

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 76LJ-30070134)
BY FIELDSTONE SUBDIVISION WATER) PRELIMINARY DETERMINATION TO
USER'S ASSOCIATION, INC.) GRANT PERMIT**

On December 3, 2014, Fieldstone Subdivision Water User's Association, Inc. (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ-30070134 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 44 gallons per minute (GPM) and 17.77 acre-feet (AF) of water for the beneficial uses of multiple domestic and lawn and garden. The Department published receipt of the Application on its website. Prior to receipt of the application, the Department and the Applicant held a pre-application meeting on July 15th, 2014. The Department sent Applicant a deficiency letter pursuant to § 85-2-302, Montana Code Annotated (MCA), dated May 28, 2015. The Applicant responded to the deficiency letter on June 12th, 2015. The Application was determined to be correct and complete on September 1, 2015. An Environmental Assessment for this Application was completed on November 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
 - Aquifer Testing Addendum
 - Fieldstone Subdivision Plat Maps
 - Proposed Public Water Supply Well Logs
 - Pentair STA-Rite HS Series Pump Curves

- Goulds Booster Pump Specifications & Pump Curves
- Water System Design Drawings
- Form 633 in Electronic Format
- Maps:
 - USGS Topographic map with township, range, section, boundary lines, and north arrow
 - Aerial photo with point of diversion, place of use, township, range, section, scale, and north arrow

Information Received after Application Filed

- Deficiency response letter received by the Department on June 12, 2015

Information within the Department's Possession/Knowledge

- Rose Creek Watershed and Water Right Report drafted by Melissa Brickl, Hydrologist-Water Resource Specialist, Kalispell Regional Office, 2014
- Aquifer Test Report from Department Groundwater Hydrologist dated February 11, 2015
- Depletion Report from Department Groundwater Hydrologist dated February 10, 2015
- Median of the Mean Monthly Flows for the Flathead River at Columbia Falls and Polson, USGS Gage Nos. 12363000 and 12372000, respectively
- Flathead River Physical and Legal Availability Analysis considering prior appropriations at Columbia Falls and Polson, Gage Nos. 12363000 and 12372000, respectively
- Correspondence from then Regional Manager Marc Pitman to Brad Bennett, Applied Water Consulting, Inc., dated February 13, 2015 granting a variance to aquifer testing requirements found in Administrative Rules Of Montana, 36.12.121(3)(a)

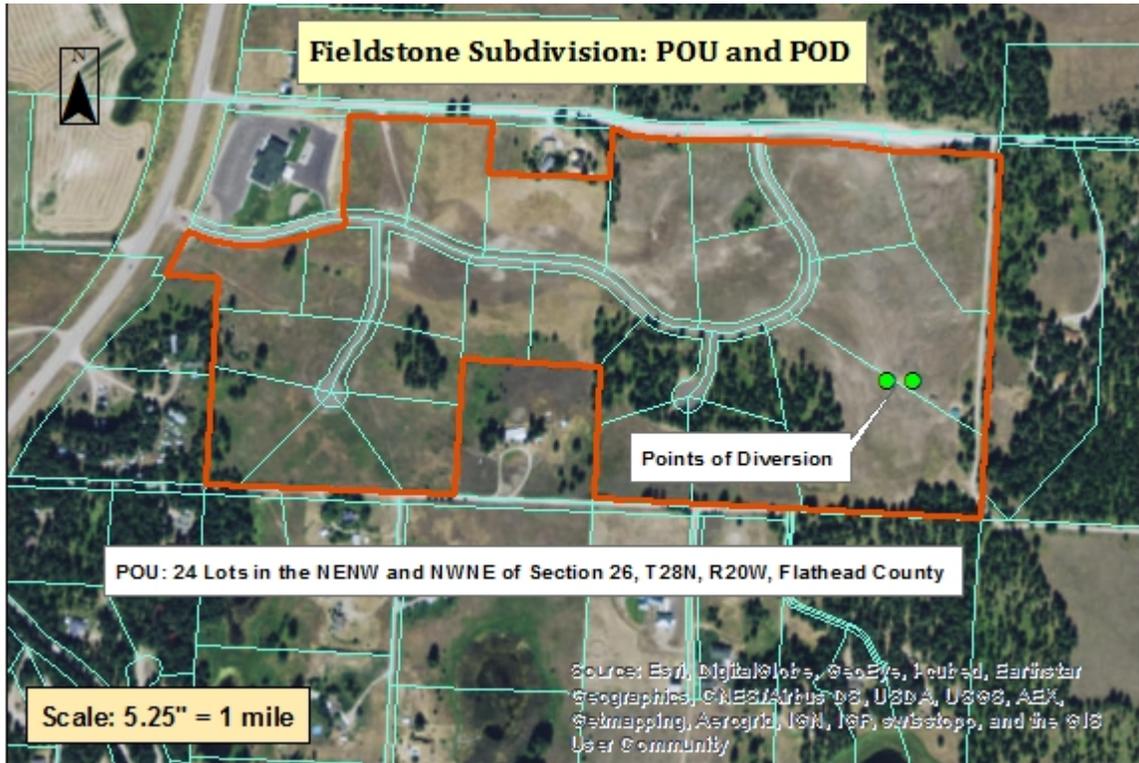
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater from an unconfined gravel and sand aquifer adjacent to the Flathead Valley's deep alluvial aquifer through two wells identified as PWS #1 (260 feet deep) and PWS #2 (283 feet deep) from January 1 through December 31, annually. Water will be diverted from these two wells located in the SENWNE of Section 26, T28N, R20W, Flathead County at a combined maximum rate of 44 GPM, diverting up to 17.77 AF for the purposes of multiple domestic and lawn and garden. The applicant proposes to supply 24 lots with a domestic water supply and irrigate up to 8.26 acres of lawn and garden. The place of use is generally located in the NENW and NWNE of Section 26, T28N, R20W, Flathead County.
2. Individual septic systems will be utilized for each of the 24 lots at the Fieldstone Subdivision. Wastewater from the septic systems will return to Rose Creek or the Flathead River by way of groundwater recharge.
3. Consumptive use for this diversion was calculated using the DNRC standard of 10% for domestic wastewater treated using on-site septic systems ($6.72 \text{ AF} \times 0.10 = 0.67 \text{ AF}$) and 100% of the requested diverted volume of 11.05 AF for lawn and garden irrigation. The NRCS Irrigation Water Requirement (IWR) program calculated 11.21 AF of consumption; thus, the Department considers the requested volume of 11.05 AF to be 100% consumptive and finds total consumptive use for this provisional permit is up to 11.72 AF.
4. The Applicant has agreed to measure the flow rate and volume of water diverted and report these figures to DNRC on an annual basis. The following condition applies:
"The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time water was diverted. Records shall be provided by January 31st of each year and upon request at other times during the year until the beneficial water use permit is perfected and the Department receives a project completion notice. Failure to submit

reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Division Kalispell Regional Office. The appropriator shall maintain the measuring device so that it always operates properly and measures flow rate and volume accurately.”



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

GENERAL CONCLUSIONS OF LAW

5. 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 . . .

6. 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.

7. 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.

8. 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).

9. 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.

10. 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

11. The groundwater wells were completed in an unconfined sand and gravel aquifer adjacent to a deep confined aquifer referred to as the Deep Aquifer by Montana Bureau of Mines and Geology. The wells are located approximately 75 feet apart and are 260 and 283 feet deep. The wells are located approximately 7,000 feet, 8,000 feet, and 9,500 feet from Rose Creek, Mill Creek, and the Flathead River, respectively. The Deep Aquifer and adjacent sand and gravel aquifers are major groundwater flow systems with predominant north to south flow directions and are the most utilized aquifers in the Flathead Valley area. These systems respond as a single,

connected system and experience water level rise in the spring and drop off in late summer, recovering in the fall and remaining stable throughout the winter.

12. The Applicant applied for and received a variance to aquifer testing requirements. The variance granted allows the Applicant to use aquifer properties obtained during a 24-hour aquifer test conducted on PWS #1 at a rate of 33.9 GPM and an 8-hour drawdown yield test performed on PWS #2. Both aquifer tests were conducted in 2007, prior to the department's adoption of the current policy described in ARM 36.12.121.

13. The Department Groundwater Hydrologist utilized the Cooper-Jacob (1946) and Neuman (1974) solutions to analyze drawdown in PWS #1 and PWS #2 and determined that the Neuman solution resulted in the most accurate representation of aquifer properties at the site when compared to other known aquifer parameter data in the vicinity of the proposed subdivision. Transmissivity and storativity, obtained from the Neuman solution used to model drawdown from pumping, were 1,290 ft²/day and 0.007, respectively. Use of these values meet the requirements described in ARM 36.12.121 and are adequate to address the criteria under MCA § 85-2-311.

14. Physical groundwater availability was evaluated by calculating aquifer flux through a zone of influence determined by the 0.01 foot drawdown contour. A distance of 6,000 feet from the public water supply wells to the 0.01 foot contour was calculated using the Neuman solution with values of 1,290 ft²/day for transmissivity, 0.007 for storativity, 0.07 for specific yield, and a constant pumping rate of 11 GPM for one year (flow rate required to produce the requested volume over a period of 365 days). Total aquifer flux through the delineated area is 1,297 acre-feet (AF) per year. The Applicant is requesting a total annual appropriation of 17.77 AF.

15. The Applicant conducted a 24-hour aquifer test at 33.9 GPM on PWS #1 with a maximum drawdown of 26 feet below the static water level of 73.2 feet below ground surface (bgs), leaving 160.8 of water above the bottom of the well casing. An 8-hour aquifer test was conducted at 30.6 GPM with a maximum drawdown of 91 feet below the static water level of 60.3 feet bgs, leaving 131.7 feet of water above the bottom of the well casing. The combined testing rate of 64.5 GPM exceeds the requested 44 GPM flow rate.

16. The Department finds that the requested flow rate and volume of 44 GPM up to 17.77 AF is physically available.

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. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

20. The Applicant has proven that water is physically available at the proposed points of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF Nos. 11-16)

Legal Availability:

FINDINGS OF FACT

21. Within the zone of influence, groundwater water rights on record with the Department list a total annual appropriation of 315.20 AF. Subtracting the legal demands of 315.20 AF from the calculated aquifer flux of 1,297 AF leaves 981.80 AF of groundwater legally available for the proposed appropriation of 17.77 AF.

22. Department hydrologists determined that the surface water depletions caused by pumping the public water supply wells primarily occurs through propagation of drawdown to Rose Creek, the Flathead River downstream of Kalispell, and Flathead Lake. Mill Creek will be depleted as a result of less spring flow in Rose Creek discharging to Mill Creek. Seasonal fluctuations in depletions are expected to be dampened, resulting in constant year-round depletions equally proportioned between Rose Creek and the Flathead River, ultimately culminating in Flathead Lake. Monthly depletion volumes range between a low of 0.91 AF and a high of 1.01 AF for a total depletion of 11.88 AF of surface water from the two affected sources; the 11.88 AF depletion figure is based on water requirements as calculated by the department through use of NRCS Irrigation Water Requirements for turf grass on 8.26 acres of lawn and garden and water demands for multiple domestic use in 24 homes. These volumes divided proportionally result in estimated depletions to any one affected surface water source ranging from 0.46 AF per month to 0.51 AF per month. The rate of depletion was calculated to be a constant 7.40 GPM, divided proportionally between the two affected surface water sources for a maximum depletion from any one source of 3.70 GPM. These values are conservative as the Applicant has indicated that through operation of the public water supply wells, consumptive use will not exceed 11.72 AF.

23. The Department conducted a study of the Rose Creek watershed to determine if water is legally available. Rose Creek originates from three groundwater springs in the NWSW and SWSW of Section 23, T28N, R20W, Flathead County. Rose Creek is a water body that has been manipulated by humans for road construction and agricultural purposes. The stream can be broken down into three reaches and defined as the northern, middle, and lower sections. Mill Creek and the lower section of Rose Creek are flooded annually as Flathead Lake is raised to full pool elevation during the summer months when irrigation demands are greatest. The middle section of Rose Creek is highly vegetated and either dry, marshy, or made up of stagnant pools. The northern section of Rose Creek flows year-round and through manipulation by man is now a tributary to Mill Creek. Upstream of the confluence of Rose Creek and Mill Creek, Mill Creek is perched and will not be depleted from the proposed use except for through propagation of depletions to Rose Creek. Due to the heavily manipulated nature of Rose Creek, only water

rights with points of diversion on Rose Creek between the headwater springs and the confluence of Rose and Mill Creek were assessed for legal availability in these sources. There are a total of three water rights within this affected reach with a combined flow rate of 1.22 CFS. The Department conducted a hydrologic investigation on Rose Creek and determined Rose Creek has an average discharge of 1.87 CFS late in the irrigation season (see Department Report in file; Brickl, 2014). The measured discharge of 1.87 CFS compared to legal demands of 1.22 CFS demonstrates that 0.65 CFS of water is legally available in Rose Creek for the calculated depletion of 0.008 CFS ($3.70 \text{ GPM} \div 448.8 \text{ GPM/CFS} = 0.008 \text{ CFS}$) in this source.

24. The Department assessed all surface water legal demands from the Flathead River at Columbia Falls (USGS gage #12363000) to the Inlet of Flathead Lake and from Flathead Lake to the Flathead River near Polson (USGS gage #12372000). When calculating legal demand volumes, irrigation and lawn/garden use were allotted an April 1st to October 31st period of diversion. Domestic, commercial, multiple domestic, industrial, and other uses were assessed as year round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of depletion, it was assumed the flow rate associated with each month is continuously in use. This valuation method leads to an overestimate of legal demands for the water rights' respective periods of use and as a result, the Department considers this an appropriate measure of legal demands. A summary of physical availability and legal demands over the proposed period of depletion for Flathead River and Flathead Lake are presented in Tables 1 and 2 below and demonstrate that the depletion rate of 3.70 GPM (0.008 CFS) and volume of 0.46 to 0.51 AF per month are legally available in the Flathead River above the confluence with Mill Creek and the depletion rate of 7.40 GPM (0.016 CFS) and volume of 0.91 AF to 1.01 AF per month are legally available in Flathead River below the confluence with Mill Creek and in Flathead Lake.

Table 1: Flathead River at Columbia Falls USGS Gage # 12363000 Median of the Mean Monthly Flows minus Existing Legal Demands:

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	5,607.00	3,615.34	1,991.66	122,248.09
February	4,869.00	3,615.34	1,253.66	69,502.91
March	4,772.00	3,615.34	1,156.66	70,995.79
April	10,535.00	6,768.09	3,766.91	223,754.45
May	22,645.00	8,243.09	14,401.91	883,989.24
June	24,940.00	8,243.09	16,696.91	991,796.45
July	11,605.00	5,520.09	6,084.91	373,491.78
August	5,798.00	3,618.09	2,179.91	133,802.88
September	5,071.00	3,618.09	1,452.91	86,302.85
October	5,166.50	3,618.09	1,548.41	95,041.41
November	4,626.50	3,615.34	1,011.16	60,062.90
December	6,036.00	3,615.34	2,240.66	148,580.11

* Legal demands were assessed below USGS gage #12363000 to the inlet of Flathead Lake

Table 2: Flathead Lake Median of the Mean Monthly Volumes minus Existing Legal Demands

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,270.00	98.68	10,171.32	624,309.87
February	9,207.50	98.68	9,108.82	504,987.79
March	7,731.50	98.68	7,632.82	468,496.74
April	9,214.50	169.13	9,045.37	538,396.48
May	18,960.00	169.13	18,790.87	1,154,720.78
June	25,720.00	169.13	25,550.87	1,518,919.56
July	13,570.00	169.13	13,400.87	823,783.21
August	6,312.00	169.13	6,142.87	378,287.17
September	6,109.00	169.13	5,939.87	354,026.16
October	7,342.00	169.13	7,172.87	441,508.57
November	8,864.50	98.68	8,765.82	520,684.14
December	9,953.50	98.68	9,854.82	604,883.10

* Legal demands were assessed on Flathead Lake and Flathead River to the USGS gage station in Polson; this analysis does not include water rights on the Salish-Kootenai dam.

25. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is the sum of 614,200 AF and 1,217,106 AF, which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

26. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to, federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000) for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF to meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, obtains full pool status each year.

27. Pending an adjudication of Confederated Salish & Kootenai Tribes' hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in Flathead River, Flathead Lake, and Rose Creek can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

CONCLUSIONS OF LAW

28. 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).

29. 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.

30. 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.

31. 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.

32. 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. 21-27)

Adverse Effect

FINDINGS OF FACT

33. The Applicant provided a plan for utilization of water permitted under this application, demonstrating that water use can be controlled to ensure that water rights of prior appropriators can be satisfied in the event of a call. Based on water usage at the time of impact to senior appropriators, water restrictions placed on the individual lots within the place of use will be regulated by the Fieldstone Subdivision Water User’s Association. During times of water shortage the Applicant will initiate the following plan:

- a) Initially reduce lawn and garden irrigation application by 50%
- b) Cease lawn and garden irrigation completely
- c) Initiate domestic water rationing to 50% during extreme shortage

In the event that a valid call for water is received from a senior water user, the Applicant has the ability to shut power off to the pumps and diversion will be ceased.

34. The potential for adverse effects to senior groundwater appropriators was evaluated using drawdown information derived from the Neuman solution and the following parameters: Storativity = 0.007, Transmissivity = 1,290 ft²/day, Specific Yield = 0.07. After five years of pumping at the requested monthly pumping schedule, drawdown in excess of 1 foot occurs in zero wells within 550 feet of the proposed wells. As distance from the pumping wells increases, drawdown effects in existing wells decreases; there are no well water rights in the subject or adjacent deep aquifer that are predicted to experience drawdown greater than 1 foot and thus, no adverse effects from pumping the proposed wells at the requested flow rate and volume.

35. Consumptive use for this diversion was calculated using the DNRC standard of 10% for domestic wastewater treated using on-site septic systems (6.72 AF × 0.10 = 0.67 AF) and up to the requested diverted volume of 11.05 AF for lawn and garden irrigation. Total consumptive use for this appropriation is up to **11.72 AF** (0.67 + 11.05 = 11.72).

36. Rate and timing of depletions from pumping the subject aquifer are expected to propagate to Rose Creek, the Flathead River, and ultimately culminate in Flathead Lake. Long-term net depletions to these surface water sources are expected to occur year round. Depletions from the proposed use will generally range from 0.91 AF to 1.01 AF per month with depletions to surface water sources totaling 11.72 AF. Physical and legal availability for this volume of water have been established in Findings of Fact Nos. 22-24.

CONCLUSIONS OF LAW

37. 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.

38. 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).

39. In regard to senior hydropower water rights, the facts in this application are distinguishable from those in *In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLC)* concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production. The proposed appropriation in this case is a surface water appropriation more than 150 miles upstream of Noxon Reservoir and is located above Flathead Lake and Kerr Dam, and below the inflows from the Bureau of Reclamation's Hungry Horse Dam.

Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin, does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista's and PPL Montana's prior appropriations in this basin which has not been closed to appropriation by the Legislature, does not include the right to prevent this appropriation where Avista and PPL Montana LLC can reasonably exercise their hydropower water rights.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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. 33-36)

Adequate Diversion

FINDINGS OF FACT

45. The proposed means of diversion consists of two wells identified as public water supply well (PWS) #1 and PWS #2. PWS #1 is a 6-inch cased well that was completed to a depth of 260 feet with a static water level of 90 feet below ground surface (bgs) in April, 2007. PWS #2 is a 6-inch cased well completed to a depth of 283 feet with a static water level of 105 feet bgs in October, 1992. Each PWS well has been fitted with an in-line flow meter to allow the Applicant to measure flow rate and volume diverted. The water supply system includes a 33,000 gallon storage reservoir with conveyance consisting of 3,575 feet of 4-inch class 150 PVC water main, 480 feet of 6-inch class 150 PVC water main, and 1-inch service connections to each of the 24

lots served by the system. Each well is fitted with a Sta-Rite 3 hp submersible pump capable of producing 22 GPM for a combined maximum output of 44 GPM. The pumps will cycle on an alternate lead-lag schedule based on demand. Pump operation is controlled by water level within the storage reservoir, with the lead pump operating when the water level in the reservoir lowers by 6 inches and the lag pump operating when the water level in the reservoir lowers by 12 inches. The water supply system also incorporates two Goulds model 4SH booster pumps that are used in combination with the PWS wells and storage reservoir to provide a peak instantaneous demand of 110 GPM to the 24 lots served. The water supply system was designed by the professional engineering company Birk Engineering and Construction, Inc.

46. Drawdown within each well casing was calculated by the Department by modeling pumping effects in each well using half the monthly pumping schedule based on the requested domestic and lawn and garden volume, and adding drawdown from daily pumping and other well interference. The total maximum drawdown in PWS #1 was calculated to be 29 feet, leaving 157.8 feet of available drawdown above the bottom of the well. Maximum drawdown in PWS #2 was calculated to be 94.5 feet, leaving 128.3 feet of available drawdown above the bottom of the well.

CONCLUSIONS OF LAW

47. 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.

48. 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.

49. 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).

50. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

51. 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. 45, 46).

Beneficial Use

FINDINGS OF FACT

52. The proposed appropriation is for the purpose of multiple domestic on twenty four lots and up to 8.26 acres of lawn and garden irrigation for a total annual diverted volume up to 17.77 AF. The period of use for the purpose of multiple domestic is January 1 through December 31 and the period of use for the purpose of lawn and garden irrigation is April 15 through October 15, annually.

53. The Applicant's professional engineer calculated multiple domestic demands based on a formula using 100 gallons per day per person times an average of 2.5 residents per dwelling. This formula is accepted by the Department of Environmental Quality (DEQ) as adequate for domestic water demands and waste water discharge requirements per DEQ-3 Section 3.2.1.2a and DEQ-4 Section 3.1.2.B. The total diverted volume for multiple domestic is 6.72 AF for twenty four lots.

54. The Applicant used calculations performed by a professional engineer to arrive at diverted volume requirements for 8.26 acres of lawn and garden irrigation. The Applicant's design is based on an application of 1 inch per week for a total of 16 weeks during the 26 week period of diversion lasting from April 15 to October 15, annually. Based on this calculation, the requested volume for 8.26 acres of lawn and garden irrigation is 11.05 AF.

55. The volume requested for multiple domestic and lawn and garden irrigation is less than DNRC standards. The requested volumes for both purposes were calculated by a licensed

professional engineer, Bret A. Birk, P.E., and deemed by the Applicant to be sufficient for the proposed subdivision.

56. The requested flow rate of 44 GPM is based on calculations provided by the Applicant's engineer and will be the maximum flow rate pumped from the two wells. The Applicant will use a combination of the PWS wells, storage, and booster pumps to supply the estimated peak instantaneous demand of 110 GPM.

CONCLUSIONS OF LAW

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

58. 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).

59. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as ‘lawn and garden irrigation’) which is a recognized beneficial use. § 85-2-102(4), MCA. “Domestic use” by DNRC rule means those water uses common to a household including: --- (g) garden and landscaping irrigation up to five acres.” ARM 36.12.101(21). Applicant has proven by a preponderance of the evidence multiple domestic and lawn and garden irrigation is a beneficial use and that 14.05 AF of diverted volume and 102 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF Nos. 52-56)

Possessory Interest

FINDINGS OF FACT

60. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

CONCLUSIONS OF LAW

61. 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.

62. 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.

63. 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. 60)

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. 76LJ-30070134 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of two wells. The pumping will occur from January 1 to December 31 at a flow rate and volume of 44 GPM up to 17.77 AF from two points of diversion in the SENWNE of Section 26, T28N, R20W, Flathead County. Multiple domestic use will occur from January 1 to December 31 and lawn and garden use will occur from April 15 to October 15. The place of use is located in the Fieldstone Subdivision (24 lots) located in the NENW and NWNE of Section 26, T28N, R20W, Flathead County.

The application will be subject to the following conditions, limitations or restrictions:

WATER MEASUREMENT RECORDS REQUIRED

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME WATER WAS DIVERTED. RECORDS SHALL BE PROVIDED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES DIVISION KALISPELL REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO THAT IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives 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 3rd day of December, 2015.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 3rd day of December, 2015, by first class United States mail.

FIELDSTONE SUBDIVISION W.U.A.
PO BOX 39
COLUMBIA FALLS, MT 59912

BRAD BENNETT
C/O APPLIED WATER CONSULTING
P.O. BOX 7667
KALISPELL, MT 59904

NAME

DATE