

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

* * * * *

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30148753 BY PRAIRIE DOG DEVELOPMENT, LLC	}	PRELIMINARY DETERMINATION TO GRANT PERMIT
--	---	--

* * * * *

On April 15, 2020, Prairie Dog Development, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30148753 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 300 gallons per minute (GPM) up to 82.2 acre-feet (AF). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of August 18, 2020. Environmental Assessment for this Application was completed on September 2, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Aquifer Testing Addendum, Form 600-ATA and electronic Form 633

Attachments:

- Maps:
 - USGS map which identified the place of use, proposed points of diversion, township, range, and section lines.
 - Subdivision Layout and Preliminary Plat map
 - Aquifer Testing Layout map
 - Preliminary Water System Layout map
- Associated right abstract for 76LJ 45143-00

- Preliminary Hydraulic Analysis
- Pump Specifications and driller logs
- USDA Natural Resource Conservation Service (NRCS), 2003 Irrigation Water Requirements (IWR) program output for pasture grass

Information Received after Application Filed:

- E-mail from Applicant’s consultant entitled “RE: Prairie Dog question” dated and received July 16, 2020 which responded to a Department inquiry about the aquifer test. Applicant submitted updated Form 633 for each well.
- E-mail from Applicant’s consultant entitled “RE: Prairie Dog Development LLC 76LJ 30148753” which clarified the lawn and garden period of diversion and use, dated and received August 14, 2020.

Information within the Department’s Possession/Knowledge:

- USGS flow records for the Flathead River at Columbia Falls gage; station No. 12363000. Period of record October 1951 – May 2020.
- USGS flow records for the Flathead River near Polson gage; station No. 12372000. Period of record October 1938 – May 2020.
- Aquifer Test Report dated June 26, 2020 and Depletion Report dated June 26, 2020, written by Attila Fohnagy, Groundwater Hydrologist, Water Management Bureau.
- Legal demands for the above-mentioned streams using the Department water right database.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents.
 - “Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer” written by the Department’s Water Management Bureau, dated December 12, 2019.
 - “DNRC Consumptive Use Methodology – Turf Grass”, dated March 23, 2010.

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater for multiple domestic use January 1st through December 31st and lawn and garden irrigation April 20th through October 10th at a rate of 300 GPM up to 82.21 AF from two wells in the SWNWSE of Section 16, Township 30N, Range 20W, Flathead County, Montana.
2. The place of use is generally located in The Benches Subdivision in the W2SE, Sec 16, Township 30N, Range 20W, Flathead County, Montana (Figure 1). 49 lots will be developed with 50 homesites and 25.7 acres of lawn and garden will be irrigated.
3. Statement of Claim 76LJ 45143-00 is associated with the proposed place of use but is not supplemental. The water right is for irrigation of 33 acres from a spring fed pond. The proposed water right will not be used in conjunction with Statement of Claim 76LJ 45143-00. Lawn and garden irrigation within the subdivision will be supplied by the public water supply system.
4. The point of diversion is located in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions. The Applicant's wells are approximately 2,000 feet and 3,000 feet east of the Flathead River and Taylor Spring Creek (also known as Mengon Creek). The source aquifer is a deep confined aquifer, referred to by Montana Bureau of Mines and Geology (MBMG) as the Deep Aquifer. Depletions to this aquifer will show up in the Flathead River and Flathead Lake. Taylor Spring Creek is not hydraulically connected to the source aquifer based on examined well logs within the area.

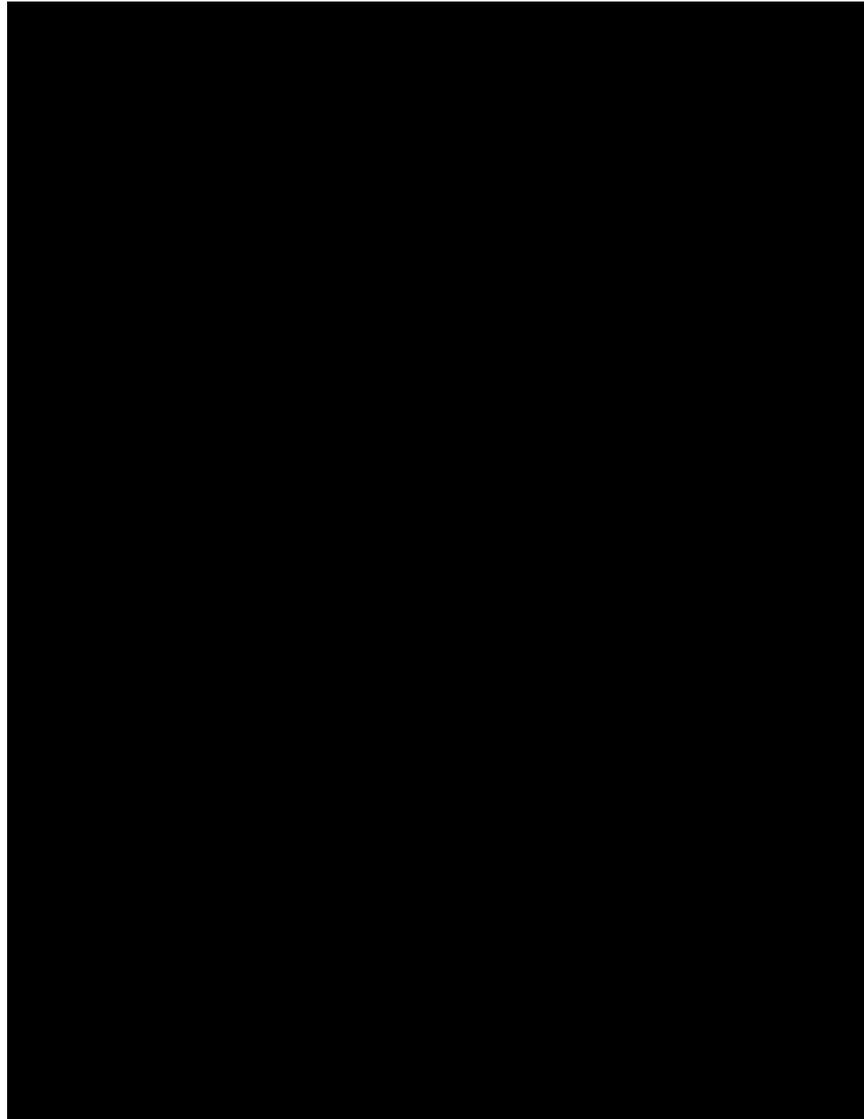


Figure 1: Map of Proposed Place of Use and Two Points of Diversion

5. The total requested diverted volume is 82.2 AF; of this 40.9 AF will be consumed. Using the USDA Irrigation Water Requirement (IWR) Program 25.7 acres of lawn and garden (average of 0.52 acres/lot) will consume 38.1 AF. Assuming a system efficiency of 70 percent, 54.35 AF will be diverted for lawn and garden irrigation. A total of 49 lots with 50 homesites will be developed within the subdivision. Per Flathead County Environmental Health Department construction standards for subsurface wastewater treatment systems each residence is allotted

500 gallons/day. Two homes are proposed on lot one for a total of 875 gallons/day. Total annual multiple domestic use is 27.86 AF [(48 lots × 500 gal/day × 365 days) + (1 lot × 875 gal/day × 365 days) ÷ 325,851 gal/AF]. Assuming a consumptive value of 10% for drain fields the total consumed volume for multiple domestic use is 2.8 AF. The designed capacity of the system is 300 GPM (peak flow for multiple domestic equals 86.5 GPM, lawn and garden equals 208.5 GPM). The pumps will operate on an alternate basis and will not pump simultaneously. Based on the pump curve, each pump is capable of producing 300 GPM. The Applicant proposes to meter use. Metering of the system shall account for the total water diverted from the wells in combination.

§ 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 proposed appropriation will utilize two wells (PWS North GWIC No. 304934, PWS South GWIC No. 305019). Both PWS North and South are 227 feet deep with a static water level of 51 feet below ground surface (at time of drilling). Both wells are completed in a confined gravel and sand aquifer system referred to by MBMG as the Deep Aquifer. The two wells are approximately 115 feet apart. Both wells were drilled by a licensed well driller, license No. WWD-718.

13. The Applicant supplied data from two 72-hour yield drawdown tests conducted on PWS North and South. PWS North (No. 304934) was tested on February 17, 2020 at a minimal flow rate of 300 GPM. The maximum drawdown in the pumping well was 11.5 feet below the static water level of 49.9 feet below top of casing. PWS South (No. 305019) was tested on March 2, 2020 at a minimal flow rate of 300 GPM. The maximum drawdown in the pumping well was 15.3 feet below the static water level of 50.8 feet below top of casing. Background groundwater levels in the pumped well and observation wells were recorded for each test. Each test followed Department approved procedures. No Department variance was granted.

14. Drawdown is modeled for the period of diversion for PWS North (GWIC No. 304934) and PWS South (GWIC No. 305019) by assigning each well half the assumed monthly pumping schedule. This analysis uses the Neuman-Witherspoon (1969) solution with inputs of $T = 2,246 \text{ ft}^2/\text{day}$ and $S = 0.00042$. The monthly pumping schedule is obtained by evenly distributing the

requested domestic volume throughout the entire year and apportioning the requested irrigation volume based on the net irrigation requirement from the Kalispell Station in the Irrigation Water Requirement (IWR) program (NRCS, 2003) (Table 6). The aquifer adjacent to the proposed wells will experience the largest drawdown of 6.7 feet during the period of diversion at the end of July.

15. The total maximum drawdown of 16.1 feet for PWS North (GWIC No. 304934) is the sum of the modeled aquifer drawdown at the end of July (6.7 feet) and the drawdown (9.4 feet) at 314 minutes (time it takes to pump July's daily volume of 94,392 gallons) into the 72-hour aquifer test. This would leave 151.0 feet of water column above the bottom of GWIC No. 304934 during the period of maximum use.

16. The total maximum drawdown of 19.5 feet for PWS South (GWIC No. 305019) is the sum of the modeled aquifer drawdown at the end of July (6.7 feet) and the drawdown (12.8 feet) at 311 minutes (time it takes to pump July's daily volume of 94,392 gallons) into the 72-hour aquifer test. This would leave 146.7 feet of water column above the bottom of GWIC No. 305019 during the period of maximum use.

17. The wells are drilled into a confined gravel and sand aquifer system, known as the Deep Aquifer. Physical availability for the purpose of evaluating legal availability is evaluated pursuant to the Department's Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer (DNRC, 2019). As described in DNRC (2019), groundwater levels in the Deep Aquifer (and physical availability of groundwater in the context of a legal availability analysis) are effectively controlled by the stage of Flathead River and Flathead Lake. A new groundwater user will reduce the discharge from the aquifer to the river and lake, generally in an amount equivalent to their consumptive use. Depending on the project location, the effects of consumptive use on Flathead Lake and the Flathead River between Columbia Falls and Flathead Lake will be evaluated via a stream depletion analysis. Because groundwater levels in the Deep Aquifer are controlled by the stage of the Flathead River and Flathead Lake, physical availability will be addressed by quantifying the median of the mean monthly flows and volumes of the

Flathead River and Flathead Lake during the proposed period of diversion/surface water depletion.

18. Physical availability of the Flathead River from the USGS gage at Columbia Falls to the inlet of Flathead Lake will be quantified monthly. The Flathead River at Columbia Falls, MT USGS Gaging Station No. 12363000, period of record (October 1951 – May 2020) and the method outlined below were utilized to quantify median of the mean monthly flows and volumes during the proposed period of diversion (Table 1).

Table 1: Flathead River at Columbia Falls USGS Gage # 12363000 Physical Availability

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	5,245	4,869	4,920	10,895	22,645	24,680
Volume (AF)	321,907.4	269,937.4	301,989.6	647,163.0	1,389,950.1	1,465,992.0
	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	11,400	5,482	4,585	5,052	4,546	5,499
Volume (AF)	699,732.0	336,485.2	272,349.0	310,091.8	270,032.4	337,528.6

19. The USGS gage on the Flathead River at Columbia Falls, MT marks the upstream extent of the depleted reach and is the nearest gage on the Flathead River above the inlet to Flathead Lake. The data range used includes the entire period of record for this gage. Gaging station records were used to calculate median of the mean flow rates (CFS) for each month during the proposed period of diversion, which were then converted to monthly volumes (AF). Volumes were calculated by converting monthly flows using the following equation found on the Department’s Form 615 (monthly flow (CFS) × 1.98 × days per month = AF/month).

20. For analysis of reaches where the gaging station used marks the upstream extent of the depleted reach (in this instance, the entire reach of the Flathead River between the Columbia Falls USGS gage and the inlet of Flathead Lake), the median of the mean monthly gage value represents physical availability for the reach.

21. The Flathead River near Polson, MT USGS Gaging Station #12372000 (period of record: October 1938 – May 2020) and the method outlined below were utilized to quantify median of

the mean monthly flows and volumes during the proposed period of diversion for the reach consisting of Flathead Lake down to USGS gaging station #12372000 (Table 2).

Table 2: Flathead River near Polson USGS Gage # 12372000 Physical Availability

Month	Median of the Mean Monthly Flow Gage No. 12372000 (CFS)	Existing Legal Demands on Flathead Lake (CFS)	Physically Available Water Flathead Lake (CFS)	Physically Available Water Flathead Lake (AF)
January	10,405	104.7	10,509.7	645,083.4
February	9,208	104.7	9,312.2	516,266.6
March	7,866	104.7	7,970.7	489,239.6
April	9,560	172.5	9,732.5	578,112.6
May	19,420	172.5	19,592.5	1,202,589.8
June	25,820	172.5	25,992.5	1,543,956.6
July	12,745	172.5	12,917.5	792,878.3
August	6,244	172.5	6,416.0	393,816.2
September	6,022	172.5	6,194.5	367,955.4
October	7,369	172.5	7,541.5	462,899.4
November	8,838	104.7	8,942.7	531,194.5
December	10,110	104.7	10,214.7	626,976.3

22. The USGS gage on the Flathead River near Polson, MT is the nearest gage downstream of Flathead Lake. The data range used includes the entire period of record for this gage. Gaging station records were used to calculate median of the mean flow rates (CFS) for each month during the proposed period of diversion, which were then converted to monthly volumes (AF). Volumes were calculated by converting monthly flows using the following equation found on the Department’s Form 615 (monthly flow (CFS) × 1.98 × days per month = AF/month).

23. For analysis of reaches where the gaging station used is below the depleted reach (in this instance, the entirety of Flathead Lake), Department practice is to add in the flow rates and volumes of existing rights within the reach to the gage values to determine physical availability. This is done to account for existing users’ withdrawals on the source. For this analysis, the Department will add in all rights from the USGS gage near Polson up to the inlet of the Flathead River into Flathead Lake to determine physical availability for the reach.

24. When calculating the volume appropriated by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1 to October 31. All other water uses were analyzed as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users. Volumes were calculated by converting monthly flows using the following equation found on the Department's Form 615 (monthly flow (CFS) \times 1.98 \times days per month = AF/month).

25. Based on this information water is physically available within the Deep Aquifer and from the Flathead River and Flathead Lake to supply the proposed use of 300 GPM and 82.2 AF.

CONCLUSIONS OF LAW

26. 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."

27. *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).

28. 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).

29. 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)12-25.

Legal Availability:

FINDINGS OF FACT

30. The Department's December 12, 2019 memo states groundwater levels within the Deep Aquifer are controlled by the stage of the Flathead River/Flathead Lake. Therefore, these two sources were evaluated for legal availability. A new groundwater user will reduce the discharge from the aquifer to the river and lake, generally in an amount equivalent to their consumptive use.

31. Legal availability analysis of these surface waters needs to be based on the timing of the depletions and in accordance with ARM 36.12.1702. The stream depletion analysis is limited to effects from the new groundwater appropriation, and not the cumulative total of all existing water rights within the Deep Aquifer; consistent with current practice regarding new groundwater appropriations. Total annual consumption for multiple domestic and lawn and garden use is calculated to be 40.9 AF. Net depletion by pumping in the Deep Aquifer primarily occurs through propagation of drawdown through the overlying confining layer to the Flathead River downstream of Columbia Falls. Therefore, depletion effects are expected to be dampened resulting in constant year-round depletion even though consumption from the requested appropriation is concentrated in the summer. The Department has determined the proposed use will result in a constant year-round rate of depletion of 25.4 GPM from the Flathead River downstream of Columbia Falls and Flathead Lake (Table 3).

Table 3: Consumption and Net Depletion to Flathead River for Application No. 76LJ 30148753

Month	Consumption (AF)	Depletion (AF)	Depletion (GPM)
January	0.2	3.5	25.4
February	0.2	3.1	25.4
March	0.2	3.5	25.4
April	1.0	3.4	25.4
May	5.2	3.5	25.4
June	7.6	3.4	25.4
July	10.8	3.5	25.4
August	9.7	3.5	25.4
September	4.9	3.4	25.4
October	0.5	3.5	25.4
November	0.2	3.4	25.4
December	0.2	3.5	25.4
TOTAL	40.9	40.9	

32. Legal availability of the Flathead River below USGS gage # 12363000 to the inlet of Flathead Lake were quantified monthly throughout the proposed period of diversion utilizing the Flathead River at Columbia Falls, MT USGS Gaging Station #12363000 and the method outlined below.

33. For this analysis, the Department subtracted out all existing rights (legal demands) from the Columbia Falls USGS gage down to the Flathead Lake inlet in order to determine legal availability for this reach (Table 4). When evaluating criteria for legal availability (36.12.1704 & 36.12.1705), existing legal demands are subtracted from physically available water. A list of existing rights was generated for this reach of the Flathead River. A copy of this list can be found in the water right file or provided upon request.

34. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1 to October 31. All other water uses were analyzed as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month

of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users. Volumes were calculated by converting monthly flows using the following equation found on the Department’s Form 615 (monthly flow (CFS) × 1.98 × days per month = AF/month).

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	5,245	3,508.4	1,736.1	106,559.4
February	4,869	3,508.4	1,360.6	75,429.4
March	4,920	3,508.4	1,411.6	86,641.6
April	10,895	6,816.3	4,078.7	242,275.8
May	22,645	8,291.3	14,353.7	881,031.2
June	24,680	8,291.3	16,388.7	973,489.8
July	11,400	5,568.3	5,831.7	357,950.8
August	5,482	3,666.3	1,815.7	111,448.7
September	4,585	3,666.3	918.7	54,571.8
October	5,052	3,666.3	1,385.7	85,055.3
November	4,546	3,508.4	1,037.6	61,631.1
December	5,499	3,508.4	1,990.6	122,180.6

35. Legal availability for Flathead Lake to USGS gage # 12372000 was quantified monthly throughout the proposed period of diversion utilizing the Flathead River near Polson, MT USGS Gaging Station #12372000 and the method outlined below. Selis Ksanka Qliske Dam near Polson is the control structure for Flathead Lake, and depletions accumulating in Flathead Lake reduce the total volume of water leaving the Lake (passing over/through the dam).

36. For this analysis, the Department will subtract out all existing rights (legal demands) from the Flathead Lake inlet down to the USGS gage near Polson in order to determine legal availability for this reach (Table 5). When evaluating criteria for legal availability (36.12.1704 & 36.12.1705), existing legal demands will be subtracted from physically available water. A list of

existing water rights on Flathead Lake from the Flathead Lake inlet down to the Polson USGS gage was compiled. A copy of this list can be found in the water right file or provided upon request.

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

Month	Physically Available Water Flathead Lake (CFS)	Existing Legal Demands on Flathead Lake (CFS)	Physically Available Water Minus Legal Demands (CFS)	Physically Available Water Minus Legal Demands (AF)
January	10,509.7	104.7	10,405.0	638,658.9
February	9,312.2	104.7	9,207.5	510,463.8
March	7,970.7	104.7	7,866.0	482,815.1
April	9,622.5	172.5	9,450.0	561,330.0
May	19,522.5	172.5	19,350.0	1,187,703.0
June	25,892.5	172.5	25,720.0	1,527,768.0
July	12,932.5	172.5	12,760.0	783,208.8
August	6,435.5	172.5	6,263.0	384,422.9
September	6,210.5	172.5	6,038.0	358,657.2
October	7,541.5	172.5	7,369.0	452,309.2
November	8,942.7	104.7	8,838.0	524,977.2
December	10,214.7	104.7	10,110.0	620,551.8

37. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1 to October 31. All other water uses were analyzed as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users. Volumes were calculated by converting monthly flows using the following equation found on the Department's Form 615 (monthly flow (CFS) × 1.98 × days per month = AF/month).

38. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Selis Ksanka Qlispe Dam. The two claimed water rights for Selis Ksanka Qlispe 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.

39. Selis Ksanka Qlispe 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 Selis Ksanka Qlispe Dam require 1,831,306 AF to meet the hydropower water rights claimed in the adjudication, the records show that Selis Ksanka Qlispe Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

40. 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

41. 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).

42. 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.

43. 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.

44. 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*.

45. 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 30-40.

Adverse Effect

FINDINGS OF FACT

46. As noted in the Aquifer Test Report (Folnagy, A., 2020), the Department’s groundwater hydrologists evaluated drawdown in nearby wells using the Neuman-Witherspoon (1969) solution with the following parameters: $T = 2,246 \text{ ft}^2/\text{day}$, $S = 0.00042$, and the assumed monthly pumping schedule in Table 6. The monthly pumping schedule is obtained by evenly distributing the requested domestic volume throughout the entire year and apportioning the requested irrigation volume based on the net irrigation requirement from the Kalispell Station in the Irrigation Water Requirement (IWR) program (NRCS, 2003). The two proposed wells were modeled as one well due to their close proximity. Drawdown is largest at the end of July of the fifth year of pumping. After five years of an assumed monthly pumping schedule, drawdown in excess of one foot extends 290 feet from the Applicant’s wells. There are no water rights completed in the source aquifer that may experience drawdown greater than one foot.

Table 6: Monthly pumping schedule for proposed wells. The diversion (AF) includes both the domestic and irrigation use.

Month	IWR (in) – Kalispell	Diversion (AF)	Diversion (GPM)
January	0.00	2.3	17.5
February	0.00	2.3	17.5
March	0.00	2.3	17.5
April	0.36	3.4	25.8
May	2.33	9.5	71.3
June	3.45	12.9	97.1
July	4.92	17.4	131.1
August	4.41	15.8	119.3
September	2.17	9.0	67.6
October	0.12	2.7	20.3
November	0.00	2.3	17.5
December	0.00	2.3	17.5
Total	17.76	82.2	

47. To evaluate if this project will adversely affect existing water rights on the Flathead River and Flathead Lake the Department subtracts monthly net depletions (40.9 AF annually; 25.4 GPM per month) 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.

48. 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 proposes the following plan:

1. Reduce irrigation application 50%;
2. Cease irrigation;
3. Initiate domestic water rationing to 50% and
4. Turn off the well pumps and haul water for domestic use

49. The Applicant proposes to meter use. Metering of the system shall account for the total water diverted from the wells in combination.

CONCLUSIONS OF LAW

50. 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.
51. 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(5).
52. 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.
53. 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.
54. 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.

55. 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.

56. 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) (TRLC) concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production. The proposed appropriation in this case is a 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.

57. 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.

58. 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 46-49).

Adequate Diversion

FINDINGS OF FACT

59. The proposed appropriation will utilize two wells: PWS North (GWIC No. 304934) and PWS South (GWIC No. 305019). Both PWS North and South are 227 feet deep with a static water level of 51 feet below ground surface (at time of drilling). Both wells are completed in a confined gravel and sand aquifer system referred to by MBMG as the Deep Aquifer. The two wells are approximately 115 feet apart. Both wells were drilled by a licensed well driller, license No. WWD-718, in accordance with MCA Title 37, Chapter 43 and ARM Title 36, Chapter 21.

60. The Benches Subdivision public water supply shall include two wells, pump house, pressure tanks, 3,700 feet of six-inch looping water main, and appurtenant valving and controls. Each lot shall tap into the main line with a class 160 polyethylene service line with a curb stop and valve box. Each well will house a Goulds model 320L25 submersible pump with 25-hp motor (or equivalent). Each pump will be capable of producing 300 GPM at 220 feet of total dynamic head. The well pumps are controlled by the pressure in the water system, system pressure is maintained via variable frequency drives. System pressure will operate between 60-75 psi. The pumps will alternate each demand cycle. Based on the production capacity of the two wells no storage will be required. The system is being designed by a professional engineer from A2Z Engineering and shall be approved by the Department of Environmental Quality as a public water supply system prior to installation.

CONCLUSIONS OF LAW

61. 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.

62. 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.

63. 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 59-60).

Beneficial Use

FINDINGS OF FACT

64. Total requested diverted volume is 82.2 AF; of this 40.9 AF will be consumed. Using the USDA Irrigation Water Requirement (IWR) Program, 25.7 acres of lawn and garden (average of 0.52 acres/lot) will consume 38.1 AF. Assuming a system efficiency of 70 percent, 54.35 AF will be diverted for lawn and garden irrigation. A total of 49 lots with 50 homesites will be developed within the subdivision. Per Flathead County Environmental Health Department construction standards for subsurface wastewater treatment systems each residence is allotted 500 gallons/day. Two homes are proposed on lot one for a total of 875 gallons/day. Total annual multiple domestic use is 27.86 AF [(48 lots × 500 gal/day × 365 days) + (1 lot × 875 gal/day × 365 days) ÷ 325,851 gal/AF]. Assuming a consumptive value of 10% for drain fields the total consumed volume for multiple domestic use is 2.8 AF.

65. The designed capacity of the system is 300 GPM (peak flow for multiple domestic equals 86.5 GPM, lawn and garden equals 208.5 GPM). The pumps will operate on an alternate basis and will not pump simultaneously. Based on the pump curve, each pump is capable of producing 300 GPM. The Applicant proposes to meter use. Metering of the system shall account for the total water diverted from the wells in combination.

CONCLUSIONS OF LAW

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

67. 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).

68. 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).

69. Applicant proposes to use water for multiple domestic and lawn and garden use which are recognized beneficial uses. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence multiple domestic and lawn and garden are beneficial uses and that 82.2 AF of diverted volume and 300 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 64-65)

Possessory Interest

FINDINGS OF FACT

70. 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

71. 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.

72. 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.

73. 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 70)

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 30148753 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of two wells (GWIC No. 304934 & No. 305019, both 227 feet deep), from January 1st through December 31st at 300 GPM up to 82.2 AF, from two points in the SWNWSE, Section 16, Township 30N, Range 20W, Flathead, Montana for multiple domestic use January 1st through December 31st and lawn and garden irrigation April 20th through October 10th. The place of use is located in The Benches Subdivision, Section 16, Township 30N, Range 20W, Flathead County, Montana. 25.7 acres will be irrigated and 49 lots developed with 50 homesites.

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 8th of September 2020.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 8th day of September 2020, by first class United States mail.

PRAIRIE DOG DEVELOPMENT, LLC
719 3RD STREET WEST
WHITEFISH, MT 59937

WATER AND ENVIRONMENTAL TECHNOLOGIES
102 COOPERATIVE WAY, SUITE 100
KALISPELL, MT 59901

NAME

DATE