead-lag (alternate). One is classified as redundant to meet MT Department of Environmental Quality (MDEQ) public water supply system requirements (Circular DEQ-1, Section 3.2.1.1). According to the Applicant each well pump can produce 43 GPM; the maximum combined flow rate of the two wells is 43 GPM up to 39.5 AF, of which 37.61 AF is perfected. Both of these wells will be manifold together with the two proposed wells, which also operate as lead-lag and have one well classified as redundant. The four pumps will be programmed to alternate and the maximum pumping rate at a point in time

will vary depending on the demand put on the system. Between the two rights the combined maximum pumping rate of the system is 258 GPM (43 GPM + 215 GPM) up to 104.11 AF (37.61 AF + 66.5 AF). Certificate 76D 30052386 is filed on Well Aaron (GWIC # 263425); it is for 34 GPM up to 10 AF and services 36 RV lots and 2.4 acres of irrigation. 76D 30052386 will be withdrawn because the pump associated with the Certificate will be pulled and replaced by one of the proposed pumps, which pumps at a rate of 215 GPM. (PDD)

4. Twenty-two other water rights are associated with the proposed place of use. Table 1 outlines each of these rights. The Applicant proposes to irrigate the place of use via a separate distribution system which uses Indian Creek water (Statement of Claims 76D 25328 thru 76D 25336). None of the wells associated with water rights listed below are connected to the proposed public water supply system. These wells will continue to be used for their designated purposes. (PDD)

**Table 1\*(PD1): Associated Surface and Groundwater Rights for Irrigation, Domestic, Stock, and Fish & Wildlife Purposes within the Proposed Place of Use**

Water Right	Purpose	Source
76D 89204	Domestic, Lawn & Garden	Groundwater
76D 25302	Domestic	Indian Creek
76D 30013478	Domestic, Fish & Wildlife	Groundwater
76D 79284	Domestic, Irrigation	Groundwater
76D 25328	Irrigation	Indian Creek
76D 25329	Irrigation	Indian Creek
76D 25330	Irrigation	Indian Creek
76D 25331	Irrigation	Indian Creek
76D 25332	Irrigation	Indian Creek
76D 25333	Irrigation	Indian Creek
76D 25334	Irrigation	Indian Creek
76D 25335	Irrigation	Indian Creek
76D 25336	Irrigation	Indian Creek
76D 25311	Stock	Indian Creek
76D 25312	Stock	Indian Creek
76D 25313	Stock	Indian Creek
76D 25314	Stock, Fish & Wildlife	Indian Creek
76D 25315	Stock	Indian Creek
76D 25316	Stock	Indian Creek
76D 25317	Stock	Indian Creek
76D 25318	Stock	Indian Creek
76D 25319	Stock	Indian Creek

\* For ease of cross-referencing, this Final Order uses Table numbers that correspond to the matching Table numbers in the PDD or Technical Report. Those noted as (PDx) are taken from the PD and those noted as (TRx) are taken from the Technical Report

5. The point of diversion is located in the Kootenai River Basin (76D) in an area that is not subject to water right basin closures or controlled groundwater area restrictions. The Applicant's wells are 750 feet, 11,000 feet, 17,000 feet and 22,000 feet from Indian Creek, Tobacco River, Tetrault Lake and Lake Koocanusa, respectively. The source aquifer is a 40-foot thick sand and gravel aquifer associated with glacial outwash deposits that have been incised by the Tobacco River which lies to the south and Kootenai River to the west. (PDD)

6. At full build out the proposed public water supply system will distribute water to 234 residences (62.91 AF/year), 183 RV lots (30.75 AF/year) and the following commercial uses: clubhouse/halfway houses, restaurant, maintenance facility, two RV comfort stations and nine commercial lots (10.45 AF/year). Permit 76D 30047716 is supplemental to this permit and provides water for multiple domestic (127 lots) and commercial (clubhouse/halfway houses, restaurant, 5 commercial lots) uses associated with Indian Springs Ranch Subdivision (Phase 1 and 2). It was permitted for 43 GPM up to 39.5 AF, of which 37.61 AF is perfected. (PDD)

7. The Applicant requests 66.5 AF of additional volume (28.77 AF Multiple Domestic, 30.75 AF RV Lots, and 6.98 AF Commercial) and a greater pumping rate (215 GPM) to service all developments within the proposed place of use at full build out. Table 2 breaks down all uses and the volumes needed to fulfill each purpose. The Applicant requested a flow rate of 215 GPM. With one source off-line (only one well pumping), a maximum day demand of 195 GPM and a 35,000 gallon storage reservoir during peak periods a minimum yield of 215 GPM is required to maintain pressure in the system. (PDD)

**Table 2 (PD2): Requested Water Volume Summary**

Use	Quant.	Design Demand (acre-feet)	Supplemental		Application (acre-feet)
			76D 30047716 (acre-feet)	76D 30052386 <sup>a</sup> (acre-feet)	
<b>Domestic</b>					
Single Family (Ph. 1 & 2)	127	34.14	35.29	---	0
Single Family (Future)	107	28.77	---	---	28.77
<b>Subtotal</b>					<b>28.77</b>
<b>Other Purpose</b>					
RV (Initial RV Park)	36	6.05	---	4.00 <sup>a</sup>	6.05
RV (Additional South & North)	147	24.70	---	---	24.70
<b>Subtotal</b>					<b>30.75</b>
<b>Commercial</b>					
Phase 1 & 2 (clubhouse/halfway house, restaurant, and 5 other commercial)		3.47	4.22	---	0
RV Comfort Stations	2	5.49	---	---	5.49
Maintenance	1	0.15	---	---	0.15
Indian Creek Ranch & Reserve	4	1.34	---	---	1.34
<b>Subtotal</b>					<b>6.98</b>
<b>Total</b>					<b>66.49</b>

<sup>a</sup> This certificate will be withdrawn and this volume not included.

8. Within the proposed place of use all wastewater will be disposed of via drainfields, therefore of the total requested volume (66.5 AF) 10 percent or 6.65 AF will be consumed. Provided the applicant disposes waste water in the manner described and does not allow the waste water to be diverted or used for any purpose other than recharging the aquifer, consumption and depletions to surface water are limited to 6.65AF. (PDD)

**LEGAL AVAILABILITY (Tobacco River)**

**FINDINGS OF FACT**

9. The Department used the USGS gage No. 12301300 near Eureka on the Tobacco River to find the median of the mean monthly flows on the Tobacco River. To determine the monthly volume of water passing the gage, the Department took the median of the mean monthly flow for each month times 1.98 times the number of days in the month (CFS x 1.98 AF/CFS/day x # of days). The Department used the water conversion values found in the Department’s Form 615. The result is as follows:

**Table 3 (PD3): Median of Mean Monthly Flow and Volume Tobacco River near Eureka  
USGS Station No. 12301300**

	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>
<b>Flow (CFS)</b>	88.55	96.65	126.60	407.60	748.25	710.25
<b>Volume (AF)</b>	5,435.20	5,358.28	7,770.71	24,211.44	45,927.59	42,188.85
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>Flow (CFS)</b>	289.05	115.15	105.90	101.75	107.70	95.60
<b>Volume (AF)</b>	17,741.89	7,067.91	6,290.46	6,245.42	6,397.38	5,867.93

10. While accepting the flows found in Table 3, Applicant contends that the calculated volumes are not correct. Applicant used a conversion factor that is more precise than the conversion factor used by the Department. Applicant consistently found higher volumes throughout every month of the year. Applicant faults the Department for this discrepancy. (Siemens Pre-filed Testimony (Siemens) @ B pp. 5)

11. It is readily apparent that the discrepancy between the Department’s and the Applicant’s estimation of volumes is simply one of rounding. The Department could have used a more precise multiplier such as 1.984 or 1.9836, (the Hearing Examiner notes that Applicant’s own testimony refers to DNRC Form 615 “Water Conversion Table” which notes that 1 cfs = 1.98 AF/day) but such an increase in precision would not result in a more accurate estimation. Precision and accuracy are not synonymous. This is especially true in the measurement of

stream flow. It is widely accepted that even the *flow* rates published by the USGS have an accuracy of around 5 percent. For example, even if the accuracy of the Eureka gage was within 1 percent, for January the flow could be between 87.66 CFS and 89.44 CFS. Both the Department's and the Applicant's estimation of volume techniques would fall within that range. (Department knowledge and Hearing Examiner calculations)

12. This Hearing Examiner finds that the Department's calculation of monthly volumes at USGS gage No. 12301300 are reasonable and this Hearing Examiner will not fault the Department for rounding as cited in DNRC Form 615. Furthermore, Applicant's contention that "DNRC did not show their calculation method to determine the volumes in their analysis thus reiteration of their technique is not possible" is without merit, especially in light of Applicant's possession of Department's Form 615 "Water Conversion Table" found in Siemens @ B pp. 41.

13. The Montana Department of Fish, Wildlife and Parks (MFWP) hold instream flow water rights on the Tobacco River. These instream flow rights represent the majority of water rights on the Tobacco River. Those rights are described as follows:

<b>Table 4 (TR2) FWP Tobacco River Water Rights</b>			
WR Number	Period of Diversion*	Flow Rate (cfs)	Volume (AF)
76D 122348 00	04/16 to 04/30	171	5,086
76D 122351 00	05/01 to 05/15	409	12,166
76D 122370 00	05/16 to 05/31	692	21,956
76D 122346 00	06/01 to 06/15	703	19,517
76D 122349 00	06/01 to 06/15**	1,263	2,505
76D 122350 00	06/16 to 06/30	433	12,880
76D 122345 00	07/01 to 07/15	282	8,388
76D 122347 00	07/16 to 04/15	100	54,334

\*Periods of diversion are based on the period of diversion identified in the supporting documentation in the claim file. The water right general abstracts contain different data.

\*\*76D 122349-00 is claimed as a flow rate that is to be maintained for a one-day period during the period of use

(DNRC Technical Report)

14. The Department identified all existing surface water legal demands from USGS station No. 12301300 Tobacco River near Eureka to the inlet of Lake Koccanusa, including the MFWP's instream flow rights and subtracted those legal demands from the median of the mean

monthly flows and volumes for the USGS gage from Table 3, above. The result is represented in the following tables:

**Table 5 (TR4): Physically Available Water (median of monthly mean flows) USGS gage 12301300 compared with existing legal demands on the Tobacco River from USGS gage 12301300 to the confluence with the Kootenai River (Lake Kootcanusa):**

Month	Water Physically Available (CFS)	FWP Instream Flow Rights (CFS)*	Existing Legal Demands (CFS)	Total Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)
January	88.55	100	0.07	100.07	-11.52
February	96.65	100	0.07	100.07	-3.42
March	126.6	100	0.07	100.07	26.53
April*	407.6	171	0.07	171.07	236.53
May*	748.25	692	0.07	692.07	56.18
June*	710.25	1263	10.07	1,273.07	-562.82
July*	289.05	282	10.07	292.07	-3.02
August	115.15	100	10.07	110.07	5.08
September	105.9	100	6.07	106.07	-0.17
October	101.75	100	0.07	100.07	1.68
November	107.7	100	0.07	100.04	7.63
December	95.6	100	0.07	100.07	-4.47

\*April, May, June and July were assigned the higher of the two flow rates occurring in that month

**Table 6 (TR5): Physically Available Water (median of monthly mean volumes) USGS gage 12301300 compared with existing legal demands on the Tobacco River from USGS gage 12301300 to the confluence with the Kootenai River (Lake Kootcanusa):**

Month	Water Physically Available (AF)	FWP Instream Flow Rights (AF)	Existing Legal Demands (AF)	Total Legal Demands (AF)	Physically Available Water minus Legal Demands (AF)
January	5,435.20	6,037.0	4.3	6,041.3	-606.1
February	5,358.28	6,037.0	3.9	6,040.9	-682.6
March	7,770.71	6,037.0	4.3	6,041.3	1,729.4
April*	24,211.44	8,105.0	4.2	8,109.2	16,102.3
May*	45,927.59	34,122.0	4.3	34,126.3	11,801.3
June*	42,188.85	34,902	1,549.2	36,451.2	5,737.7
July*	17,741.89	11,407.0	1,549.3	12,956.3	4,785.6
August	7,067.91	6,037.0	1,549.3	7,586.3	-518.4

Month	Water Physically Available (AF)	FWP Instream Flow Rights (AF)	Existing Legal Demands (AF)	Total Legal Demands (AF)	Physically Available Water minus Legal Demands (AF)
September	6,290.46	6,037.0	854.2	6,891.2	-600.7
October	6,245.42	6,037.0	4.3	6,041.3	204.1
November	6,397.38	6,037.0	4.2	6,041.2	356.2
December	5,867.93	6,037.0	4.3	6,041.3	-173.4

\*FWP instream water right volumes are cumulative; volumes for different periods within the same month were summed.

As can be seen there is no water flow legally available in January, February, June, July, September and December and no water volume legally available in January, February, August, September, and December. (DNRC Technical Report)

15. Regarding existing legal demands, Applicant maintains that there are only three water rights on the Tobacco River between the USGS gage and Lake Koocanusa. The record discloses that the Department found four existing legal demands on the Tobacco River (in addition to the DFWP instream flow rights) between the gage and Lake Koocanusa (two for stock water and two for irrigation). Applicant argues that they found only three rights in the identified reach and conducts their own analysis of the legal demands represented by those (three) rights. The record is clear that the Applicant’s analysis has not considered all of the legal demands on the Tobacco River between the gage and Lake Koocanusa. Applicant’s estimates of the flows and volumes (of the three rights they identified), while interesting, are unavailing. Even one substituted the Applicant’s figures into the appropriate columns of Tables 5 and 6, the flows and volumes will still exceed the amounts legally available. (File Technical Report; Siemens @ B pp. 16 – 20)

16. Applicant properly asserts that the Department did not consider the input of flows from Indian Creek which enters the Tobacco River approximately 0.25 miles downstream from the USGS gage. Applicant applied the Department approved methodology (Parrett-Cartier) for estimating stream flows from ungaged streams on Indian Creek. Applicant presents a Table which shows the results of the methodology as “Median Monthly Discharge (cfs)” and “Volume (AF/month).” Unfortunately for Applicant, a comparison of their table with the legal availability determined in Tables 5 and 6, above, still show that even with the input from Indian Creek,

water is not legally available in the Tobacco River in two months. For example, the Applicant estimates an input of 6.96 cfs and 427.7 AF in January due to Indian Creek while Tables 5 and 6 show deficits of 11.52 cfs and 606.1 AF. Likewise, for February Applicant calculates input of 329.2 AF while Table 6 shows a deficit of 682.6 AF. Finally, Applicant’s own estimates of input due to Indian Creek are undermined by their admission the “[a] more detailed analysis of the proportion in Indian Creek flows would need to be evaluated to estimate the direct contributions to the Tobacco River.” (Siemens @ B pp. 23 – 25)

17. Regarding legal availability of surface water in the Tobacco River as related to the DFWP instream flows, applicant asserts that the DFWP instream flows are simply wrong. Applicant attempts to show that what really should have been granted to DFWP is less than what actually was granted. Applicant also attempts to show that the methodology for determining the instream flow was flawed. These arguments are simply a collateral attack on the instream flow and should have been presented and argued at the time the instream flow was granted. The instant proceeding is the wrong forum in which to bring these issues and this Hearing Examiner has no jurisdiction to consider or rule on them. (Siemens @ 20, 26, 27; Pre-filed testimony of Fisher)

**NET DEPLETIONS/ADVERSE EFFECT (Tobacco River)**

**FINDINGS OF FACT**

18. Monthly depletions to surface water due to groundwater withdrawal were modeled using a transient superposition model in MODFLOW 2000. The assumptions used are similar to those of analytical models the Department typically uses for calculating depletion with the exception that depletion of multiple surface waters and the influence of irregular boundary shapes can be modeled. The results are presented in Table 2 of the Revised Depletion Report:

**Table 7 (PD5): Monthly Depletions to Surface Water Sources**

<b>Month</b>	<b>Total Consumption (AF)</b>	<b>Tobacco River Depletion (AF)</b>	<b>Tobacco River Depletion (GPM)</b>	<b>Lake Koocanusa Depletion (AF)</b>	<b>Lake Koocanusa Depletion (GPM)</b>
January	0.56	0.45	3.25	0.12	0.87
February	0.51	0.40	3.25	0.11	0.87
March	0.56	0.45	3.25	0.12	0.87
April	0.55	0.43	3.25	0.12	0.87

Month	Total Consumption (AF)	Tobacco River Depletion (AF)	Tobacco River Depletion (GPM)	Lake Koocanusa Depletion (AF)	Lake Koocanusa Depletion (GPM)
May	0.56	0.45	3.25	0.12	0.87
June	0.55	0.43	3.25	0.12	0.87
July	0.56	0.45	3.25	0.12	0.87
August	0.56	0.45	3.25	0.12	0.87
September	0.55	0.43	3.25	0.12	0.87
October	0.56	0.45	3.25	0.12	0.87
November	0.55	0.43	3.25	0.12	0.87
December	0.56	0.45	3.25	0.12	0.87
<b>TOTAL</b>	<b>6.65</b>	<b>5.25</b>		<b>1.40</b>	

19. Applicant argues that there is no connection between the Applicant’s proposed source aquifer and the Tobacco River and that the model used by the Department was too simplistic compared with the complex geology of the Tobacco Plains. Applicant exerts considerable effort in explaining the weaknesses in the Department’s modeling effort such as explaining that the Tobacco plains consist of complex geology which is unsuitable for a homogeneous model, the physical geology prevents groundwater from reaching the Tobacco River, etc. However, the Applicant does not provide an alternative model to demonstrate these weaknesses or show that there is no groundwater connection to the Tobacco River. (Pre-filed testimony of Weight; Pre-filed testimony of Overton)

20. Applicant’s own testimony and exhibits belie the assertion that there is no hydraulic connection between groundwater and the Tobacco River. “The Tobacco River has *limited* groundwater communication with the Tobacco Plains near Eureka” and “. . . the Tobacco River is bounded by rock of lower permeability that would *inhibit* stream capture.” (emphases provided). (Siemens @ B pp. 9). Those statements do not say that there is *no* groundwater communication or that rock of lower permeability would *prevent* stream capture.

21. Applicant’s own Exhibit 1 which depicts groundwater flow lines and areas of relatively impermeable rocks clearly show groundwater flow lines going to the Tobacco River south of the Indian Springs development. The same map also shows that there are small pockets of relatively impermeable rock between the Indian Springs development and the Tobacco River but they are not continuous. Interestingly, the map shows a continuous band of relatively impermeable rock running along the *south* bank of the Tobacco River. All of the potential

impacts from the proposed wells would be propagated to the *north* bank of the Tobacco River which is the area of more complex geology. (Exhibit 1)

22. Applicant provides Exhibits 3 and 4 which are copies of two Applications for Beneficial Use in the Tobacco plains which were granted and did not identify a groundwater connection with the Tobacco River. While both of these granted applications identify a groundwater connection with the Kootenai River (Lake Koocanusa) but not the Tobacco River, neither application was subject to the now more rigorous analysis that the Department currently utilizes to evaluate hydraulic connectivity of surface water and groundwater. Applicant presents these exhibits as proof of no groundwater connection with the Tobacco River. This Hearing Examiner notes that the permit granted in Exhibit 4 is for a development more than three miles west and approximately one mile north of the Indian Springs development placing it much closer to Lake Koocanusa. As was stated in the Revised Depletion Report “[t]he information and evaluations [in the current application] by DNRC addressed the issue of depletion to the Tobacco River because the wells in this application are approximately 4,500 closer to the Tobacco River compared to the wells in [Exhibit 3]. Given the location of the new wells, the Tobacco River is the closest surface water body . . . .” For these reasons, the current application is evaluated on a record that includes additional facts not considered in prior applications.” This Hearing Examiner finds that Exhibits 3 and 4 do not provide proof on no groundwater connection with the Tobacco River. (Exhibits 3, 4; Revised Depletion Report)

23. The Department recognized the complexity of the geology of the Tobacco Plains and states. “. . . given the nature of the glacial stratigraphy, one could infer that the shallow and intermediate aquifers are just sequences of sandy/gravelly lenses set in glacial clay and lake deposits and *that they act as a single aquifer*” (emphasis provided) and that “[f]or the purpose of modeling stream depletion, the shallow and intermediate aquifer will be modeled as one continuous aquifer that discharges to both Lake Koocanusa and the Tobacco River.” (Revised Depletion Report) I find that the model used by the Department to calculate depletions to surface water was appropriate and establishes that there is a hydraulic connection between the source groundwater and the Tobacco River that will result in year round depletions to the Tobacco River in the amounts set forth in Table 7.

24. The Applicant did not provide a mitigation/aquifer recharge plan and did not prove there was no prestream capture. The Applicant does have a plan for the exercise of the permit that demonstrates that the Applicant’s use of water can be controlled so the groundwater water

rights of prior appropriators will be satisfied. Should call be made, the Applicant proposes to turn off the well pumps and haul water for domestic use. This plan does not prevent surface water rights of prior appropriators on the Tobacco River from being adversely effected because surface water depletions will continue after the well is shut off.

### **CONCLUSIONS OF LAW (Legal Availability and Adverse Effect)**

25. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. However, as previously explained, the show cause proceeding in this matter was limited to the legal availability and adverse effect criteria which provide in relevant part: § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) *water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:*

(A) *identification of physical water availability;*

(B) *identification of existing legal demands 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, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water;*

(b) *the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), 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;*

§ 85-2-311(1)(a) and (b), MCA (emphasis provided)

26. To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the

U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. DNRC (Bostwick I), 2009 MT 181, ¶¶21, 351 Mont. 26, 208 P.3d 868. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id.

27. With regard to the burden of proof, the Montana Supreme Court further recognized:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier, 278 Mont. 50, 60-61, 933 P.2d 1073, 1079, 1080 (1996)(superseded by legislation on another issue; See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011).

The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey, 211 Mont. 91, 97-98, 685 P.2d 336, 340; see also Mont. Const. art. IX §3(1).

28. It is well settled that a ground water appropriation can deplete hydrologically connected surface water and impact surface water rights through induced infiltration and/or pre-stream capture. E.g. Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224; Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Granite Ditch Co. v. Anderson, 204 Mont. 10, 662 P.2d 1312(1983). E.g. Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224; Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Granite Ditch Co. v. Anderson, 204 Mont. 10, 662 P.2d 1312(1983). Where a proposed groundwater appropriation will deplete surface water, an applicant must analyze legal availability and adverse effect for both ground water and surface water even if the hydrologic connection is attenuated and the depletion small. E.g. Bostwick v. DNRC (Bostwick II) 2013 MT 48, ¶¶ 32-41, 369 Mont.

150, 296 P.3d 1154; Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 4-5 (2011); §§ 36.12.1705(2) and 1706(2), ARM, even if the hydrologic connection is attenuated and the depletion small. E.g. Bostwick v. DNRC (Bostwick II) 2013 MT 48, ¶¶ 32-41, 369 Mont. 150, 296 P.3d 1154; Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 4-5 (2011); §§ 36.12.1705(2) and 1706(2), ARM.

29. An applicant must prove legal availability of amount of depletion to hydrologically connected surface water throughout the period of diversion either by establishing surface water is legally available in the amount of the depletion through comparative analysis of the legal demands and physical availability of water in the surface water source; or, through a mitigation/aquifer recharge plan to offset depletions to the surface water source. §85-2-311(1)(a), MCA; §§ 36.12.1704 through 1706; Eg. Bostwick v. DNRC (Bostwick II) 2013 MT 48, ¶¶ 32-36, 369 Mont. 150, 296 P.3d 1154; Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994)(affirming DNRC denial of permit application explaining that ground water tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required)(*affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied) *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the

proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated).

30. Analysis of 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 rights of all prior appropriators will be satisfied. See *Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick I*, at ¶ 21; *Sitz Ranch, Order Affirming DNRC Decision*, Pg. 4. In analyzing adverse effect to other appropriators, it is appropriate to rely upon the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 816 P.2d 1054 (1991). Similar to proof of legal availability, a mitigation plan may be used to prove lack of adverse effect. § 36.12.1706(2), ARM.

31. The model used by the DNRC in the PDD establishes that the proposed groundwater withdrawals will deplete surface water in the Tobacco River at a constant rate of 3.25 gpm throughout the year. Although the Applicant criticized the findings and conclusions reached in the PDD, it did not provide reliable model as an alternate to that used by the DNRC. The assertion that the source aquifer is not hydrologically connected to the Tobacco River without scientific modeling fails to meet the Applicant's burden. *Bostwick II*, at ¶ 36. Likewise, the assertion that prior appropriators will not be adversely affected by depletions without an adequate plan to prevent adverse effect does not sustain an applicant's burden of proof. *Bostwick II*, at ¶¶ 37 – 41; *Wesmont Developers, Memorandum and Order*, at Pg. 11; *Sitz Ranch, Order Affirming DNRC Decision*, at Pgs. 3-4(Court rejected applicant's argument that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source.").

32. The evidence establishes that the proposed appropriation will cause year round depletions at a constant rate to the Tobacco River. The legal demands exceed the amount of water physically available in the Tobacco River during the months of January, February, June, July, September, and December. The Applicant did not supply a mitigation/aquifer recharge plan to offset surface water depletions caused by its proposed appropriation during those periods of time when water is not legally available. Accordingly, this Hearing Examiner concludes that the Applicant has not proven by a preponderance of evidence that surface water can reasonably be considered legally available in the Tobacco River during the period in which the Applicant seeks to appropriate, in the amount consumed.

33. Furthermore, the evidence establishes that the depletions to the over-appropriated Tobacco River have the potential to adversely affect senior water appropriators such as MFWP. The Applicant did not provide any plan, mitigation or otherwise, to ensure that the Applicant's proposed use would be controlled in a manner ensuring that water rights of prior appropriators would be satisfied. Accordingly, this Hearing Examiner concludes that the Applicant has not proven by a preponderance of evidence the water rights of prior appropriators on the Tobacco River will not be adversely affected.

### **CONCLUSION**

For the reasons set forth above and those found in the Preliminary Determination to Deny dated April 8, 2016, Application for Beneficial Water Use Permit No. 76D-30071039 by Indian Springs Ranch Water & Sewer, LLC is **DENIED**.

### **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, Mont. Code Ann.) 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 district 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 district court.

Dated this 2<sup>nd</sup> day of September 2016.

/Original signed by David A Vogler/

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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 2<sup>nd</sup> day of September 2016 by first class United States mail.

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