

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41S 30066542 BY EXPRESS PIPELINE, LLC</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On June 13, 2013, Express Pipeline LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 41S 30066542 to the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 110 GPM up to 18.12 AC-FT of water for Industrial and Fire Protection Use. The Department published receipt of the Application on its website. The Application included a request to the Department to issue an Interim Permit to Appropriate Water, and on August 27, 2013, an Interim Permit was issued. The Application was deemed correct and complete on August 8, 2014. Applicant then requested a modification to the Application on October 13, 2014 (via email), and per administrative rule the priority date was reset to 11:36 am on that date. The Department sent a second deficiency letter on April 9, 2015, and upon the Applicant's response the modified Application was deemed correct and complete on June 1, 2015. An Environmental Assessment for this Application was completed on September 10, 2015.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Aerial photos, maps and design plans of the project

Information Received after Application Filed

- Multiple email communications between the Applicant’s consultant and the Department clarifying various issues

Information within the Department’s Possession/Knowledge

- File for Provisional Permit No. 41S 113639-00
- File for Provisional Permit No. 41S 30065060, by Bos Terra, LP
- Aquifer Test Report, Attila Fohnagy, DNRC Groundwater Hydrologist, July 25, 2013
- Depletion Report, Russell Levens, DNRC Groundwater Hydrologist, August 1, 2013
- Water right records, DNRC database
- USGS Water-Resources Investigations Report: 89-4082, Estimates of Monthly Streamflow Characteristics at Selected Sites in the Upper Missouri River Basin, Montana, Base Period Water Years 1937-86. For full report see [http://dnrc.mt.gov/divisions/water/water-rights/docs/new-appropriations/water-availability/c-05\\_upper\\_missouri.pdf](http://dnrc.mt.gov/divisions/water/water-rights/docs/new-appropriations/water-availability/c-05_upper_missouri.pdf). Pertinent portions of the report are contained in the file.
- Water Conservation and Salvage Report for Montana. U.S. Dept. of Agriculture, Soil Conservation Service. 1978. See file for pertinent portions of the report.
- Department Groundwater Hydrologist James Heffner’s method of accounting for return flow allowance.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

**PROPOSED APPROPRIATION**

**FINDINGS OF FACT**

1. The applicant proposes to divert groundwater from an existing 2003-foot deep well completed into the Third Cat Creek Member of the Kootenai Formation (identified in the remainder of this Order simply as the Kootenai Formation). The well was previously permitted by the Department in 2001 (Provisional Permit No. 41S 113639), with a flow rate of 120 gallons per minute (GPM) and a volume of 17.0 acre-feet (AF), for industrial purposes. On January 27,

2002 the Permittee submitted a Project Completion Notice (PCN) to the Department affirming the completion of the well and application of water to beneficial use. The amount of water put to use at the time of the PCN filing was less than the permitted amount. Per the information submitted with the PCN materials, the amount of water verified/certified by the Department to be beneficially used for Provisional Permit No. 41S 113639 was 88 GPM up to 15.0 AF.

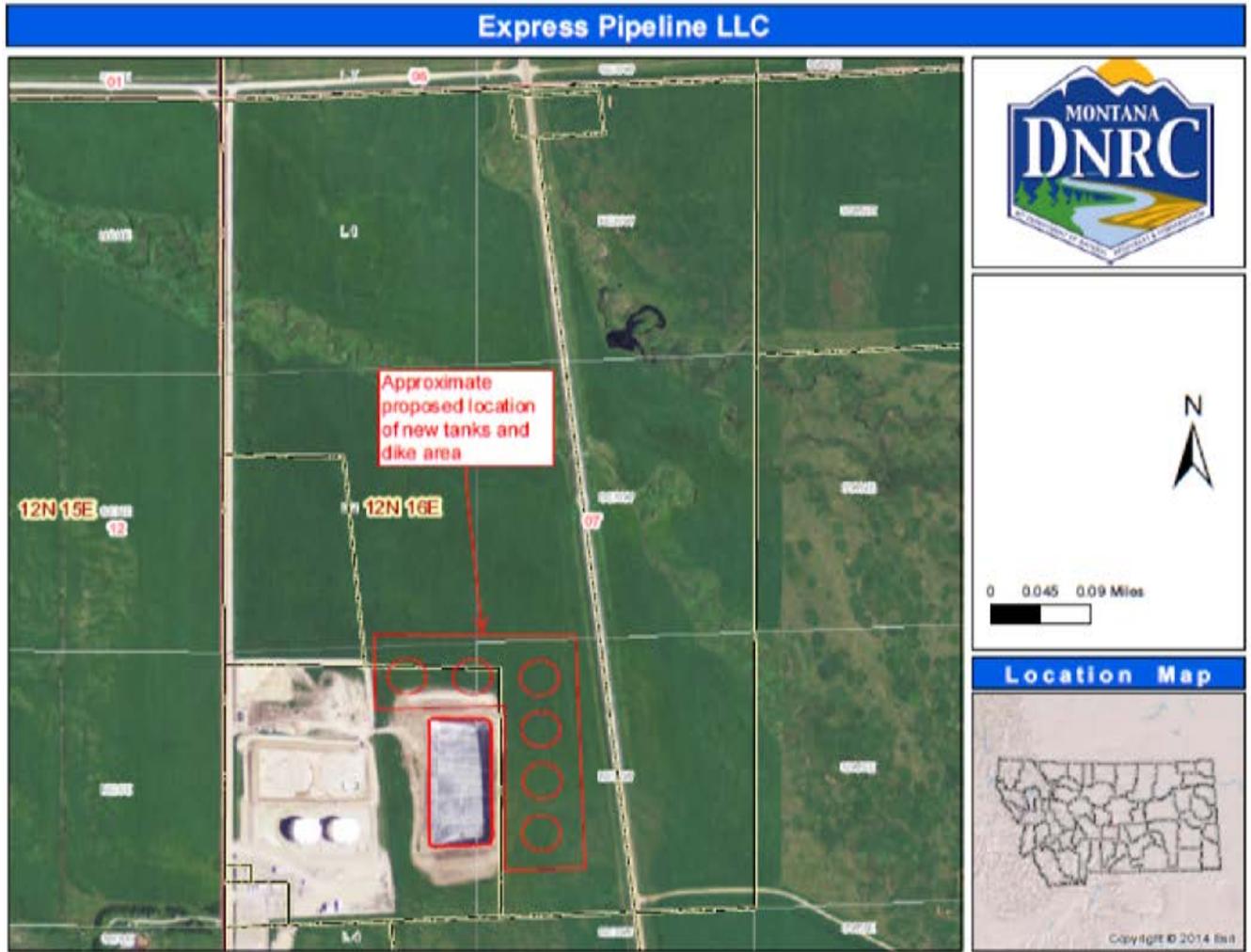
Provisional Permit No. 41S 113639 is, therefore, limited to an appropriation of 88 GPM up to 15.0 AF. File No. 41S 113639.

2. The proposed appropriation will be used in combination with the existing Permit. The appropriation is to increase the flow rate by 22 GPM, from the existing 88 GPM to 110 GPM, and increase the volume by an additional 18.1 AF, for industrial and fire protection purposes. Water will be appropriated between January 1 and December 31 annually. The industrial use is more specifically described as hydrostatic testing of oil storage tanks (testing will occur prior to filling the tanks with oil) and general water usage around the industrial site. A proposed 37.3 AF storage reservoir will be added as well. Application.

3. A series of oil tanks will be erected at the project location, and each one will be hydrostatically tested. Each tank will have the capacity to store 150,000 barrels or about 19.3 AF. After each tank is filled, the water will be recycled to test the next tank. Since the existing appropriation is for 15 AF, the requested volume in this application of 18.1 AF equates to the balance of water needed to sustain the filling of one storage tank (19.3 AF), plus the annual volume of water estimated to evaporate from the pond surface (13.8 AF). Application.

4. The well, or point of diversion, is located in the SWNWSW Section 7, T12N, R16E, Fergus County. The place of use for both purposes is in the W2 Section 7, T12N, R16E. The general location of the project is about 4 miles north of Garneill, MT. Application.

5. Water diverted for the project will be consumed and not returned to the aquifer or a hydraulically-connected surface water source. The total estimated consumption for the proposed permit is equal to the annual appropriation, or 18.1 AF. DNRC Depletion Report



**Express Pipeline Expansion**

**§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

6. The Montana Constitution expressly recognizes in relevant part that:
  - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the

state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

7. 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. Section § 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;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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. Montana Dept. of

Natural Resources and Conservation, 2009 MT 181, ¶ 21. 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. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

8. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

9. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

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.

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., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

10. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

11. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **Physical Availability**

#### **FINDINGS OF FACT**

12. The source is groundwater, and the method of appropriation is by a well drilled to a depth of 2003 feet. The well is an existing development that has been appropriating water since at least 2002 at 88 GPM up to 15.0 AF annually. The proposal in this application is to increase the flow

rate by 22 GPM, from an existing 88 GPM to 110 GPM, and increase the volume by an additional 18.1 AF. Application; File for Provisional Permit No. 41S 113639.

13. A limited aquifer test was conducted in 2002 during the first permitting process for the well subject to this application. The well was pump tested at 120 GPM for a period of 8 hours. While that particular pump test is informative, it was not conducted in sufficient length of time to meet current well testing standards and confirm the aquifer properties for purposes of the proposed appropriation. ARM 36.12.121.

14. Applicant submitted a variance request to use information/data from nearby groundwater wells and their drawdown and yield tests, in lieu of following the Department's administrative rules for aquifer testing. The Department granted the request. File; ARM 36.12.121.

15. Three existing groundwater wells, located within the Judith River basin and appropriating water from the Kootenai Formation, were analyzed for aquifer test data. The Department selected data from one of the wells (Bos Terra well), located 12.7 miles from the proposed production well, as being most representative of the aquifer properties in the vicinity of applicant's proposed well. The aquifer properties were used to analyze drawdown at the well and to calculate groundwater flux through the zone-of-influence. The groundwater flux, or the amount of water calculated to be physically available to the proposed production well, was determined to be 414.1 acre feet per year. DNRC Aquifer Test Report.

16. The Department's Aquifer Test Report concludes the evidence shows the proposed well is capable of producing the proposed appropriation. Groundwater flux through the zone exceeds the proposed volume of water. There is sufficient water in the aquifer to supply 110 GPM up to 18.12 AF. DNRC Aquifer Test Report.

#### CONCLUSIONS OF LAW

17. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

18. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant

produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

19. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. Finding of Fact No. 16.

### **Legal Availability:**

#### **FINDINGS OF FACT**

##### **Groundwater**

20. The Department calculated the zone-of-influence of the pumping well to extend 20,000 feet from the well. Analysis indicates this is the areal extent of the Third Cat Creek Member of the Kootenai Formation in the Buffalo, Montana area. According to the Department's database, there are 4 groundwater rights that withdraw water from the aquifer within the zone-of-influence. The total volume of water associated with the 4 rights is 83.9 AF. By comparison, the estimated flux through the zone of influence, or volume of water physically available annually, is 414.1 AF. Supply exceeds demands by 330 AF ( $414.1 - 83.9 = 330.2$  AF). The Department finds that groundwater is legally available in the amount proposed. DNRC Aquifer Test Report.

##### **Surface Water**

21. Discharge points (springs) for the Kootenai Formation are often found at outcrops along the flanks of the mountains with flows of up to 25 GPM, and two larger springs (300-400 GPM) are known to exist a distant 50 miles northwest of the Applicant's well. Additionally, upward leakage from the Kootenai Formation through the Colorado Formation likely discharges as concentrated flows beneath terrace gravels at unknown locations and/or as diffuse seepage throughout the Judith Basin. According to Department Groundwater Hydrologist Attila Fohnagy, the proposed groundwater appropriation will deplete surface water by reducing discharge directly from the Kootenai Formation, or by reducing seepage upward through the Colorado. Department Depletion Report. There are no specific studies to draw conclusions on which, if

any, surface water sources in the immediate area are hydraulically connected to Kootenai Formation groundwater, or may be depleted by appropriations from the Kootenai. Rather, the evidence indicates that effects will be spread out over an expansive geographic region, somewhere in the Judith Basin watershed, and that the surface waters of the Missouri River and lower Judith River will be depleted. File for Permit No. 41S 30065060; Department Depletion Report.

22. Roughly mid-way between the proposed project location and the confluence of the Judith River and Missouri River, Warm Spring Creek flows into the Judith River. For purposes of analyzing surface water availability and depletion effects, the Department finds the proposed appropriation will deplete the waters of the lower Judith River below the confluence of Warm Spring Creek. Since the proposed use is year-round, depletions to the affected reach will result in constant year-round depletions equal to the amount of water consumed by the project. The Department has estimated consumption, and therefore eventual depletion to surface water, to be 18.1 AF per year, at an average rate of 11.2 GPM (the flow rate was determined by the total consumed volume normalized over the course of a year). File for Permit No. 41S 30065060; DNRC Depletion Report.

23. A U.S. Geological Service (USGS) gaging station is located on the Judith River near its mouth, greater than 40 stream miles below the confluence of Warm Spring Creek. The station has been in existence and recorded stream flows since 2000. In its Technical Report, crafted in preparation for this Preliminary Determination, the Department produced the following Table 1 to compare legal and physical demands. Table 1 below reflects the median of the mean monthly stream flows (Physical Availability), Department records of water rights/reservations between Warm Spring Creek and the mouth of the Judith River (Existing Legal Demands), and a comparison of stream flows to legal demands (Physical-Legal). Technical Report.

Table 1

<b>Month</b>	<b>*Physical Availability (CFS)</b>	<b>Existing Legal Demands (CFS)</b>	<b>**Physical – Legal (CFS)</b>
January	251.2	160	91.2

February	257.1	160	97.1
March	414.9	160	254.9
April	380.2	220.4	159.8
May	601.7	331.7	270
June	510.6	331.7	178.9
July	244.9	331.7	-86.8
August	214.5	331.7	-117.2
September	224.9	330.0	-105.1
October	281.7	218.1	63.6
November	263.0	167.4	95.6
December	235.2	160	75.2

\*USGS Gage 06114700 - Median of the mean monthly streamflow.

\*\*Comparison of median of the mean monthly streamflow to existing legal demands. A **negative value** means the claimed legal demands exceed streamflows.

The Existing Legal Demands column in Table 1 reflects the cumulative total of water rights in the 40-mile reach of river (Judith River) between Warm Spring Creek and the Missouri River.

24. In a previous change decision by the Department for a groundwater well appropriating water from the same source aquifer, and located only 12 miles from the proposed well, further analysis of legal and physical water availability was conducted using a U.S. Geological Investigation report. Provisional Permit No. 41S 30065060, by Bos Terra, LP; *USGS Water-Resources Investigations Report: 89-4082, Estimates of Monthly Streamflow Characteristics at Selected Sites in the Upper Missouri River Basin, Montana, Base Period Water Years 1937-86* (USGS Report). The USGS Report provided the Department the opportunity to estimate stream flows in the upper reaches of the potentially-affected segment, using a greater range of information. In the Bos Terra proceeding, the Department analyzed physical and legal demands by river segment, rather than the entire river reach to the Missouri River. That is, the analysis included a breakdown of legal availability in two segments: 1) from the confluence of Warm Spring Creek with the Judith River to the USGS gage on the Judith River; and 2) from the USGS

gage on the Judith River to the Missouri River. The analysis conducted in the Bos Terra decision is relevant to this change proceeding and follows in Finding of Fact 25.

25. The USGS Report was used by the Department to identify median stream flows in the Judith River below the confluence of Warm Spring Creek, by accounting for the combined contribution of flows from Big Spring Creek and Warm Spring Creek, the two principle tributaries that contribute to the river in the region. James Heffner, Department Groundwater Hydrologist, utilized the data to create a comparison of physical water availability to legal demands on the Judith River by river segment. The first segment was the reach between Warm Spring Creek and the Judith River USGS gage, and the second segment was the reach between the USGS gage to the Missouri River. Physical availability of the first/upper segment was estimated using the median flow statistics identified in the USGS Report for Big Spring Creek and Warm Spring Creek. Additionally, minimal flow contributions of 10 CFS from the Judith River above the two tributary sources were added to the median flow estimations, based on information contained in Department records for the last permit authorized on the Judith River in the general area (*December 28, 1999 Letter from Montana Department of Fish Wildlife and Parks*, Permit No. 41S 108524 by James Guslander, issued January, 2000). No other tributary inflows were included in the estimations because Big Spring Creek and Warm Spring Creek are the most significant tributaries that contribute to flows in the lower Judith River, and the amount of other tributary contributions are unknown to the Department. Water right diversions below the Warm Spring Creek reporting site (Warm Springs Creek above Meadow Creek) to its mouth were not subtracted from the estimated flows (100 to 110 cfs), because flows in the USGS Report agree with information submitted by DFWP in the 2000 Guslander Permit proceeding (in that proceeding, DFWP, as an objector to the application, noted that USGS data indicate flows in Warm Springs Creek are “*between about 100 to 150+ cfs in late summer*”). Department personnel from the Lewistown Regional Office have observed the Judith River for many years, and agree with this assessment. Thus, an additional 10 CFS was added year-round to the estimated flow contributions of Big Spring Creek and Warm Spring Creek. Finally, water right diversions of record on the Judith River between Big Spring Creek and Warm Spring Creek were

subtracted from the estimated inflows. The following Tables reflect physical availability, legal availability (per water right records) and a comparison of the two criteria. File.

Table 2

<b>Physical Availability of Judith River @ Warm Spring Creek Confluence</b>												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
<b>Big Spring Creek – Q50 (median flows)</b>	89	95	98	230	690	460	260	180	150	110	110	96
<b>Warm Spring Creek – Q50 (median flows)</b>	110	100	110	110	100	110	110	110	110	110	110	100
<b>Flow of Judith River above Big Spring</b>	10	10	10	10	10	10	10	10	10	10	10	10
<b>Legal demands Big Spring Creek to Warm Spring Creek</b>				-11.76	-27.13	-27.13	-27.13	-27.13	-23.79	-11.76	-3.03	
<b>Physical Availability@ WarmSprings Creek Confluence (CFS)</b>	209.0	205.0	218.0	338.2	772.9	552.9	352.9	272.9	246.2	238.2	227.0	206.0
<b>Physical Availability@ WarmSprings Creek Confluence (Acre-Feet)</b>	12828	11771	13381	20091	47439	32840	21659	16749	14625	14623	13482	12644

Table 2 reflects that between 205 CFS and 773 CFS is physically available on a median monthly basis throughout the year below the Warm Springs Creek confluence in the Judith River, which is considered to be the potentially-affected reach for the proposed application. The flow exceeds DFWP’s instream flow reservation of 160 CFS at that point in all months on a

median basis. Table 2 also reflects the volume of water physically available at the upgradient point.

26. The current USGS gaging station is located more than 40 stream miles below the confluence of Warm Spring Creek. The station has been in existence and recorded stream flows since 2000. The tables below reflect physical availability, legal demands, and legal availability in both flow rate and volume in the reach of Judith River between Warm Spring Creek and the USGS gage, and between the USGS gage and the Missouri River.

Tables 3A and 3B

<b>Physical/Legal Availability: Warm Spring Creek to USGS Gage- Flow Rate and Volume</b>												
	Jan	Feb	Mar	Apr	May	Jun	Jul	*Aug	*Sep	Oct	Nov	Dec
<b>Flow Rate Physically Available</b>	209.0	205.0	218.0	338.2	772.9	552.9	352.9	272.9	246.2	238.2	227.0	206.0
<b>Existing Legal Demands (CFS)</b>	160.0	160.0	160.0	219.2	289.2	289.2	289.2	289.2	287.4	217.0	166.3	160.0
<b>Flow Rate Legally Available</b>	49.0	45.0	58.0	119.0	483.7	263.7	63.7	-16.3	-41.2	21.2	60.7	46.0
<b>Volume Physically Available</b>	12828	11771	13381	20091	47439	32840	21659	16749	14625	14623	13482	12644
<b>Existing Legal Demands (AF)</b>	9842	9842	9842	10701	12497	12497	12497	12497	12456	10666	9921	9842
<b>Volume Legally Available</b>	2987	1929	3539	9391	34941	20343	9162	4251	2169	3958	3562	2803

<b>Physical/Legal Availability: Judith River from USGS Gage to Missouri River in Flow Rate And Volume (Acre-Feet)</b>												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
<b>Flow Rate Physically Available</b>	251.15	257.1	414.9	380.2	601.7	510.6	244.9	214.5	224.9	281.7	263	235.2

<b>Existing Legal Demands (CFS)</b>	160.0	160.0	160.0	160.0	201.4	201.4	201.4	201.4	201.4	160.0	160.0	160.0
<b>Flow Rate Legally Available</b>	91.2	97.1	254.9	220.2	400.3	309.2	43.5	13.1	23.5	121.7	103.0	75.2
<b>Volume Physically Available</b>	15416	14763	25467	22584	36932	30330	15032	13166	13359	17291	15622	14437
<b>Existing Legal Demands (AF)</b>	9838	9838	9838	9838	10541	10541	10541	10541	10534	9838	9838	9838
<b>Volume Legally Available</b>	5577	4925	15628	12746	26392	19789	4491	2626	2825	7453	5784	4598

The data indicate that during the period of August and September, legal demands exceed the physical water supply on a flow rate basis. In contrast to Table 1, reflected in Finding of Fact No. 23, Table 3A shows water is legally available in July, and the water deficit in August and September (flow rate) is much narrower. Water is shown to be legally available in volume in all months. File.

27. An important component of stream flows that is not reflected in a simple legal demand analysis (accounting of recorded legal demands without analysis of the final disposition of diverted water) is the amount of water that returns to a source after appropriation. The Department's records indicate flow rate by the amount of water diverted, not consumed. In most cases flood irrigation returns a portion of the water diverted to the source, thereby increasing stream flows. Analysis of irrigation methods and water rights on the Judith River below Warm Spring Creek reveals that many of the systems are flood irrigation systems. Consideration of return flows helps to reconcile legal demands with stream flows recorded by the USGS gage near

the mouth of the Judith River. James Heffner, Department Groundwater Hydrologist, developed a method of accounting for return flows from appropriated water. Mr. Heffner's results indicate that the physical water supply in the Judith River, in both flow rate and volume, above and below the USGS gage, exceed water right legal demands in all months.

Legal demands for irrigation Statements of Claim (pre-1973 water rights), as identified by the regional office, were adjusted by an allowance for return flow accretions to the river during the months that appropriations occurred. This return flow allowance, or credit was calculated for each individual water right, in part, based on information contained in a 1978 U.S. Department of Agriculture report on irrigation efficiencies in Montana, by county. Water Conservation and Salvage Report for Montana; U.S. Dept. of Agriculture, Soil Conservation Service, 1978. The allowance assumes that return flows accrete in a constant, year-round pattern, but is applied only during the period of diversion. The predicted results err on the side of protecting existing water users when determining if water is legally available, while providing an explanation for why the gauged records near the mouth of the Judith River reflect higher stream flows than what may be calculated in a simple legal demands analysis. A more detailed explanation of Heffner's return flows accounting method can be found in the file. Tables 4A-4D below show Heffner's results.

Table 4A Big Spring and Warm Spring as proxy for Judith River Upstream to current gage site on lower Judith River  
Median of the Mean - Monthly Flows (CFS) vs Legal Demands

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MMF (CFS)	209.0	205.0	218.0	338.2	772.9	552.9	352.9	272.9	246.2	238.2	227.0	206.0
Legal Demand (CFS)	160.0	160.0	160.0	193.1	239.2	239.2	239.2	239.2	238.0	191.1	163.5	160.0
Available (CFS)	49.0	45.0	58.0	145.2	533.7	313.7	113.7	33.7	8.2	47.1	63.5	46.0

Table 4B Big Spring and Warm Spring as proxy for Judith River Upstream to current gage site on lower Judith River  
River

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Days	31	29	31	30	31	30	31	31	30	31	30	31

MMVOL (AF)	12828	11771	13381	20091	47439	32840	21659	16749	14625	14623	13482	12644
Legal Demand (AF)	9842	9842	9842	10319	11505	11505	11505	11505	11478	9883	9883	9842
Available (AF)	2987	1930	3539	9773	35934	21335	10154	5244	3147	4740	3599	2803

Table 4C

USGS gage Judith River nr mouth, nr Winifred M

Median of the Mean - Monthly Flows (CFS) vs Legal Demands

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MMF (CFS)	251.15	257.1	414.9	380.2	601.7	510.6	244.9	214.5	224.9	281.7	263	235.2
Legal Demand (CFS)	160.0	160.0	160.0	160.0	187.6	187.6	187.6	187.6	187.6	160.0	160.0	160.0
Available (CFS)	91.2	97.1	254.9	220.2	414.1	323.0	57.3	26.9	37.3	121.7	103.0	75.2

Table 4D

USGS gage Judith River nr mouth, nr Winifred M

Median of the Mean - Monthly Volumes (AF) vs Legal Demands

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Days	31	29	31	30	31	30	31	31	30	31	30	31
MMVOL (AF)	15416	14763	25467	22584	36932	30330	15032	13166	13359	17291	15622	14437
Legal Demand (AF)	9838	9838	9838	9838	10306	10306	10306	10306	10302	9838	9838	9838
Available (AF)	5577	4925	15628	12746	26626	20023	4726	2860	3057	7453	5784	4598

28. The Department finds the method developed by its groundwater hydrologist of accounting for return flow accretions credible and reasonable. The analysis can be applied in this instance because DNRC staff are generally familiar with the irrigation practices along the reaches of river at issue. The analysis shows that surface water is reasonably legally available in all months of the year, throughout the potentially-impacted reach, on a median basis.

## CONCLUSIONS OF LAW

29. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(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.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

30. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

31. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the

effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *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); see also Robert and Marlene 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 Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *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.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *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 Application for Beneficial Water Use Permit No. 76H-*

30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

32. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *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 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, 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 for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *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); 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); 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 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; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

33. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

34. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

35. Applicant has proven by a preponderance of the evidence that 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. § 85-2-311(1)(a)(ii), MCA. (FOF Nos. 20, 28)

### **Adverse Effect**

#### **FINDINGS OF FACT**

36. Applicant’s proposed appropriation of groundwater from the Kootenai Formation is 110 gallons per minute (GPM) up to 18.12 acre-feet per year. Analysis by DNRC groundwater hydrologist Attila Fohnagy indicates there are 4 groundwater rights (groundwater wells) that

withdraw water from the Kootenai Formation within the zone-of-influence. The total volume of water associated with the 4 rights is 83.9 acre-feet. By comparison, the estimated flux through the zone-of-influence is 414.1 acre-feet, leaving a volume in excess of demand of 330 acre-feet. Fohnagy conducted analysis to estimate drawdown in the 4 wells due to pumping of the proposed production well over a five year period. That analysis showed drawdown in the 4 wells from 5.2-12.0 feet, but leaving greater than 1,200 feet of available water column in all wells.

Department Aquifer Test Report. The analysis shows that existing groundwater rights can be exercised after the implementation of the proposed project. The Department finds that the water rights of prior groundwater appropriators will not be adversely affected.

37. The source of water in this change proceeding is groundwater. Deeper groundwater in the Judith Basin, such as that found in the Kootenai Formation, is hydraulically connected to surface water in the lower reaches of the Judith River and farther downstream in the Missouri River. The proposed appropriation is hydraulically connected to these surface water sources. Stream Depletion Report. The Judith River is not legislatively or administratively closed to new consumptive uses, and although water shortages are common on the river above the confluence of Big Spring Creek, they are not below Big Spring Creek and Warm Spring Creek.

38. The calculated depletion rate to the Judith River is 11.2 GPM (year-round depletion). Depletion Report. The impacted reach of stream is the Judith River from the confluence of Warm Spring Creek to the Missouri River, an approximate 40-mile segment. In this reach of stream three types of water rights exist: stockwater, irrigation, and an instream flow water reservation for 160 CFS. The Judith River has been measured at its mouth since 2000, by a U.S. Geological Service gage, and a compilation of recorded flows can be found in FOF No. 23.

39. A comparison of legal demands to stream flows indicates that the physical water supply exceeds legal demands in the Judith River between the confluence of Warm Spring Creek and the Missouri River in all months of the year (on both a flow rate and volume basis). See Finding of Fact No. 27. USGS gaging records reflect the same result. The Department finds that the water rights and reservations of prior surface water appropriators will not be adversely affected.

## CONCLUSIONS OF LAW

40. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that 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. 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 right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.
41. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).
42. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.
43. In analyzing adverse effect to other appropriators, an applicant may use 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 (1991), 249 Mont. 425, 816 P.2d 1054.
44. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-

2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

45. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

46. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant's burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measurable," and that the depletion "won't change how things are administered on the source.").

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

47. The Applicant has proven by a preponderance of the evidence that 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. § 85-2-311(1)(b) , MCA. (FOF Nos. 36 and 39)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

48. Water will be appropriated by a groundwater well drilled to a depth of 2,003 feet. The well was completed to drilling industry standards in October, 2000, by Central Drilling, a licensed well driller in the State of Montana. The well is artesian and flowing at the surface, and has been used since its completion at a flow rate of 88 GPM up to 15 AF annually. The proposed appropriation is for an additional 22 GPM and 18.12 AF, bringing the combined appropriation to 110 GPM up to 33.12 AF. Application; File for Provisional Permit No. 41S 113639-00.

49. Applicant plans on installing a 7.5 horsepower pump, set at 350 feet below ground surface, to supplement the natural artesian flow of the well. The pump will facilitate an increase in flow rate to 110 GPM. The well will be used as necessary for industrial purposes, and the flow rate can achieve the 33.12 AF volume in a period of 68 days. Application.

50. The Department finds the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Application.

#### **CONCLUSIONS OF LAW**

51. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

52. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

53. Water wells must be constructed according to the laws, rules and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

54. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF No. 50).

### **Beneficial Use**

#### **FINDINGS OF FACT**

55. The proposed appropriation will be used in combination with an existing Permit. The appropriation is to increase the flow rate by 22 GPM, from the existing 88 GPM to a combined 110 GPM, and increase the volume by an additional 18.1 AF, for industrial and fire protection purposes totaling 33.1 AF.

56. The maximum combined flow rate of 110 GPM is based on the proposed pump capacity. The industrial purpose (hydrostatic tank testing), will be the primary purpose for which water will be used. Water will also be appropriated and stored in the reservoir for the purpose of fire protection, but the appropriation is secondary to industrial use (not added to). The total combined appropriation of 33.1 AF for the existing permit and this proposed permit includes the estimated annual evaporation from the pond surface (13.8 AF) and the amount of water to hydro-test one, 150,000-barrel storage tank, or 19.3 AF. The Applicant provided information to show fire protection needs of 17.5 AF annually, slightly less than that amount needed for hydrostatic testing. Therefore, when water is needed for hydrostatic testing the total, combined appropriation will be 33.1 AF (13.8 AF + 19.3 AF = 33.1 AF). If hydrostatic testing is not scheduled to occur in any given year, the combined appropriation will be 31.3 AF (13.8 AF + 17.5 AF = 31.3 AF), or that amount only necessary for fire protection. Application.

57. The Department finds that industrial and fire protection purposes are beneficial uses and that an additional flow rate of 22 GPM and volume of 18.1 AF of water are the amounts needed

to sustain the beneficial use. The combined appropriation of this proposed permit and the existing permit (41S 113639) of 110 GPM and 33.1 AF is also a beneficial use of water.

#### CONCLUSIONS OF LAW

58. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

59. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

60. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

61. Applicant proposes to use water for industrial and fire protection purposes. Applicant has proven by a preponderance of the evidence industrial and fire protection purposes are beneficial uses and that a combined flow rate of 110 GPM and total of 33.12 acre-feet of water requested are the amounts needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF No. 57)

### **Possessory Interest**

#### **FINDINGS OF FACT**

62. The Applicant signed and had the affidavit on the application form notarized affirming the applicant has 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. Applicant is proposing to expand its current ownership by purchasing 40 acres to the east of its existing site and has signed a purchase agreement with the adjacent land owner. A copy of that agreement was submitted with the Applicant's deficiency response. The expanded place of use will allow the Applicant additional acreage for the additional six proposed oil tanks. Department Technical Report.

#### **CONCLUSIONS OF LAW**

63. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

64. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

65. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF No. 62)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41S 30066542 should be **GRANTED**.

The Department determines the applicant may divert and beneficially use groundwater by means of a 2,003 foot deep well, from January 1 through December 31, at 22 GPM up to 18.1 AF. The combined appropriation with Permit No. 41S 113639 shall be 110 GPM up to 33.1 AF. The point of diversion is located in the SWNWSW Section 7, T12N, R16E, Fergus County. The place of use for both Industrial and Fire Protection purposes is in the W2 Section 7, T12N, R16E. The maximum volume of water specifically associated with each purpose for this permit is: Industrial – 18.1 AF; Fire Protection – 17.5 AF.

**NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 11<sup>th</sup> day of September, 2015

/Original signed by Scott Irvin/  
Scott Irvin, Regional Manager  
Lewistown Regional Office  
Department of Natural Resources and Conservation