

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40B 30070712 BY WILKS RANCH MONTANA LTD)))	PRELIMINARY DETERMINATION TO GRANT PERMIT WITH MODIFICATIONS
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On September 11, 2014, Wilks Ranch Montana LTD (Applicant) submitted Application for Beneficial Water Use Permit No. 40B 30070712, for irrigation purposes, to the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 28, 2014. Applicant responded with information dated December 12, 2014. The Application was determined to be correct and complete on February 20, 2015. After the Department issued its Technical Report on February 24, 2015, the Applicant requested a waiver of the 120-day statutory timeline for issuing a Preliminary Determination on March 4, 2015. The waiver was requested in order for the Applicant to collect additional information/evidence to address the statutory criteria for permit issuance. On December 7, 2015 Applicant submitted a report containing additional information. On May 18, 2016 the Department issued a Draft Preliminary Determination (Draft PD) in the matter. Applicant's attorney consulted with the Department via phone conference on June 3, 2016 about the Draft PD, and Applicant's consultant followed with additional information/data via email communication on the same day. Applicant's attorney did not request a hearing in the matter. An Environmental Assessment for this Application was completed on May 17, 2016.

INFORMATION

The Department considered the following information in its Preliminary Determination.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600 and Addendums, Attachments, Maps, and Photos

Information Received after Application Filed

- Applicant's written response to the Department's deficiency letter, dated December 12, 2014, including a Technical Memorandum containing flow measurement data
- Applicant's Technical Memorandum to the Department, received March 20, 2015, regarding Durfee Creek flow measurements and data
- Applicant's report (with attachments), received December 7, 2015, containing additional information/evidence to address the Department's Technical Report
- Communications:
 - January 27, 2014 pre-application email from Applicant's consultant (WGM Group) to Department Regional Manager Scott Irvin explaining a flow measuring protocol, source/basin conditions in Flatwillow Creek
 - October 20, 2014 email from Department Hydrologist Mike Roberts to Scott Irvin regarding inconsistencies (in application materials) in Applicant's flow measurements in Durfee Creek
 - November 19, 2014 email from Applicant's consultant requesting additional time to address application deficiencies
 - January 13, 2015 email from Mike Roberts to Scott Irvin with Roberts' technical assessment of Applicant's evidence related to physical availability of stream flows in Durfee Creek
 - Personal communication with Sterling Sundheim, Civil Engineer Specialist, DNRC Lewistown Water Resources Regional Office, regarding water use on Flatwillow Creek (March 31, 2016)
 - June 3, 2016 email communication from Applicant's consultant, Kyle Mace of WGM Group, regarding water right legal demands in the month of March

Information within the Department's Possession/Knowledge

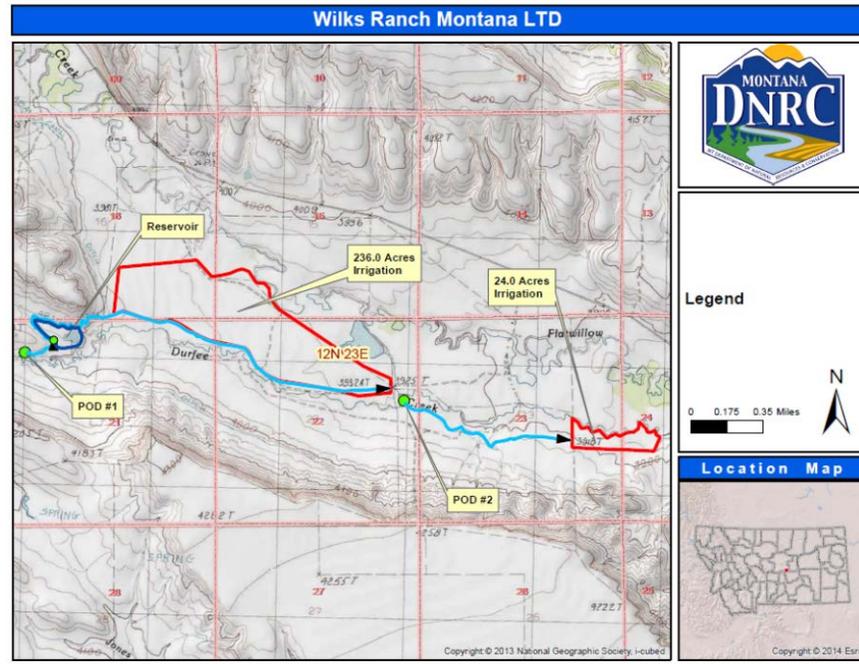
- Department's Surface Water Permit Application Technical Report (Technical Report)
- Water Right records
- All publically-available U.S. Geological Survey stream flow data/information
- State of Montana property ownership records (Cadastral)

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. Applicant proposes to divert water from Durfee Creek from November 1 through June 30 at a flow rate of 4.0 cubic feet per second (CFS), and a volume of up to 151.4 acre-feet (AF), and store the water in an off-stream reservoir. The point of diversion is a headgate located in the SWNWNW Section 21, and the off-stream storage reservoir is located in the NWNENW Section 21, both in T12N, R23E, Fergus County. The reservoir has a capacity of 114.4 acre-feet (AF). After the water is stored, it will be released or pumped from the reservoir and used for irrigation purposes during the period April 15 to October 15. Stored water may be discharged directly to a conveyance ditch that will deliver the water to 236 acres located in Sections 15, 16, 21 and 22, T12N, R23E, or pumped from the reservoir back into Durfee Creek and conveyed to a secondary diversion in the SESENE Section 22, T12N, R23E. A headgate and ditch will divert/convey water from the secondary diversion to 24 acres in Sections 23 and 24, T12N, R23E. The 236 acres in Sections 15, 16, 21 and 22 are currently irrigated under two existing water rights (40B 41502 and 40B 41503), therefore this proposal adds supplemental water to the existing irrigated parcel. The 24-acre parcel in Sections 23 and 24 is not associated with any existing water rights and is proposed for new irrigation under this project. Application.



GENERAL

FINDINGS OF FACT

2. In order to protect prior existing water rights, Applicant has agreed to multiple conditions for permit issuance. Those conditions generally include water measurement, installation and monitoring of stream gauges, adherence to minimum stream flows before appropriating water (trigger flows) and coordinating appropriations with the Petrolia Irrigation District. The conditions are outlined under the Conditions section of this document. Conditions section.

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

GENERAL CONCLUSIONS OF LAW

3. 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 . . .

4. 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), MCA, 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 . . .¹

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. 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, 351 Mont. 26, 208 P.3d 868. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35, 357 Mont. 438, 240 P.3d 628.

5. 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

¹ An applicant may be required to prove additional criteria regarding water quality if a valid objection is filed. See 85-2-311(1)(f-h) and (2), MCA.

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.

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (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).

7. 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 the permit criteria. § 85-2-311(6), MCA.

8. 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

9. Applicant requests an appropriation of 4 CFS and 151.4 AF per year. Application; Applicant’s Deficiency Response.

10. The source of water is Durfee Creek, a source originating in the Little Snowy Mountains of Central Montana. Durfee Creek is a spring-fed stream, but also receives water from snowmelt and storm runoff. The proposed period of appropriation is November 1 through June 30, a period designed to principally divert water during the non-irrigation season and during high spring flows. Warm water springs provide baseflow to Durfee Creek and allow diversions to occur throughout the winter and spring months.

11. Applicant collected flow measurement data throughout each month of the requested period of appropriation. The data include measured stream flows that exceed the proposed flow rate of 4.0 CFS for all months, except May. The following table reflects the maximum flow measured for each month.

Month	Nov	Dec	Jan	Feb	Mar	Apr	May	June
Measured Flow (CFS)	6.54	7.10	7.05	5.91	4.84	4.25	3.48	5.03

12. Applicant's consultant travels an extensive distance to take flow measurements and timing of those measurements to coincide with high flows in the source can be difficult. The consultant provided pictures taken June 12, 2015 showing evidence that a large flow event had taken place in Durfee Creek recently. Due to the annual variability of precipitation events and runoff surges, and in consideration of the flow measurements taken in April and June, it is reasonable to conclude the source varies substantially and at times can provide flows in excess of 4 CFS in May.

13. The requested volume can be diverted in 19.1 days at the proposed 4 CFS flow rate. The evidence shows that the off-stream reservoir could be filled to capacity in any month or combination of months.

14. The Department finds that water can be considered physically available in the amounts requested, in both flow rate and volume, during the months of the proposed appropriation. Department Technical Report; Applicant's report received December 7, 2015.

CONCLUSIONS OF LAW

15. 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."

16. 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).

17. 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).

18. 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. (FOF 14)

Legal Availability

FINDINGS OF FACT

19. The area of potential impact, as determined by the Department, is Durfee Creek from the proposed point of diversion downstream to its confluence with Flatwillow Creek; and Flatwillow Creek from its confluence with Durfee Creek downstream to Petrolia Reservoir. All water rights in this area will be considered in the legal demands analysis to follow. This area of impact varies from the Department's Technical Report, as the Report further considered impacts to the confluence of Flatwillow Creek and the Musselshell River. However, upon further reflection, Petrolia Reservoir is such a prominent feature on Flatwillow Creek that influences and resets stream flows, the Department determines it is sufficient to analyze for legal availability only to the reservoir.

20. Both Durfee Creek and Flatwillow Creek are in the potential area of impact for the proposed appropriation of water. This is an appropriate conclusion because Durfee Creek is a perennial tributary of Flatwillow Creek, and extensive water use occurs on Flatwillow Creek throughout the entire year. The proposed diversion of water from Durfee Creek will reduce the amount of water physically available in Durfee Creek and Flatwillow Creek. Following is a legal availability analysis of each source.

Durfee Creek

21. According to Department records, six water rights exist on Durfee Creek at or below the proposed point of diversion, of which the Applicant owns four of these rights. Applicant's existing rights include two claims for stock water to supply 400 and 500 animal units respectively, and two irrigation claims with a combined flow rate of 11.75 CFS to irrigate 398 acres. Don and Jean Kimmel are owners of the other two irrigation rights, with a combined appropriation (flow rate) of 303.6 gallons per minute (GPM) or 0.68 CFS, and a place of use of 346 irrigated acres. The Department estimates the volume associated with the Kimmel water rights at 203.9 AF for the period that could be affected by Applicant's proposed appropriation, based on the volume of water a flow rate of 303.6 GPM could produce during those months. These water rights comprise the legal demands on the reach of Durfee Creek that could potentially be impacted by the proposed appropriation. Department Water Right Records. A

comparison of legal demands versus Applicant’s measured monthly stream flow measurements (physical water availability) is included in the following table:

Table: Durfee Creek Legal Availability:

<i>Month</i>	<i>Physical Availability (CFS)</i>	<i>Existing Legal Demands (CFS)</i>	<i>Physical – Legal (CFS)</i>	<i>Physical Availability (AF)</i>	<i>Existing Legal Demands (AF)</i>	<i>Physical – Legal (AF)</i>
Nov	6.54	0.91	5.63	389.2	42.8	346.4
Dec	7.10	0.23	6.87	436.6	2.5	434.1
Jan	7.05	0.23	6.82	433.5	2.5	431.0
Feb	5.91	0.23	5.68	339.9	2.4	337.5
Mar	4.84	0.91	3.93	297.6	42.8	254.8
Apr	4.25	5.91	-1.66	252.9	340.3	-87.4
Apr 15	4.25	12.66	-8.41	252.9	554.5	-301.6
May	3.48	12.66	-9.18	214.0	742.0	-528.0
June	5.03	12.66	-7.63	299.3	742.0	-442.7

22. Applicant asserts that its own existing water rights should be excluded from the legal availability analysis (identification of legal demands in the potentially affected area) because Applicant cannot adversely affect itself. The Department rejects that assertion because Applicant’s existing water rights do, in fact, create a legal demand on the source, and MCA 85-2-311(1)(a)(ii) does not exclude the identification of select water rights when determining if water is legally available for a new use. It is the Department’s practice to include all water rights on the source, within the affected area, when conducting a legal availability analysis. Applicant states it is willing to accept a condition(s) on the proposed permit that would address concerns regarding any adverse effects that could result from a negative legal availability determination.

23. Applicant proposes to install a measuring device in Durfee Creek in order to monitor stream flows and ensure sufficient water exists in the stream to satisfy water rights owned by a downstream appropriator. See the Conditions section for conditions the Department imposes in order to protect prior appropriators. Application.

24. Based on stream measurements provided by the Applicant and a comparison to legal demands, the Department finds that water is legally available in Durfee Creek in the months of

November through March. However, it finds that water is not legally available in Durfee Creek in the months of April through June. Finding of Fact No. 21 (Table).

Flatwillow Creek

25. Applicant argued that certain water rights of downstream appropriators on Flatwillow Creek should not be recognized for purposes of analyzing legal demands, because Applicant feels those water rights are either abandoned or otherwise not valid. Applicant is in litigation over those water rights in Montana's general stream adjudication. Applicant also asserted the Department should modify (reduce in assigned flow rate) its method of calculating downstream legal demands for certain instream stock water uses. The Department assigned a flow rate for each instream stock water right of 35 GPM in this matter, just as it routinely does in other change application analyses. Applicant did not provide a persuasive argument in either case. It would be premature of the Department to modify its analysis and discount other water rights before the Water Court ruled in the matter. Additionally, the Department will follow its normal protocol for evaluating the legal demands of instream stock uses. ARM 36.12.1704-1705.

26. Applicant also asserted the Department should stray from protocol in how it compares legal demands to physical stream conditions. It noted the Department should compare legal demands to *mean monthly* stream flow data on Flatwillow Creek rather than make a comparison based on *median of the mean monthly* flow data and volume estimates. However, the Department's administrative rules direct that if actual stream gaging records are available, they shall be used to estimate the median of the mean monthly flow rates and volumes. ARM 36.12.1702(2). That data is then considered in the Department's comparison against legal demands to determine if water is legally available for a new appropriation. In this instance, an historic USGS gage located upstream of the community of Flatwillow, and upstream of Petrolia Reservoir, in Section 19, T12N, R25E, provided 45 years of record with which to judge streamflows. This data encompasses the only gauged period of record available for the source upstream of Petrolia Reservoir. The median of the mean monthly flows can be calculated by the records for the period of May 1911 through September 1956. The Department will use this gage for making the comparison between legal demands and physical availability, because it was located above

Petrolia Reservoir, it represents a reasonably lengthy and reliable data set, and because there is otherwise a lack of publically-available data with which to select as an alternative.

27. Petrolia Reservoir is a large, on-stream reservoir managed by the Petrolia Irrigation District. It is located at the confluence of Flatwillow Creek and Elk Creek, and both drainages contribute water to the reservoir. Water stored in Petrolia Reservoir is largely used for irrigation purposes on thousands of acres. The capacity of the reservoir is 8,380 AF. A volume of water will eventually be decreed by the Water Court to each water right held by the District (for both sources of water), but no flow rate will be decreed. Because the reservoir is located on-stream, Montana’s general stream adjudication process does not assign a flow rate to water rights appurtenant to on-stream reservoirs (the adjudication process will only decree a volume to on-stream reservoirs). Therefore, when analyzing existing legal demands for purposes of assessing the statutory criteria, the Department must make some assumptions for the flow rate necessary to fill Petrolia Reservoir during the November through June period, as well as make assumptions/distinctions on how much water is contributed to the reservoir by Flatwillow Creek and Elk Creek. The Department makes its determination based on the relative size of drainage areas contributing to Petrolia Reservoir by each source (a method suggested by the Applicant). The table below includes an assessment of legal demands and legal availability for all water rights in the potentially affected reach, including the Department’s projections for amounts of water contributed by Flatwillow Creek to Petrolia Reservoir to fulfill the District’s water rights (including assumptions for flow rate).²

Table: Flatwillow Creek Legal Availability:

<i>Month</i>	<i>Physical Availability* (CFS)</i>	<i>Existing Legal Demands** (CFS)</i>	<i>Physical – Legal (CFS)</i>	<i>Physical Availability (AF)</i>	<i>Existing Legal Demands (AF)</i>	<i>Physical – Legal (AF)</i>
Nov	29.3	178.1	-148.8	1743.5	7912.9	-6169.4
Dec	15.9	71.3	-55.4	977.7	3367.6	-2389.9
Jan	14.6	71.3	-56.7	897.7	3367.6	-2469.9
Feb	15.3	72.9	-57.6	880.1	3246.8	-2366.7

² The legal and physical demands for the month of March were updated after issuance of the Draft PD, and after a June 3, 2016 conference with the Applicant’s attorney and consultant, based on their request to delineate March into two segments – March 1 through March 9, and March 10 through March 31. Email communication from Kyle Mace, WGM Group, June 3, 2016.

Mar 1 – Mar 9	59.8	126.2	-66.4	3677.0	6952.9	-3275.9
Mar 10 – Mar 31	59.8	228.0	168.2	3677.0	10234.7	-6557.7
Apr	149.2	336.8	-187.6	8878.0	18483.9	-9605.9
May	152.9	343.5	-190.6	9401.5	20396.8	-10995.3
June	174.6	344.2	-169.6	10389.4	19786.8	-9397.4

* - Physical Availability for Flatwillow Creek is based on a historic USGS gage located upstream of the Town of Flatwillow in Section 19 T12N R25E. Existing water rights upstream of the historic gage site to the Durfee and Flatwillow Creeks confluence were included in both the physical availability and legal demands calculations. This data encompasses the longest gauged period of record available for the source, is located upstream of Petrolia Reservoir and is based on median of the mean monthly flows for USGS measurements recorded between May 1911 and September 1956.

** - Legal Demands include all rights from the confluence of Durfee and Flatwillow Creeks downstream to Petrolia Reservoir. The MT FWP instream flow reservation of 15 CFS is included in the legal demands analysis.

28. Department staff located in its Lewistown Water Resources Regional Office have observed conditions on Flatwillow Creek and Petrolia Reservoir since 1980. Personal communication with Sterling Sundheim, Civil Engineer Specialist, Lewistown DNRC. On numerous occasions throughout the years Petrolia Reservoir has filled to capacity and spilled under a free-flow condition, making water physically and legally available to other junior water users while fulfilling the Petrolia Irrigation District’s water needs. While the data in Finding of Fact No. 27 do not reflect water being legally available on a median of the mean basis, during any month of the proposed appropriation the Department is aware there can be times when water is legally available. These occasions will vary depending on stream conditions, water use by irrigators, and storage water levels and the management of Petrolia Reservoir.

29. The Montana Department of Fish, Wildlife and Parks (DFWP) holds a 15 CFS instream, year-round water reservation to support the fishery in Flatwillow Creek. This reservation exists in the affected reach of Flatwillow Creek between its confluence with Durfee Creek and Petrolia Reservoir. The table in Finding of Fact No. 27 shows that estimated median of the mean stream flows on Flatwillow Creek immediately below Durfee Creek exceed the 15 CFS water reservation in all months but January. However, the Department’s Technical Report indicates that only during the months of March through June do physical stream flows exceed the DFWP

water reservation at the former USGS stream gauge on Flatwillow Creek. Department Technical Report.

30. While the table in Finding of Fact No. 27 indicates water is never legally available on a median of the mean basis, it reflects a striking difference in legal water availability between the irrigation and non-irrigation seasons (per NRCS Climatic Area guidelines, the growing season in the Flatwillow Creek drainage above Petrolia Reservoir generally begins April 1 or later) . The data used to compile the table show that during the period December through March 9, there are only a few water rights claimed for individual irrigation purposes upstream of Petrolia Reservoir, and the majority of water use is attributable to storage by the Petrolia Irrigation District and instream flow by DFWP. The Department’s Lewistown Water Resources Regional Office staff believe appropriations of water for irrigation purposes in December through February rarely occur, other than for storage in Petrolia Reservoir. Therefore, administering the Applicant’s proposed new use of water in the non-irrigation season could be reasonable, with conditions, given the few appropriators on the source. During the period March 10 through November, however, numerous water rights exist and the lack of legally available water on a median basis is substantial. Administering the proposed new use with a long list of senior water users would be extraordinarily difficult, especially when no water commissioner is present to oversee appropriations.

31. Based on the USGS stream gaging record and a comparison to legal demands the Department finds that water is not legally available in Flatwillow Creek during the requested period of appropriation of November through June on a median of the mean monthly basis. However, water is *occasionally* legally available. For example, when Petrolia Reservoir is filled to capacity and spilling water, or potentially when the District is deliberately not impounding water in the reservoir because it anticipates the reservoir will fill at a future date. Water may also be considered legally available when stream flows in the affected reach of Flatwillow Creek are greater than the legal demands of DFWP (15 CFS water reservation during the non-irrigation season).

32. The Department finds that under certain limiting conditions water can be determined to be legally available and the Applicant could reasonably appropriate during the non-irrigation season

of December 1 through March 9. Outside of this period, the Department finds that water is not reasonably legally available. The conditions for the period of December 1 through March 9, that allow for a finding of legal availability, include stream trigger flows in order to meet DFWP's instream flow reservation and monitoring and coordination with the Petrolia Irrigation District. The conditions are outlined in detail in the Conditions section in this Order and further discussed in the Adverse Effect section. USGS Stream Records; Water Right Records; Department Technical Report.

CONCLUSIONS OF LAW

33. 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).

34. 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.

35. 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.

36. In analyzing legal availability for surface water, an applicant is 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. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6. *In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management* (DNRC Final Order 1991)(Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

37. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

38. As conditioned, the Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period December 1 through March 9, in the amount requested, based on the records of the Department and other evidence provided to the Department. Water is not legally available during November, and March 10 through June. §85-2-311(1)(a)(ii), MCA. (FOF 32)

Adverse Effect

FINDINGS OF FACT

39. The proposed appropriation is for 4.0 CFS and up to 151.4 AF, during the period November 1 through June 30. Water is physically available in Durfee Creek in the amounts necessary to fulfill the requested appropriation throughout the requested period, but it is only legally available in the source from November through March. Water is not legally available in the months of April, May and June in Durfee Creek. The evidence shows there is an insufficient supply of water to meet the water right legal demands of the six existing water rights on the source and the appropriation requested in this application during April, May and June. Finding of Fact No. 24.

40. Water is not legally available during any portion of the proposed period of appropriation in Flatwillow Creek on a median of the mean monthly basis. However, water in excess of legal demands is available on occasion. During the period of December 1 through March 9 there are few water users exercising water rights on Flatwillow Creek, principally, the Petrolia Irrigation District and Montana DFWP. The Department finds that under certain limiting conditions the Applicant can appropriate, on occasion, if it monitors streamflows and only diverts when water is in excess of DFWP's instream flow reservation (15 CFS) and the storage water rights held by the Petrolia Irrigation District.

41. Flatwillow Creek is designated a chronically-dewatered stream by DFWP, from the Durfee Creek confluence to Petrolia Reservoir.

42. Applicant has proffered a stream flow measurement plan in order to monitor flows in Flatwillow Creek. The monitoring will allow Applicant to determine when it can appropriate water for its proposed project. The plan includes the installation of a measuring device immediately upstream of Petrolia Reservoir to ensure DFWP's instream flow reservation is being met. Applicant's December 7, 2015 letter to the Department.

43. Applicant has a plan to prevent adverse effects to the Petrolia Irrigation District. It proposes to communicate with the District prior to diverting water for impoundment in its Durfee Creek reservoir. Applicant will confirm from the District that the District's water rights are

satisfied and gain permission to appropriate water under the proposed permit. Applicant's December 7, 2015 letter to the Department.

44. Applicant has proposed to measure its appropriations (flow rate and volume) from Durfee Creek into the conveyance facility.

45. Applicant has proposed to monitor/measure stream flows in Durfee Creek with a staff gauge to ensure sufficient flows remain for a downstream appropriator. The proposal includes the development of a rating curve that will allow the staff gauge to be read and stream discharge easily determined. Applicant's December 7, 2015 letter to the Department.

46. Any Permit, if issued, will be junior in priority to all other water rights on Durfee Creek and Flatwillow Creek. The Permit will be subject to a "call" if senior water rights are not satisfied.

47. As conditioned below, the Department finds that no adverse effects will result from the proposed appropriation during the period of December 1 through March 9, based on the Applicant's plan and agreement to conditions imposed in the Conditions section of this Order. On June 3, 2016 the Applicant's attorney, Ryan Mattick, and the Department discussed the findings in the Preliminary Determination to Grant with Modifications (sent to the Applicant as a Draft Preliminary Determination to Grant with Modifications), and Mr. Mattick did not request a hearing in the matter. However, Mr. Mattick did request the Department to consider amending a measuring condition and reanalyzing legal availability under a slightly different analysis, and both requests were adopted by the Department.

CONCLUSIONS OF LAW

48. 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.

49. 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).

50. 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.

51. 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.

52. 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.

53. 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.

54. Based upon Applicant’s plan for operation of its permit and as conditioned, and an appropriation period of December 1 through March 9, 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 47)

Adequate Diversion

FINDINGS OF FACT

55. The point of diversion is an existing headgate and ditch system that services other irrigation water rights owned by the Applicant. The diversion works consist of a 36-inch steel headgate, a short section of corrugated metal pipe, and an open ditch with the following dimensions: top width of 6 feet; bottom width of 2 feet; and depth of 2 feet. Water is conveyed in the ditch to a point approximately 900 feet from the headgate to a second 36-inch headgate, where it is released from the ditch into the off-stream reservoir. The reservoir is a 30-foot high embankment, with a freeboard of 4 feet and surface area of 11 acres, and a capacity of 114.4 AF. Water will be pumped from the storage reservoir back into the ditch, via a portable pumping system, and delivered to the place of use for irrigation purposes. The water will be co-mingled with water appropriated from Flatwillow Creek to irrigate one parcel, or directed to a second parcel that will exclusively be irrigated with Durfee Creek water. The file contains photos, designs and specifications of various components of the diversion, conveyance and impoundment structures. File.

56. The Department finds the proposed diversion works to be adequate and capable of appropriating the requested flow rate of 4 CFS and volume of 151.4 AF.

CONCLUSIONS OF LAW

57. 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. 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. 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. §85-2-402 (2)(b), MCA. (FOF 56).

Beneficial Use

FINDINGS OF FACT

58. The proposed beneficial use includes a diverted flow rate of 4.0 CFS and volume of 151.4 AF to flood irrigate 24 acres of previously non-irrigated acreage and supplement flood irrigation on 236 acres of existing agricultural crops. Irrigation is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

59. The requested volume includes the reservoir capacity of 114.4 AF plus the estimated annual evaporation of 37.0 AF. The volumetric, per-acre appropriation of water for the proposed permit is 0.6 AF. Given that the Applicant already has existing supplemental water rights from Durfee Creek and Flatwillow Creek for 236 of the 260 acres, this deficit irrigation volume is reasonable compared to standard guidelines set in administrative rule. The flow rate of 4.0 CFS will allow the off-stream reservoir to be filled in about 19 days. Applicant has stated its intention to measure appropriations from Durfee Creek that are slated to be used under this permit, and keep a separate accounting of the water from other appropriations under existing water rights. Accordingly, the Department will impose a measuring condition that tracks and documents appropriations. See the Conditions Section in this Preliminary Determination. File; ARM 36.12.115; Technical Report.

60. The Department finds that flood irrigation of agricultural crops is a beneficial use, and that a flow rate of 4.0 CFS and diverted volume of 151.4 AF are reasonable for the proposed use. (FOF 58)

CONCLUSIONS OF LAW

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

62. 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).

63. 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. 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).

64. Applicant proposes to use water for irrigation purposes, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 151.4 AF of diverted volume and 4.0 CFS of flow rate are the amounts needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF No. 60)

Possessory Interest

FINDINGS OF FACT

65. The Applicant signed and had the affidavit on the application form notarized affirming it 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.

CONCLUSIONS OF LAW

66. 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.

67. 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.

68. 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 65)

CONDITIONS

THE APPROPRIATOR SHALL COMPLY WITH ALL OF THE FOLLOWING CONDITIONS TO EXERCISE THIS PERMIT:

WATER MEASUREMENT RECORDS REQUIRED, WATER MONITORING REQUIRED, AND A WATER MEASURING/MONITORING PLAN REQUIRED.

A. INSTALL A MEASURING/MONITORING DEVICE IN FLATWILLOW CREEK UPSTREAM AND AS NEAR AS PRACTICAL TO PETROLIA RESERVOIR, AND MONITOR STREAM FLOWS. THE TYPE AND LOCATION OF THE DEVICE MUST BE

APPROVED BY THE DEPARTMENT. THE APPROPRIATOR SHALL KEEP A DAILY WRITTEN RECORD OF THE FLOW RATE IN FLATWILLOW CREEK WHEN APPROPRIATIONS ARE OCCURRING FROM DURFEE CREEK. THE APPROPRIATOR SHALL DIVERT WATER ONLY DURING THE PERIOD OF APPROPRIATION WHEN STREAM FLOWS IN FLATWILLOW CREEK AT THE MEASURING STATION EXCEED THE MONTANA FISH, WILDLIFE & PARKS INSTREAM FLOW WATER RESERVATION OF 15 CUBIC FEET PER SECOND, PLUS THE FLOW RATE OF ANY EXISTING RIGHTS BETWEEN THE GAGE LOCATION AND PETROLIA RESERVOIR, INCLUDING THOSE OF THE PETROLIA IRRIGATION DISTRICT. APPROPRIATOR MUST CEASE DIVERSION ON DURFEE CREEK WHEN FLOWS AT THE MEASURING STATION ON FLATWILLOW CREEK DROP BELOW THE REQUIRED TRIGGER FLOW AND WHEN THE WATER RIGHTS HELD BY THE PETROLIA IRRIGATION DISTRICT OR OTHERS ARE NOT SATISFIED.

B. INSTALL A MEASURING DEVICE IN THE CONVEYANCE FACILITY FROM DURFEE CREEK, AS NEAR AS PRACTICAL TO THE HEADGATE ON THE SOURCE, IN ORDER TO MEASURE APPROPRIATIONS. FOR EACH DAY OF DIVERSION UNDER THIS PERMIT, THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE FLOW RATE AND VOLUME OF WATER DIVERTED, INCLUDING THE PERIOD OF TIME OF DIVERSION. RECORDS MUST ACCOUNT SEPARATELY FOR ANY APPROPRIATIONS UNDER THIS PERMIT FROM APPROPRIATIONS UNDER ANY OTHER WATER RIGHT USING THE SAME DIVERSION WORKS AND CONVEYANCE FACILITY, IF APPLICABLE.

C. THE APPROPRIATOR SHALL DIVERT WATER ONLY IF STATEMENT OF CLAIM NO. 40B 119573, OWNED BY PETROLIA IRRIGATION DISTRICT, IS BEING MET, BASED ON DISCUSSIONS WITH AND AS DETERMINED BY THE PETROLIA IRRIGATION DISTRICT. THE PETROLIA IRRIGATION DISTRICT MUST GRANT PERMISSION TO THE APPROPRIATOR FOR IT TO APPROPRIATE WATER FROM DURFEE CREEK. IT IS THE RESPONSIBILITY OF THE APPROPRIATOR TO CONTACT THE PETROLIA IRRIGATION DISTRICT PRIOR TO DIVERTING, AND AT LEAST WEEKLY THEREAFTER, TO ENSURE THAT SUFFICIENT WATER IS FLOWING IN FLATWILLOW CREEK TO MEET THE DEMANDS OF THE DISTRICT. IF THE DISTRICT'S WATER RIGHT IS NOT BEING MET, THE APPROPRIATOR SHALL CEASE DIVERSIONS, INCLUDING ANY TIME THE DISTRICT MAKES A CALL ON WATER. THE APPROPRIATOR SHALL KEEP A RECORD OF THE DATE, TIME AND NAME OF THE INDIVIDUAL CONTACTED AT THE DISTRICT AND SUBMIT RECORDS UPON REQUEST OF THE DEPARTMENT.

D. THE PERMITTEE SHALL SUBMIT A PLAN INDICATING THE PROPOSED DESIGN OF EACH MEASURING OR MONITORING DEVICE AND A MAP OF THE SPECIFIC LOCATION OF EACH DEVICE. THE PLAN AND DEVICE TYPE AND LOCATION MUST BE APPROVED BY THE DEPARTMENT BEFORE WATER IS DIVERTED UNDER THIS

PERMIT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING/MONITORING DEVICES ARE IN PLACE AND OPERATING.

E. RECORDS SHALL BE SUBMITTED BY MAY 1 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS AS REQUIRED BY THESE CONDITIONS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE AT THE ADDRESS BELOW. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING/MONITORING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATELY DURING PERIODS OF APPROPRIATION UNDER THIS PERMIT.

SUBMIT RECORDS TO:

LEWISTOWN WATER RESOURCES REGIONAL OFFICE
613 NE MAIN ST, SUITE E
LEWISTOWN, MT 59457
PH: (406)538-7459
FAX: (406)538-7089

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. 40B 30070712 should be **GRANTED WITH MODIFICATIONS**. The Applicant may divert and store water from Durfee Creek, by means of a headgate and conveyance facility. The point of diversion is located in the SWNWNW Section 21, T12N, R23E, Fergus County. The storage reservoir is located in the NWNENW Section 21, and places of use are located in Sections 15, 16, 21, 22, 23 and 24, all in T12N, R23E. Water may be diverted from December 1 through March 9, at a flow rate of up to 4.0 CFS and volume of up to 151.4 AF. The period of use is April 15 to October 15, and the purpose for which water can be used is irrigation.

The Permit will be subject to the conditions, limitations or restrictions outlined in the Conditions section of this document.

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 9th day of June 2016.

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Water Resources 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 WITH MODIFICATIONS was served upon all parties listed below on this 9th day of June 2016, by first class United States mail.

RYAN MATTICK
MOORE, O'CONNELL & REFLING
PO BOX 1288
BOZEMAN, MT 59771

NAME

DATE