

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

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**APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30072061 )  
PRELIMINARY DETERMINATION TO GRANT PERMIT )**

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On January 6, 2015, White Rock Aggregate LLC & Nelcon Inc. (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30072061 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1,102.43 AF. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as November 20, 2015. An Environmental Assessment for this Application was completed on December 18, 2015.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600

Attachments:

- Maps:
  - Site maps which identified the place of use, proposed point of diversion, township, range, and section lines.
  - Ownership Map
- Department Aquifer Testing Variance Response, Aquifer Testing Addendum, Form 633
- Reservoir/Place of Storage Addendum

Information Received after Application Filed:

- Deficiency Response Letter dated October 5, 2015 submitted by Applied Water Consulting

Information within the Department's Possession/Knowledge:

- USGS flow records for the Flathead River at Columbia Falls gage; station # 12363000. Period of record October 1951 – September 2014.
- USGS flow records for the Flathead River near Polson gage; station # 12372000. Period of record October 1938 – April 2015.
- Aquifer Test Report and Depletion Report, written by Attila Fohnagy, Groundwater Hydrologist, Water Management Bureau.
- Legal demands for the above mentioned streams using the Department water right database

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 impound groundwater in a pit for industrial and fisheries use January 1<sup>st</sup> thru December 31<sup>st</sup> from a point located in the W2W2 Section 36, Township 30N, Range 21W, Flathead, Montana. The place of use is generally located in the W2W2 Section 36 and the E2NESE of Section 35, Township 30N, Range 21W, Flathead, Montana (Figure 1) for industrial use. The place of use for the fishery is the W2W2 Section 36, Township 30N, Range 21W, Flathead, Montana. No flow rate is associated with this permit; it is a groundwater pit. The Applicant is requesting 1,101.12 AF for industrial purposes. Water will be diverted from the pit for industrial use, which includes gravel extraction, aggregate washing and dust suppression. Once gravel mining is finished the 41.93 acre pit will be reclaimed and turned into a 41.93 acre fish pond. The Applicant is requesting 939.92 AF for fisheries use. The reclaimed pit volume is smaller because the walls will be tapered to 3:1 slopes versus the pit which had nearly vertical

walls. The two pit volumes are not cumulative; this permit will reflect the maximum volume of 1,101.12 AF associated with the industrial use.



**Figure 1:** Proposed place of use for White Rock Aggregate, LLC and Nelcon Inc.

2. No supplemental or associated rights exist on the proposed place of use.
3. The point of diversion is located in the Upper Flathead River Basin (76LJ), which is an area that is not subject to water right basin closures or controlled groundwater area restrictions. The Applicant's pit is 1.3 miles west of the Flathead River. The source aquifer is a shallow unconfined aquifer referred to as the Evergreen Aquifer; which is hydraulically connected to the Flathead River.

4. The Applicant requested 1,101.12 AF for industrial use and 939.92 AF for fishery purposes. These volumes are not additive; each volume represents the pit at different points in time. After mining is completed the pit will be reclaimed and the fishery established. The requested industrial use volume is based on full mine build out. Gravel mining operations will expose 41.93 acres of water. The pit will have nearly vertical walls. The maximum depth of the pit will be 35 feet; the water table will range from 12-15 feet below ground surface depending on seasonal fluctuations. Maximum water depth will be 23 feet. The maximum volume of the pit will be 964.39 AF (41.93 ac × 23 ft). Evaporation will total 125.37 AF. Water will be pumped from the pit for aggregate washing and dust suppression. Aggregate washing will consume an additional 3.7 AF and dust suppression 7.7 AF. The total consumed volume is 136.73 AF (125.37 AF + 3.7 AF + 7.7 AF). The total volume for industrial use is 1,101.12 AF, which is equal to one fill (964.39 AF) plus all consumed volumes (136.73 AF).

5. The reclaimed fish pond will be 41.93 acres and have a flat bottom with 3:1 sides. The bottom area will cover a total of 28.90 acres. The maximum water depth will be 23 feet. The maximum volume of the reclaimed pit is 814.55 AF based on as-built pond surveys. Evaporation will total 125.37 AF. The total requested volume for fisheries is 939.92 AF (814.55 AF + 125.37 AF).

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

#### **GENERAL CONCLUSIONS OF LAW**

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

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the

state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

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

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

7. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

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

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

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

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water;

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be

controlled so the water right of a prior appropriator will be satisfied;

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

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

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

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

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

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

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

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

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

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

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

### **Physical Availability**

#### **FINDINGS OF FACT**

12. The Department granted the Applicant a variance from conducting a 72-hour Aquifer test. In lieu of the 72-hour test, data from the Montana Bureau of Mines and Geology's Montana Ground-water Assessment Atlas 2, Ground-Water Resources of the Flathead Lake Area was utilized by the Department. The Applicant also conducted a series of four 9-hour drawdown and yield tests at 430 GPM on an adjacent gravel pit between May 29, 2015 and June 4, 2015. The pump test flow rate is equal to the anticipated maximum consumption rate in July due to evaporation and pumping for industrial use. The maximum drawdown for each test was 0.5 feet.

13. The total maximum drawdown of 5 feet is the summation of modeled drawdown at the end of one year (2.9 ft) and drawdown (2.1 ft) at 2,286 minutes (time it takes to pump the daily volume of 983,017 gallons), which is extrapolated from the 9-hour drawdown and yield tests.

Conservatively assuming a total pit depth of 30 feet and a static water level of 15 feet below ground surface, 15 feet of water would be available in the pit.

14. The Applicant’s pit will be completed in a shallow unconfined aquifer. Aquifer flux was calculated through a zone of influence (12,000 ft), which is determined by the 0.01 foot drawdown contour. Using the Theis (1935) solution, a constant pumping rate of 682.7 GPM for 365 days (equal to annual diverted volume), a transmissivity value of 61,910 ft<sup>2</sup>/day, and a storativity value of 0.13 the total aquifer flux through the delineated area is 1,238,200 ft<sup>3</sup>/day or 10,375 AF/year which exceeds the amount requested in this application.

15. Department groundwater hydrologists determined the Flathead River downstream of Columbia Falls and Flathead Lake are hydraulically connected to the pumped aquifer. Physical availability of surface water was assessed using the USGS’s Flathead River at Columbia Falls gage (station # 12363000), with a period of record of October 1951 thru September 2014 and the Flathead River near Polson USGS gage (station # 12372000) with a period of record of October 1938- April 2015. The following tables summarize physical availability for Flathead River and Flathead Lake for the proposed year-round period of depletion (Tables 1 - 2).

**Table 1: Median of Mean Monthly Flows and Volume Flathead River at Columbia Falls USGS Gage (October 1951 - September 2014)**

	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>
<b>Flow (CFS)</b>	5,607.00	4,869.00	4,772.00	10,535.00	22,645.00	24,940.00
<b>Volume (AF)</b>	344,157.66	269,937.36	292,905.36	625,779.00	1,389,950.10	1,481,436.00
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>Flow (CFS)</b>	11,605.00	5,798.00	5,071.00	5,166.50	4,626.50	6,036.00
<b>Volume (AF)</b>	712,314.90	355,881.24	301,217.40	317,119.77	274,814.10	370,489.68

**Table 2: Median of Mean Monthly Flows and Volume Flathead River near Polson USGS Gage (October 1938 – April 2015)**

	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>
<b>Flow (CFS)</b>	10,380.00	9,234.00	7,778.00	9,223.00	18,960.00	25,820.00
<b>Volume (AF)</b>	637,124.40	511,932.96	477,413.64	547,846.20	1,163,764.80	1,533,708.00
	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>Flow (CFS)</b>	13,605.00	6,317.00	6,092.50	7,369.00	8,838.00	10,070.00
<b>Volume (AF)</b>	835,074.90	387,737.46	361,894.50	452,309.22	524,977.20	618,096.00

16. Based on this information water is physically available from the Flathead River and Flathead Lake to supply the proposed use.

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 provide 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 point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. Finding of Fact (FOF) 12-16.

**Legal Availability:**

**FINDINGS OF FACT**

21. Department groundwater hydrologists determined the width of the zone of influence to be 2,300 feet. Legal demands were assessed within the zone of influence; 179 groundwater rights were evaluated. The volume of water appropriated by 179 groundwater rights is 6,606.8 AF/annum. 10,375 AF/year of aquifer flux is available through the zone of influence.

Subtracting legal demands from aquifer flux results in 3,768.21 AF/year of groundwater remaining.

22. The Applicant’s pit will be completed in a shallow unconfined aquifer. Depletions due to pit evaporation and industrial use from the pit are limited to the Flathead River south of Kalispell and Flathead Lake. The Department assessed all surface water legal demands on these sources. Seasonal fluctuations of drawdown are expected to be dampened resulting in a constant year-round rate of depletion equal to the annual rate of consumption. Below is a breakdown of monthly depletions to surface waters.

**Table 3: Monthly Depletions to Surface Water Sources**

<b>Month</b>	<b>Pond Consumption (AF)</b>	<b>Dust Suppression Consumption (AF)</b>	<b>Finished Aggregate Consumption (AF)</b>	<b>Modeled Depletion (AF)</b>	<b>Modeled Depletion (GPM)</b>
January	0.1	0.0	0.3	7.9	57.2
February	0.3	0.0	0.3	6.8	54.7
March	0.8	0.0	0.3	6.1	44.6
April	4.3	0.7	0.3	6.0	45.5
May	17.5	1.3	0.3	7.7	56.4
June	24.7	1.3	0.3	11.6	87.5
July	31.3	1.3	0.3	15.6	113.9
August	27.9	1.3	0.3	18.6	136.0
September	14.8	1.3	0.3	18.9	142.5
October	2.6	0.7	0.3	16.0	117.0
November	0.8	0.0	0.3	12.1	91.2
December	0.3	0.0	0.3	9.5	69.2
<b>TOTAL</b>	<b>125.4</b>	<b>7.7</b>	<b>3.7</b>	<b>136.8</b>	

23. 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 on Flathead Lake to USGS gage # 12372000 Flathead River near Polson. When calculating legal demand volumes, irrigation and lawn/garden use were delegated as occurring from April 1<sup>st</sup> to October 31<sup>st</sup>; all legal demands exist within climatic region three. Domestic, commercial, multiple domestic, industrial and other uses were analyzed 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 during that month. This assumption leads to an overestimate of legal demands for their respective periods and as a result the Department finds this an appropriate measure of legal demands. A summary of all legal demands over the proposed period of depletion for the Flathead River and Flathead Lake are presented in Tables 4-5 below.

**Table 4: Flathead River at Columbia Falls USGS Gage # 12363000 minus legal demands on Flathead River to inlet of Flathead Lake.**

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

**Table 5: Flathead River near Polson USGS Gage # 12372000 minus legal demands on Flathead Lake**

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,380.00	98.68	10,281.32	631,067.42
February	9,234.00	98.68	9,135.32	506,462.14
March	7,778.00	98.68	7,679.32	471,356.66
April	9,223.00	169.13	9,053.87	537,799.88
May	18,960.00	169.13	18,790.87	1,153,383.60
June	25,820.00	169.13	25,650.87	1,523,661.68
July	13,605.00	169.13	13,435.87	824,693.70
August	6,317.00	169.13	6,147.87	377,356.26
September	6,092.00	169.13	5,923.37	351,848.18
October	7,369.00	169.13	7,199.87	441,928.02
November	8,838.00	98.68	8,739.32	519,115.61
December	10,070.00	98.68	9,971.32	612,039.62

24. 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 614,200 AF plus 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.

25. 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, consistently obtains a full pool status each year.

26. 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 and Flathead Lake 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

27. 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).

28. 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.

29. 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.

30. 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*.

31. 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 21-26.

## Adverse Effect

### FINDINGS OF FACT

32. As noted in the Aquifer Test Report (Folnagy, A., 2015), the Department's groundwater hydrologists evaluated drawdown in nearby wells using the Theis (1935) solution, a transmissivity value of 61,910 ft<sup>2</sup>/day, a storativity value of 0.13 and the Applicant's average pumping rate of 682.7 GPM based on annual consumption from the pit. After five years of pumping drawdown in excess of 1 foot occurs in 18 wells (See file) within 2,300 feet of the Applicant's pit. All wells have adequate water columns available post drawdown.

33. To evaluate if this project will adversely affect existing water rights on the Flathead River and Flathead Lake the Department subtracts monthly net depletions from the flow rate/volume of water legally available on those sources. For every month of the proposed period of diversion the flow rate/volume of Flathead Lake and the Flathead River exceed all legal demands and the proposed use.

34. The Applicant has a plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of prior appropriators will be satisfied. During times of extreme water shortage or if call should be made the Applicant will stop pumping water from the pit and/or fill in the pit.

35. The proposed use will not adversely affect nearby wells or senior surface water users of the Flathead River and Flathead Lake.

### CONCLUSIONS OF LAW

36. 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.

37. 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).

38. In regard to senior hydropower water rights, the facts in this application are distinguishable from those In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLIC) 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 groundwater appropriation that depletes surface water more than 150 miles upstream of Noxon Reservoir and is located above Flathead Lake and Salish-Kootenai Dam, and below the inflows from the Bureau of Reclamation's Hungry Horse Dam.

39. 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 and Confederated Salish and Kootenai Tribes' 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 Confederated Salish and Kootenai Tribes 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 32-35)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

45. Gravel extraction started in the southeastern corner of the property and will progress in a reverse S-pattern from south to north. The site will be mined in 10 phases. At full build out gravel mining operations will expose 41.93 acres of water. The pit will have nearly vertical

sides. The maximum depth of the pit will be 35 feet; the water table will range from 12-15 feet below ground surface. Maximum water depth will be 23 feet. The maximum volume of the pit will be 964.39 AF (41.93 ac × 23 ft).

46. Mining facilities and equipment will be moved around the property as mining progresses and includes a Telsmith 24-ft by 40-ft Jaw Plant, LJ Classic with a 45-inch cone crusher and a Fabtec 5-ft by 14-ft wash plant. A Flygt portable submersible pump (model BS-2670) and 6-inch high density polyethylene main line transport the water from the pit to the gravel washing plant. The aggregate wash plant utilizes approximately 430 GPM; total consumed volume is 3.7 AF. A Flygt portable submersible pump will produce approximately 430 GPM at 110 feet of total dynamic head.

47. Dust suppression activities will utilize an on-site filling station; a gas powered Honda WD 20X centrifugal pump and water trucks. Water will be diverted from the pit to the filling station and then pumped into the trucks for them to dampen haul roads within the mine site. An average of 16,000 gallons per day, 6 days a week will be used for dust suppression April 15 thru October 15; the use is 100% consumptive. Total consumed volume for dust suppression is 7.7 AF.

48. The fish and wildlife pond will be created within the permitted mine area after final reclamation. The reclaimed fish pond will be 41.93 acres and have a flat bottom with 3:1 sides. The bottom area will cover a total of 28.90 acres. The maximum water depth will be 23 feet. The maximum volume of the reclaimed pit is 814.55 AF. Evaporation will total 125.37 AF. The pond has been designed to maximize fish habitat.

#### CONCLUSIONS OF LAW

49. 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.

50. 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.

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 45-48).

### **Beneficial Use**

#### **FINDINGS OF FACT**

52. The Applicant requested 1,101.12 AF for industrial use and 939.92 AF for fishery purposes. These volumes are not cumulative; each volume represents the pit at different points in time. After mining is completed the pit will be reclaimed and the fishery established. The requested industrial use volume is based on full mine build out. Gravel mining operations will expose 41.93 acres of water. The pit will have 1:1 sloped sides. The maximum depth of the pit will be 35 feet; the water table will range from 12-15 feet below ground surface. Maximum water depth will be 23 feet. The maximum volume of the pit will be 964.39 AF (41.93 ac × 23 ft). Evaporation will total 125.37 AF.

53. Water will be pumped from the pit for aggregate washing and dust suppression. Aggregate washing will utilize 430 GPM. Five percent is the construction standard for moisture allowed in the finished aggregate product; therefore aggregate washing consumption is expected to be 5% of the finished aggregate product. Of the 100,000 tons of aggregate produced 5,000 tons or 3.7 AF will be consumed. Dust suppression is expected to consume 16,000 gallons per day, 6 days a week, April 15 thru October 15<sup>th</sup>. Annual diverted volume for dust suppression is 7.7 AF. The total consumed volume is 136.73 AF (125.37 AF + 3.7 AF + 7.7 AF). The total diverted volume for industrial use is 1,101.12 AF, which is equal to one fill (939.92 AF) plus all consumed volumes (136.73 AF).

54. The reclaimed fish pond will be 41.93 acres and have a flat bottom with 3:1 sides. The bottom area will cover a total of 28.90 acres. The maximum water depth will be 23 feet. The

maximum volume of the reclaimed pit 814.55 AF. Evaporation will total 125.37 AF. The total requested volume for fisheries is 939.92 AF (814.55 AF + 125.37 AF).

### CONCLUSIONS OF LAW

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

56. 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).

57. 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).

58. The Applicant proposes to use water for industrial and fishery purposes which are recognized beneficial uses § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that industrial and fishery uses are beneficial uses and that 1,101.12 AF is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA (FOF 52-54).

## **Possessory Interest**

### **FINDINGS OF FACT**

59. The applicant signed and had the affidavit on the application form notarized affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

### **CONCLUSIONS OF LAW**

60. 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.

61. 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.

62. 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. 59)

### **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 30072061 should be GRANTED.

The Department determines the Applicant may impound groundwater by means of a pit, from January 1<sup>st</sup> to December 31<sup>st</sup> up to 1,101.12 AF, from a point in W2W2 Section 36 and the E2NESE of Section 35, Township 30N, Range 21W, Flathead, Montana for industrial and fishery purposes from January 1<sup>st</sup> to December 31<sup>st</sup>. The place of use is located in W2W2 Section 36 and the E2NESE of Section 35, Township 30N, Range 21W, Flathead, Montana. The pits' surface area will total 41.93 acres; maximum capacity of the pit is 964.39 AF. Maximum capacity of the reclaimed pit will be 814.55 AF.

**NOTICE**

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

DATED this 18<sup>th</sup> day of December, 2015

/Original signed by Kathy Olsen/  
Kathy Olsen, Deputy Regional Manager  
Kalispell Regional Office  
Department of Natural Resources and Conservation