Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6615
DNRCOAH@mt.gov

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

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IN THE MATTER OF APPLCIATION FOR BENEFICIAL WATER USE PERMIT NO. 76D-30147623 BY LODESTONE ADVENTURES, LLC AND PURDY, RITA A., RYAN D., AND JOSEPH L.	**)** **)** **)** **)**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL ORDER**

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On December 16, 2021, hearing examiner Cameron Boster presided over a contested case hearing on Application for Beneficial Water Use Permit No. 76D-30147623 ("Application") to determine whether Lodestone Adventures, LLC, and Joseph, Rita, and Ryan Purdy ("Applicants") proved by a preponderance of evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied, in light of Mr. Randy Wilson's and Mr. John Ruth's valid objections regarding adverse effect and physical availability. For the reasons set forth below, the hearing examiner determines that Applicants have not proved that the applicable criteria of § 85-2-311(1), MCA, have been satisfied by a preponderance of evidence.

BACKGROUND AND PROCEDURAL HISTORY

On January 22, 2020, Applicants submitted Application for Beneficial Water Use Permit No. 76D-30147623. The Application sought to divert 48.96 acre-feet/year ("AF/yr") at 154 gallons per minute ("gpm") to provide groundwater for the North Star Landing Subdivision northwest of Eureka, Montana. *Application*, p. 2. The groundwater was intended to be used for domestic and

lawn and garden purposes on the 125-lot subdivision, via three public water supply wells, pump house, storage, and distribution system. *Application*, p. 14. On July 21, 2020, Lodestone amended the Application to increase the requested permitted volume to 62.97 AF/yr. On December 15, 2020, the Department determined that Lodestone's Application was "correct and complete," and on January 6, 2021, the Department issued the Preliminary Determination to Grant the Application ("PD"). See *Correct and Complete Letter; PD.*

The PD was publicly noticed pursuant to § 85-2-307, MCA. Objector Mr. John Ruth timely filed a valid objection to the Application on the basis that the Applicant did not prove the physical availability and adverse effect criteria in § 85-2-311(1). *March 18, 2021, Ruth Objection*. Objector Randy Wilson timely filed a valid objection to the Application on the basis that the Applicant did not prove the adverse effect criteria in § 85-2-311(1). *March 18, 2021, Wilson Objection*.

Upon receipt of the two valid objections, the DNRC set this hearing to determine whether Applicants proved by a preponderance of evidence that the physical availability and adverse effect criteria of § 85-2-311(1), MCA, are satisfied. On December 16, 2021, hearing examiner Cameron Boster conducted a contested case hearing on Application for Beneficial Water Use Permit No. 76D-30147623.

After the hearing, all parties submitted closing briefs. Only the Applicants submitted proposed findings of fact and conclusions of law.

APPEARANCES AND WITNESSES

During the December 16, 2021, hearing, Applicants were represented by Attorney Rick Tappan. Objectors appeared *pro se*. At the Permit Application hearing, Applicants and Objectors elicited testimony from John Ruth, Kathy Olsen, Melissa Schaar, Randy Wilson, Jamie Graham, Ian Thomsen, Melissa Brickl, and Brad Bennett, all of whom presented testimony under oath. All

parties were provided the right to elicit testimony through direct and cross examination of all witnesses who testified at the hearing.

EXHIBITS

The audio recording of the hearing is split into two files. The first half of the hearing recording will be cited by referring to "R1" and noting the hour, minute, and second of the track at which the relevant evidence is presented. The second half of the hearing will be cited as "R2."

In addition to the administrative file maintained by DNRC regarding the Application and the video and audio recordings of the hearings, the administrative record includes the following exhibits. Applicants' exhibits have been labelled with the prefix "A," Objector Ruth's exhibits have been labelled with the prefix "OR," and Objector Wilson's exhibits have been labelled with the prefix "OW."

Applicant

A-1: Administrative File

A-2: First Discovery Requests to Ruth

A-3: Ruth Discovery Response.pdf

A-4: First Discovery Requests to Wilson

A-5: Wilson Discovery Responses.pdf

A-6: Impeachment Ex ASTM_4050

A-7: Impeachment Ex ANSI NGWA-01-14 Water Well Construction Standard Section 7

A-8: NS-6 Field Notes

A-9: NS-7 Field Notes

A-10: NS-8 Field Notes

A-11A: McCrometer Manual

A-11B: McCrometer Specifications Sheet

A-12A: Neptune Product Sheet

A-12B: Neptune Specifications Sheet

A-12C: Neptune Parts sheet

A-13A: NS-1 - GWIC 285865

A-13B: NS-3 - GWIC 285868

A-13C: NS-4 - GWIC 285868

A-13D: NS-5 - GWIC 285897

A-13E: NS-6 - GWIC 300353

A-13F: NS-7 - GWIC 303821

A-13G: NS-8 - GWIC 303822

A 13H: Wilson - GWIC 90310

A-13I: Cook - GWIC 166555

A-13J: Handy - GWIC 302631

A-13K: Linnel - GWIC 126341

A-14A: 12-16-2019 Pre-Application Meeting Form

A-14B: 12-16-2019 Pre-Application Meeting Package

A-15A: MBMB Bulletin 81

A-15B: gwof_24

A-16A

A-16B

A-16C

A-17

Objector Ruth

OR-1 - Flow Meter Totalizer Summary for NS-6 on Friday Feb 1 2019

OR-2-Selected Aquifer Test Data_NS-6

OR-3-Selected Aquifer Test Data_NS-7

OR-4-Selected Aquifer Test Data_NS-8

OR-5-Cross Section for Domestic Wells_Edited

OR-6-Photo 1 of Turbid Water NS-7

OR-7-Photo 2 of Turbid Water NS-7

OR-8-John Ruth Resume

OR-9a-Lodestone Discovery Requests to Ruth

OR-9b-Ruth Response to Lodestone Discovery Requests

OR-10-Randy Wilson Objection and OR-s

OR-11-Lodestone Response to Ruth's First Discovery Request

Objector Wilson

Objector Wilson relied on the exhibits attached to his initial objection filed on March 19, 2021. He did not submit a numbered list of numbered, labelled exhibits, and instead stated he would rely on the exhibits as they are numbered and labelled in his Objection. For clarity's sake, the hearing examiner will cite these exhibits by citing Objector Ruth's Exhibit OR-10, which includes Mr. Wilson's objection and exhibits.

BURDEN OF PROOF

The issuance of DNRC's preliminary determination to grant the application in this matter does not relieve Applicant of its obligation to prove that the applicable criteria are satisfied. It does, however, have the effect of shifting the burden of production to Objector to demonstrate that

Applicant failed to satisfy its burden on the criteria at issue in the valid objections. Because Applicant retains the burden of proof as to the criteria, Applicant may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing. See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005). In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." Id. ¶ 2 (see § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")).

SUMMARY OF OBJECTOR'S ARGUMENTS

For the sake of clarity, this Order will summarize issues presented in this matter before presenting findings of fact and conclusions of law.

Objector Ruth clearly states his arguments in his closing brief. First, Objector Ruth argues the aquifer testing that occurred to support the Application violated ARM 36.12.121 because the testing did not follow standard procedures and was not supervised by an appropriately qualified person. *Ruth Closing Brief*, pp. 4 – 7.

Second, Objector Ruth argues the NS-6, NS-7, and NS-8 aquifer tests did not comply with ARM 36.12.121 because they were not conducted at constant discharge rates, and discharge rates were not recorded at the intervals required by DNRC's Form 633. *Id*. at 8 – 11.

Third, Objector Ruth argues that the Applicants have not proved physical availability by a preponderance of the evidence because of the Applicants' failure to conduct appropriate testing and because the DNRC's analysis did not factor the location of pumps in proposed production wells to determine if the requested appropriation can be sustained. *Id.* at 12.

Fourth, Objector Ruth argues that the DNRC did not compare the physical water supply at the proposed point of diversion and the legal demand within the area of potential impact, as required by ARM 36.12.1705. *Objector Ruth's Closing Brief*, p. 13.

Objector Randy Wilson also clearly summarizes his arguments in his closing brief. First, Objector Wilson argues the aquifer testing that occurred in Applicants' NS-6, NS-7, and NS-8 tests violated ARM 36.12.121, due to lack of minimum hourly data collection and totalizer flow meter failures. *Wilson Closing Brief*, pp. 2-5. Objector Wilson also argues the aquifer testing that occurred in Applicants' NS-6, NS-7, and NS-8 tests violated ARM 36.12.121 because they were not constant rate tests. *Id.* at 4.

In summary, the Objectors argue that the aquifer testing data Applicants provided, and the manner in which it was collected, does not satisfy the requirements described in ARM 36.12.121. The Objectors further argue that because the aquifer testing data Applicants provided, and the manner in which it was collected, does not satisfy ARM 36.12.121, the Applicants cannot prove satisfaction of the physical availability and adverse effect criteria by a preponderance of evidence.

Findings of Fact

1. The Applicants propose to divert groundwater at a rate of 154 GPM up to 62.97 AF from three wells (GWIC No. 300353, 303821 and 303822) in the NWNWSW of Section 6, Township 36N, Range 27W, Lincoln County, Montana. *PD* at 3. The Applicant proposes to divert groundwater for multiple domestic use (125 residential lots) January 1st through December 31st and lawn and garden use (5.75 acres) April 15th through October 15th within the North Star Landing Subdivision. *Id.* The place of use is generally located in North Star Landing Subdivision in the W2SW and NESW, Section 6, Township 36N, Range 27W, Lincoln County, Montana. *Id.*

2. The point of diversion is located in the Kootenai River Basin (76D). *PD*, p. 3-4. The Applicant's proposed wells are approximately 2,400 feet from Kootenai River (Lake Koocanusa), and 8,000 feet from the Tobacco River at its intersection with the national hydrography dataset polygon representing Lake Koocanusa. *Id.* The source aquifer is a 30-foot thick confined sand and gravel aquifer referred to as the Deep Aquifer. *Id.* It is overlain by a more transmissive unconfined aquifer. *Id.* Groundwater flows from the margins of the valley toward Lake Koocanusa and the Tobacco River, with the predominant flow direction of west and southwest. *Id.*

3. The proposed appropriation will utilize three wells: GWIC No. 300353 (NS-6), GWIC No. 303821 (NS-7) and GWIC No. 303822 (NS-8). *PD*, p. 10. All wells are completed in a confined gravel and sand aquifer system. The three wells are within 100 feet of each other. All wells were drilled by a licensed well driller in 2019, license No. WWC-651. *Id.*

4. The Applicant supplied data from three 72-hour aquifer tests conducted on NS-6, NS-7 and NS-8. *PD*, p. 10 – 11. The NS-6 test began February 1, 2019 at 12:15 p.m. and continued uninterrupted until February 4, 2019 at 12:15 p.m. *Id.* Five observation wells were monitored: NS-1, NS-3, NS-5, Linell, and Wilson (GWIC No.'s 285865, 285868, 285897, 126341, and 90310).

Id. The maximum drawdown in NS-6 was 18.02 feet below the static water level (SWL) of 115.53 feet below top of casing (BTC). *Id.* The Wilson, Linnel, NS-3, NS-5, and NS-1 wells are 400, 1,245, 1,028, 1,104, and 1,328 feet, respectively, from the pumping well and exhibited a maximum drawdown of 3.96, 1.88, 1.38, 0.85, and 0.33 feet, respectively. *Id.*

5. The NS-7 test began September 21, 2019 at 3:00 p.m. and continued uninterrupted until September 24, 2019 at 3:00 p.m. *Id.* Four observation wells were monitored: Handy, NS-4, Cook and Wilson wells (GWIC No.'s 302631, 285868,166555, and 90310). *Id.* The maximum drawdown in NS-7 was 24.25 feet below the SWL of 114.7 feet BTC. *Id.* The observation wells NS-4, Cook, and Wilson experienced 1.15, 2.06, and 3.80 feet of drawdown, respectively, below the SWL of 113.11, 118.53, and 93.78 feet, respectively. *Id.*

6. The NS-8 test began October 14, 2019 at 12:10 p.m. and continued uninterrupted until October 17, 2019 at 12:10 p.m. *Id.* Two observation wells were monitored: NS-6, NS-7 (GWIC No. 300353, 303821). *Id.* The maximum drawdown in NS-8 was 22.08 feet below the SWL of 118.96 feet BTC. *Id.* The observation wells NS-7 and NS-6 experienced 8.47 and 8.24 feet of drawdown, respectively, below the SWL of 113.74 and 114.10 feet, respectively. *Id.*

7. Using the data Applicants collected during the NS-6, NS-7, and NS-8 tests, the DNRC performed modeling using the Cooper-Jacob (1946) solution which determined there is water physically available to supply the Applicants' proposed use. *PD*, p. 11 – 14.

8. To evaluate adverse effect, the DNRC evaluated drawdown in nearby wells using the Cooper-Jacob (1946) solution. The DNRC determined that after July of the fifth year of an assumed monthly pumping schedule, drawdown in excess of one foot extends 3,200 feet from the Applicant's wells. The DNRC located 15 water rights completed in the source aquifer that may experience drawdown greater than one foot. *PD*, p. 19.

9. The DNRC also analyzed net depletion to nearby affected surface water sources to determine the amount of physically available water minus legal demands. *PD*, p. 19 – 22.

10. In the preliminary determination, the DNRC determined that based on the evidence Applicants presented and the modeling performed by the DNRC, the Applicants proved that the water rights of a prior appropriator under an existing water right, certificate, permit, or state water reservation will not be adversely affected. *PD*, p. 24.

11. The DNRC determined the Applicant has a plan for the exercise of the permit sought that demonstrates that the Applicant's use of water can be controlled so the water rights of prior appropriators will be satisfied. *PD*, p. 22 – 23. During times of extreme water shortage or if call should be made, the Applicant proposed 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.

Further, the DNRC determined Applicant intends to monitor water use on an individual basis and will utilize provisions allowed in the Covenants, Conditions, and Restrictions of the subdivision to enforce water conservation. *Id.* The Applicant also proposed to meter water use in a manner which accounts for the total water diverted from the wells in combination. *Id.*

12. The hearing examiner reviewed Exhibits A-8, A-9, and A-10, which contain the field notes for the NS-6, NS-7, and NS-8 tests. In the hearing examiner's opinion, the field notes are not clear or well-organized. *A-8, A-9, A-10*. The notes appear in different formats on different types of paper, and the identity of persons recording the notes are often missing or not clear. *Id.*

Testimony of Brad Bennett

13. During the hearing, the parties elicited testimony from Brad Bennett, a senior hydrogeologist employed by Water & Environmental Technologies, who purportedly supervised the NS-6, NS-7, and NS-8 tests. R1 at 23:30. Mr. Bennett testified about his extensive experience conducting aquifer tests, including "dozens" of aquifer tests conducted for water rights applications, and work related to his master's thesis. *Id.* R1 at 25:00. Mr. Bennett testified that his firm uses standard procedures when conducting aquifer tests, but that those procedures are not written. R1 at 32:00.

14. Mr. Bennett explained that maintaining a constant discharge rate during aquifer testing is often required because many of the analytical models used to determine aquifer characteristics from aquifer test data require constant discharge rate for a valid analysis. R1 at 34:00.

15. Mr. Bennett testified that he did not supervise the drilling of the NS-6, NS-7, or NS-8 wells. R1 at 44:30. Mr. Bennett also confirmed he possessed no field notes documenting the drilling of these wells. R1 at 45:30. Mr. Bennett added he had no knowledge regarding whether professional consultants supervised the drilling of these wells. R1 at 46:00. Mr. Bennett stated he was not on site for the NS-6 aquifer test. R1 at 53:30. Mr. Bennett also testified that his staff who were present for the beginning of the NS-6 test vacated the site approximately 4.5 hours after the test started. R1 at 2:01:00.

16. Regarding the NS-6, NS-7, and NS-8 tests, Mr. Bennett testified that his firm measured discharge rate data throughout the tests. R1 at 48:00. Mr. Bennett confirmed that hourly discharge measurements were not collected and recorded for the NS-6, NS-7, and NS-8 tests. R1 at 1:06:30. Mr. Bennett also testified that totalizing flow meter readings were not recorded on an hourly basis throughout the aquifer tests, because "totalizer numbers are not required to be collected every

interval." R1 at 1:07:00. Mr. Bennett further confirmed that there was not someone present during the NS-6, NS-7, and NS-8 tests to take hourly flow rate measurements. R1 at 1:10:30.

17. Mr. Bennett confirmed that his field notes contained 28 instances at which direct measurements of flow rate were recorded during the NS-6 test. R1 at 1:11:00. Mr. Bennett also confirmed that the Form 633 data provided for the NS-6 test reported discharge rates at 81 different times throughout the test. *Id.* Mr. Bennett explained that he reported that data by observing the levels of fluctuation of water levels in the NS-6 production well. *Id.* No manual measurements were collected at the end of the discharge pipe during the NS-6 test. R1 at 2:04:34.

18. Although Mr. Bennett's firm did not measure and record hourly discharge rate data by reading measurements from the meters affixed to the discharge pipe, Mr. Bennett explained that they were able to measure discharge rates by measuring water levels in the proposed production wells every ten minutes throughout the duration of the test. R1 at 1:05:00, 1:11:30; *A-16A, A-16B, A-16C.* As Mr. Bennett explained, "[t]he direct read flow meters were not read every hour. However, the water level instruments that we put in the well to monitor water levels were recording the levels in the well every 10 minutes throughout the duration of the test. As such, we would know any significant fluctuations in flow rate based on changes in water level within the pumping well." R1 at 1:05:00.

19. Mr. Bennett testified that individuals visited the testing site approximately every four hours to take measurements from the installed flow meters to confirm the appropriate discharge rate was being maintained, including "staff from Larry [Stewart's] workers." R1 at 1:39:00 – 1:46:30; R1 at 2:32:30 (Mr. Ruth: "If somebody was on site every three to four hours to read the totalizing flow meter, the other times nobody was there and no discharge data was being collected. Is that accurate?" Mr. Bennett: "The flow meters were not read during those intervals."). Mr. Bennett

testified he did not know which members of Larry Stewart's staff took the measurements, but that there was more than one individual who took measurements. *Id.*; R1 at 2:01:17 ("I don't know who the individuals were, I don't recall their names."). Mr. Bennett also confirmed he had no knowledge of the background of the people who collected these measurements. *Id.* These measurements are included in the field notes generated during the test. *A-8, A-9, A-10*. Mr. Bennett also stated that when flow meters installed for the NS-7 test failed near the end of the 72-hour test, they collected manual "bucket test" measurements at the discharge pipe to confirm a constant discharge rate. These measurements are reflected in the field notes generated during the test. R1 at 2:23:00 – 2:30:00; *A-9*. Mr. Bennett conceded that the field notes do not state who took these measurements, and Mr. Bennett did not know the identities of all persons who generated field notes. R1 at 1:39:00.

20. When Objector Ruth asked Mr. Bennett if he evaluated the amount of drawdown above the pump at the conclusion of each aquifer test, Mr. Bennett indicated they "were aware of it." R1 at 50:30. When asked to describe the above-pump drawdown data for the NS-6 test, Mr. Bennett stated he did not know that information and would need to refer to the aquifer test data. R1 at 50:30.

21. Objector Ruth questioned Mr. Bennett's measurement methodology by asking Mr. Bennett how he could distinguish water level changes caused by varying discharge rate from water level changes caused by changing aquifer conditions. R1 at 2:20:00. Bennett stated that the direct flow meter measurements taken throughout the test permitted him to distinguish between these possible causes of water level changes. *Id.* However, Mr. Bennett also testified that direct flow meter measurements were not recorded when nobody was present at the site; further, some direct flow

meter measurements were recorded by unknown persons that Mr. Bennett did not supervise. *FOF 19*.

22. Mr. Bennett confirmed that discharge rate often decreases over time as water level decreases in the pumping well used during an aquifer test, and that valve adjustments may be necessary to maintain a constant discharge rate. R1 at 54:00. Objector Ruth asked Mr. Bennett if he made any adjustments to any valve during the NS-6 test in order to maintain a constant discharge rate. R1 at 53:30. Mr. Bennett indicated he believed so, but confirmed again that he was not on site for the NS-6 test. R1 at 53:30. Mr. Bennett indicated he could not recall how many valves were on the discharge pipe, but stated that he believed there was at least one, and possibly more than one. R1 at 55:00; R1 at 2:09:00. ("I don't recall how many flow regulating valves there were."). Mr. Bennett testified that he used a gate valve to regulate discharge rate, but could not recall where it was located. R1 at 2:10:00. Mr. Bennett also testified that valve adjustments made to regulate flow rate are not specified in field notes, and that the flow rates he recorded reflect any valve adjustments that were made. R1 at 2:18:00.

23. Objector Ruth asked Mr. Bennett to explain the flow meter failure that occurred during the NS-7 test. R1 at 2:22:00. Mr. Bennett explained that he was not on site, but that he understood the flow meter ceased reading. R1 at 2:22:00.

24. Objector Wilson questioned Mr. Bennett regarding photographs contained in Objector Wilson's Exhibits 3, 4, and 5, which show water leaving the NS-6 discharge pipe at purportedly different levels. R1 at 3:02:00. Mr. Wilson asked Mr. Bennett how the discharge rate measurements taken during the NS-6 test could have been constant if the water leaving the discharge pipe indicates a varying flow rate. *Id.* Mr. Bennett explained that the apparent level of water leaving the pipe can be altered by the angle and position of the pipe, and further testified

that individuals moved the pipe throughout the duration of the test. *Id.* However, Mr. Bennett did not specify who moved the pipe or when it was moved. As Mr. Bennett noted, neither he nor his staff were present for the full duration of the NS-6, NS-7, or NS-8 tests.

25. Mr. Ruth asked Mr. Bennett about the Applicants' proposed plan to obtain water from the town of Eureka during times of water shortage. R1 at 2:34:30. Mr. Bennett stated that water would "more than likely" need to be tanked from Eureka, which is approximately five miles from the proposed development. *Id.* When Mr. Ruth asked if the town of Eureka had approved any agreement to provide water to the Applicants in times of water shortage, Mr. Bennett answered, "no, not to my knowledge." R1 at 2:36:00. Based on Mr. Bennett's testimony, the hearing examiner concludes that the Applicants have not secured the necessary agreements or permission to implement the mitigation plan Applicants provided to the DNRC to prove lack of adverse effect.

26. During Applicants' cross-examination and direct examination of Mr. Bennett, Mr. Bennett confirmed that he believed the NS-6, NS-7, and NS-8 tests were routine, conducted correctly, and provided reliable data. R1 at 3:13:00 – 3:19:30; 3:23:00 – 3:32:30. Mr. Bennett further testified that the levels of discharge rate variability experienced during the test were below the industry standard 5% threshold for a long-term, constant rate test. R1 at 3:27:00, *A-6*, p. 3. Mr. Bennett also noted that he believed the 72-hour tests performed on the two additional production wells exceeded the requirements of ARM 36.12.121(3)(f), and therefore provided data "above and beyond" what is required by law. R1 at 3:30:00.

Testimony of Melissa Schaar

27. The parties elicited testimony from former DNRC hydrogeologist Melissa Schaar, who authored the Aquifer Test Report for this Application. R1 at 4:05:20. Ms. Schaar testified that the DNRC uses Form 633 data provided by Applicants in Aquifer Test Reports. R1 at 4:18:00. Ms.

Schaar stated that the DNRC does not confirm Form 633 data is correctly reported through follow-up tests or investigations. R1 at 4:21:00. Ms. Schaar testified that the DNRC assumes that qualified hydrogeologists have the expertise to collect and report accurate data. *Id*.

28. Ms. Schaar testified that her aquifer test report utilized all Form 633 data from all three test wells, and not only average values derived from that data. R1 at 4:26:30. Therefore, she stated, any variability in discharge rates reflected in that data was included in her analysis. *Id.* Ms. Schaar further testified that the purported variability in discharge rate during the NS-8 test was primarily at the beginning of the test. R1 at 4:26:30. She testified that in her experience, pump aquifer tests "very often" begin with variable discharge rates, because it is difficult to begin a pump aquifer test and immediately reach the desired rate. *Id.*

29. Ms. Schaar also defended the use of the aquifer test data used in her analysis by explaining there is a limited set of aquifer test data in the area at issue. R1 at 4:29:30. Ms. Schaar testified that it is a customary, standard practice to use aquifer test data in the DNRC database from areas closest to the subject area. R1 at 4:30:00. Ms. Schaar acknowledged that the subject area is dissimilar to an area like Missoula in that it does not have a "plethora" of aquifer test data usable for comparison – however, she stated that the DNRC can only rely on the data that the DNRC possesses. *Id.*

30. Ms. Schaar further testified about the manner in which aquifer tests are conducted. R2 at 1:00. Specifically, Ms. Schaar indicated that it is common for persons to report and log aquifer test data under the supervision of a qualified hydrogeologist. R2 at 1:30. Ms. Schaar explained that it can be impractical for a single hydrogeologist to conduct the full, "72-hour arduous test" – as she noted, "they have to sleep." *Id.*

31. Ms. Schaar discussed the results of the aquifer test report she authored for this Application. First, Ms. Schaar confirmed that the aquifer test analysis "provides a basis for evaluation adequacy

of diversion, physical availability of groundwater, and adverse effect to existing groundwater and surface water users." R2 at 3:30, *Aquifer Test Report*, p. 1. Ms. Schaar testified that the NS-6 Form 633 data the Applicants provided was sufficient to conduct an appropriate aquifer test analysis. R2 at 18:00, *Aquifer Test Report*, p. 3 ("The data in Form 633 provided by the applicant is adequate for DNRC to evaluate aquifer test data."). Further, she stated that the NS-7 and NS-8 Form 633 data provided by the applicants confirmed the reliability of the results of the NS-6 test. R2 at 22:00. When asked if the similar NS-7 and NS-8 data minimize concerns about alleged discharge rate variability during the NS-6 test, Ms. Schaar also testified that the Form 633 data provided for NS-6 showed, based on her experience, a "relatively constate rate test." R2 at 23:30. Ms. Schaar confirmed the Applicants use of five observation wells during their pump test was "above and beyond" the regulatory requirement to use one observation well. R2 at 31:10.

32. Regarding physical availability, Ms. Schaar confirmed her analysis determined that at the maximum pumping rate sought by the Applicants, "there would be enough available water in that water column for the drawdown that would be created." R2 at 25:00. She also testified that there would be water physically available in the source aquifer. R2 at 25:20. Ms. Schaar confirmed that based on all of the data collected by the Applicants, and analysis performed using the Applicants' data, there is water physically available at the three pumping wells. R2 at 32:00. When Objector Ruth requested Ms. Schaar explain her understanding of "available drawdown," Ms. Schaar testified that it meant the amount of water available in the well column. R1 at 4:05:30. When Objector Ruth asked how drawdown "relate[s] to the pump," Ms. Schaar stated she was subpoenaed as a technical expert, would only testify about the work she did for the DNRC, and was confused about why Mr. Ruth would want to ask her "all these questions." *Id.*

33. Regarding adverse effect, Ms. Schaar confirmed that, "after five years of pumping, there are 15 water rights in the source aquifer that are predicted to experience drawdown greater than 1 foot." R2 at 28:30, *Aquifer Test Report*, pp. 14, 19. Mr. Wilson's water right is one of those 15 water rights. R2 at 38:30, *Aquifer Test Report*, p. 19 (Table 5, Water Right No. 76D 7320 00). Ms. Schaar confirmed that even if Mr. Wilson's well experienced three feet, Mr. Wilson would still have approximately 27 feet of water in his well. R2 at 40:00. Ms. Schaar could not confirm whether Mr. Wilson would be able to use his well in these circumstances, because usability depends on the quality of his diversion and the efficiency of his well. R2 at 41:30.

34. Ms. Schaar noted that the Applicants have proposed a plan to control the Applicant's proposed appropriation to protect the rights of senior water right holders. R2 at 44:00; *Aquifer Test Report*, p. 22. Ms. Schaar also confirmed that she observed no evidence in the Application which suggested senior water right holders would not be able to exercise their rights. R2 at 45:30.

35. Ms. Schaar also confirmed that her analysis does not indicate where pumps are placed in individual wells that might experience additional drawdown. R2 at 49:00. She stated her analysis determined the amount of "available water column above the bottom," not where individuals have placed their pumps in wells. *Id.*

Testimony of Melissa Brickl

36. The parties elicited testimony from Melissa Brickl, former DNRC hydrologist. R2 at 57:00. Ms. Brickl authored the Groundwater Permit Application Technical report in this Application. *Id.*; *Groundwater Permit Application Technical Report*, p. 1.

37. Ms. Brickl testified generally about the content and purpose of the Groundwater Permit Application Technical Report. R2 at 57:00 – 1:07:00. Ms. Brickl testified that the Groundwater Permit Application Technical Report provided analysis and discussion regarding legal availability,

adverse effect, and physical availability, but did not reach conclusions about whether the Applicants satisfied those criteria. R2 at 1:07:00. Ms. Brickl stated that conclusions regarding criteria satisfaction are in the preliminary determination to grant the Application. *Id.*

38. Ms. Brickl testified she authored the preliminary determination to grant the Application in this matter. R2 at 1:07:30. First, Ms. Brickl confirmed there is water physically available for use at NS-6, NS-7, and NS-8. R2 at 1:09:00, 1:17:00, 1:22:00; *PD*, p. 10 – 13. She confirmed her opinion was based on all of the evidence, analysis, and investigations presented in the Application. *Id.* Second, Ms. Brickl testified that based on all of the evidence, analysis, and investigations contained in the Application, the Applicants proposed diversion satisfied adverse effect criteria. R2 at 1:24:00. Importantly, Ms. Brickl testified that the Applicant's ability to control and limit their diversion to satisfy the rights of senior water rights holders and evidence demonstrating the continued usability of potentially affected wells supported her conclusion that the Applicants satisfied the adverse effect criterion. R2 at 1:26:00; *PD*, p. 19 – 23. However, as Mr. Bennett noted during his testimony, Applicants have no agreement with the Town of Eureka by which Eureka has agreed to provide water to Applicants. *FOF 25*.

Testimony of Kathy Olsen

39. The parties elicited testimony from Kathy Olsen, DNRC's Kalispell regional manager. R2 at 1:38:30 – 14:30:00. *Id.* Ms. Olsen testified that she reviewed, approved, and signed the PD in this matter, and neither heard nor observed any evidence throughout the hearing that caused her to alter her judgment to issue the PD. *Id.*

40. Ms. Olsen confirmed that the DNRC assumes that Form 633 data provided by applicants is correct. R2 at 1:53:00.

41. Objector Randy Wilson asked Ms. Olsen how the DNRC would respond to Form 633 that was collected once every four hours, rather than every hour. R2 at 1:56:00. Ms. Olsen indicated that Form 633 is reviewed by DNRC hydrologists, not her, and therefore could not respond to that question. *Id.*

Testimony of Jamie Graham

42. The parties elicited testimony from Jamie Graham, an employee of Water & Environmental Technologies who participated in conducting the NS-7 and NS-8 tests. R2 at 2:04:30. During the NS-7 test, Ms. Graham testified that she not only took totalizer reading at the beginning and end of the test, but also routinely checked the totalizer reading and performed "time checks" to confirm the desired flow rate is occurring. R2 at 2:07:30. Ms. Graham testified these routine checks do not appear in her field notes and were not recorded due to "time constraints" experienced while running the test. R2 at 2:10:00.

43. Ms. Graham also indicated that she believed Mr. Bennett was not present for the NS-7 test. *Id.* Ms. Graham indicated other persons visited the NS-7 test site, but noted they were there to check that the generator was still running and to collect ground water level measurements. R2 at 2:11:30. Ms. Graham did not know the identity of these persons. R2 at 2:12:00.

44. Ms. Graham testified that a gate valve was used to regulate discharge rate, but did not recall whether there was one or two valves or where those valves were located. R2 at 2:13:00. Ms. Graham testified she did not believe she performed manual measurements, like "bucket tests," to verify discharge rates during the NS-7 test; rather, all discharge rate data was pulled from the flowmeter installed for the NS-7 test. R2 at 2:17:30.

45. Contrary to Mr. Bennett, who indicated his confidence regarding constant discharge rate was derived from continuous water level measurements taken throughout the tests, Ms. Graham

testified that all of the confidence for the discharge rate of the NS-7 test was based on the accuracy of the NS-7 flow meter. R2 at 2:18:00; *FOF 19*. Ms. Graham testified that flow meters stopped working during the NS-7 test, but did not know the reasons for the failures. R2 at 2:06:00. When Mr. Ruth asked Ms. Graham to explain flow rate data in parentheses located on the NS-7 Form 633, Ms. Graham testified that she was not sure what it meant. R2 at 2:23:00; *A-4*, p. 2.

Testimony of Ian Thomsen

46. The parties elicited testimony from Ian Thomsen. R2 at 2:40:00. Mr. Thomsen testified that he was primarily responsible for monitoring and collecting measurements during the NS-6 test. *Id.* Mr. Thomsen states that he measured totalizer readings at the beginning and end of the NS-6 test, but did not collect any other totalizer measurements during that test. R2 at 2:34:30. Mr. Thomsen stated that he utilized a valve to regulate the discharge rate during the NS-6 test. R2 at 2:35:30. Mr. Thomsen stated the valve was located near the flow meter, so that he could observe flow rate data while adjusting the valve. *Id.*

47. Mr. Thomsen also stated that he departed the NS-6 test site on the first day of the test at 3:30 p.m. to return to Kalispell, but could not recall when he returned to the site the following day. R2 at 2:39:00. Mr. Thomsen also could not recall whether or when he left the site on subsequent testing days. R2 at 2:44:30. Although Mr. Thomsen could not recall who remained on site to monitor the test sites overnight, Mr. Thomsen testified that it was standard procedure to ensure that some person remained on site to monitor the tests and ensure flow rate remained constant. R2 at 2:40:00. ("If we had an ongoing test, I don't believe we left it completely unsupervised for twelve hours or a long period."). Mr. Thomsen stated that he believed the individual who installed the pump was going to check the testing site throughout the night. R2 at 2:39:50. Mr. Thomsen did not know the name of the person who may have visited the site. R2 at 2:40:30. Mr. Thomsen

also indicated he was instructed by Mr. Bennett on how to conduct tests like the NS-6 test, but was never shown or given printed documents describing standard operating procedures. R2 at 2:41:45.

Testimony of John Ruth

48. During the hearing, Mr. Ruth was provided the opportunity to present factual testimony under oath in a narrative format. Mr. Ruth testified about his extensive experience and qualifications as a hydrogeologist. R2 at 2:51:00. Mr. Ruth stated that written, standard operating procedures and well-organized field notes are critical to gathering defensible data. R2 at 2:55:00. Mr. Ruth stated that he believed the Applicants' Form 633s contained "big sections of fabricated data." R2 at 2:58:00.

49. Near the start of Mr. Ruth's testimony, Mr. Ruth ceased providing factual testimony in a clear, comprehensible manner, and began to present legal arguments based on his view of the evidence presented prior to and during the hearing. R2 at 3:00:00. The hearing examiner decided to characterize Mr. Ruth's non-testimonial statements as closing argument. *Id.*

50. Mr. Ruth testified that he presented no data to support his claim that his water right would be adversely affected by the Applicant's proposed appropriation. R2 at 3:43:32. Mr. Wilson, who did not choose to testify in a narrative manner, also agreed that he presented no data to support his claim that his water right would be adversely affected by the Applicant's proposed appropriation. R2 at 3:55:56 – 3:57:24.

51. The hearing examiner finds that neither Objector presented factual, testimonial, or other documentary evidence affirmatively proving adverse effect or lack of physical availability. Both Objectors clearly indicate through their testimony, arguments, and closing briefs that neither Objector claims they can prove adverse effect or lack of physical availability. R2 at 3:55:56 – 3:57:24; *See Objector Ruth's Closing Brief*, *Objector Wilson's Closing Brief*. Rather, Objectors

argue that Applicant's failure to satisfy ARM 36.12.121 requirements and the manner in which the Applicants collected the data used by DNRC for its analysis casts significant doubt on whether Applicants have proved physical availability and lack of adverse effect by a preponderance of evidence. *Id.*

52. The Hearing Examiner concludes that Applicants did not provide all of the data required by Form 633. DNRC Form 633 states, "Discharge to be measured several times per hour during the first 3 hours of pumping and thereafter several times per hour if discharge fluctuates and requires frequent adjustment; otherwise, hourly measurements if discharge remains constant and requires little or no adjustment. Discharge must be reported in gallons per minute (gpm) if using flow meter; in cumulative gallons if using totalizing meter; or 0.01 foot if using flume/weir." *OR-2*, p. 1. It is not disputed that Applicants did not provide Form 633s for the NS-6, NS-7, and NS-8 tests which included all of the necessary flow meter, totalizing meter, or flume/weir measurements for the duration of the 72-hour tests. *OR-2, OR-3, OR-4*; *Applicants' Proposed Findings of Fact and Conclusions of Law*, p. 4 ("The fact that there was information missing from Lodestone's Form 633 does not equate to inadequate proof of the criteria.").

53. The hearing examiner finds no evidence that Applicants obtained a variance from the ARM 36.12.121(2)(f) requirements to provide "Form 633, in electronic format, with all information and data provided."

54. During the hearing, Mr. John Ruth objected to the manner in which the hearing examiner regulated the course of the hearing. R2 at 1:57:00. Specifically, Mr. Ruth stated that he was displeased that his own testimony, which he characterized as the most important to his case, began at approximately 4:30 p.m. on the date of the hearing. R2 at 1:58:00. He objected to the order in which witnesses testified, limitations imposed on the time for questioning witnesses, and the

amount of breaks provided during the hearing. *Id.* Mr. Ruth stated that the hearing "could be extended," so that he did not feel "pushed into a corner." *Id.*

55. The hearing examiner noted that the hearing had been set for a single day at the parties' request for a significant period of time. R2 at 2:00:00. After more than two hours of the time allocated for the one-day hearing had elapsed during Mr. Ruth's direct examination of his first witness, Mr. Ruth indicated he was one-third of the way through his questions for that witness. R1 at 2:11:00, 2:36:30. The hearing examiner noted that neither the subpoenaed witnessed, the other parties, nor the hearing examiner had foreknowledge of how long Mr. Ruth intended to examine each of his witnesses. R2 at 2:00:00. The hearing examiner noted that Mr. Ruth spent the majority of the morning questioning a single witness, and that much of that time was spent addressing objections regarding Mr. Ruth's repeated attempts to testify, rather than ask questions eliciting facts. *Id.* The hearing examiner noted Mr. Ruth had an opportunity to request additional hearing dates prior to the hearing. *Id.* The hearing examiner further noted that decisions to change the order of witness testimony were necessary because certain witnesses were only subpoenaed for the date of the hearing, and their testimony needed to be presented before the business day ended. *Id.*

56. The hearing examiner determined that any prejudice Mr. Ruth experienced during the hearing is the result of his own decisions before and during the hearing, the hearing examiner attempted to limit prejudice by extending the hearing beyond 5:00 p.m. and confirming Mr. Ruth and Mr. Wilson could file a closing brief outlining their arguments. R2 at 2:00:00.

57. Considering the totality of the preceding fifty-six findings of fact, the hearing examiner determines that the Objectors' arguments, testimony, and witness examination presented at the contested case hearing were sufficient to satisfy the Objectors' burden of production.

RULING ON APPLICANTS' PROPOSED FINDINGS OF FACT

Section 2-4-623(4), MCA, states that "[i]f, in accordance with agency rules, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding." Applicants did not submit proposed findings of fact in separately numbered paragraphs. *See Applicants' Proposed Findings of Fact and Conclusions of Law*. The hearing examiner will rule on Applicants' proposed findings of fact by identifying proposed findings of fact the hearing examiner does not adopt. The remainder of proposed findings of fact are adopted.

The hearing examiner does not adopt the following proposed findings of fact:

1. The first sentence of paragraph three on page two.
2. The fourth sentence of paragraph one on page three.
3. The second paragraph on page three.
4. The first sentence of paragraph four on page five.
5. The second sentence of paragraph five on page six.
6. The fourth paragraph of page seven.
7. The fifth paragraph of page seven.
8. The second sentence of paragraph two of page nine.

CONCLUSIONS OF LAW

Objector Mr. John Ruth timely filed a valid objection to the Application on the basis that the Applicant did not prove the physical availability and adverse effect criteria in § 85-2-311(1). *March 18, 2021, Ruth Objection*. Objector Randy Wilson timely filed a valid objection to the Application on the basis that the Applicant did not prove the adverse effect criteria in § 85-2-311(1). *March 18, 2021, Wilson Objection*. Because Objectors have satisfied their burden of production through their arguments, testimony, and witness examination, the issue to be answered

by the remainder is whether Applicants have proved their application satisfies the adverse effect and physical availability criteria in § 85-2-311, MCA.

Have Applicants proved the water rights of a prior appropriator will not be adversely affected by the proposed new use by a preponderance of the evidence?

1. An applicant for a beneficial water use permit possesses the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the applicant a new beneficial use permit. *Bostwick Properties v, DNRC*, 2013 MT 48, ¶ 18, 369 Mont., 150, 296 P.3d 1154 (2013). Consequently, in connection with the Permit Application, Applicant must show that:

1) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;
2) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested;
3) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
4) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
5) the proposed use of water is a beneficial use; and
6) 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. § 85-2-311(1)(a)-(e), MCA.

2. An applicant for a beneficial water use permit must prove by a preponderance of evidence that the proposed new use will not adversely affect a prior appropriator's water right. § 85-2-

311(1)(b), MCA. "[A]dverse 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." *Id.*

3. "Adverse effect for permit applications is based on the applicant's plan showing diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied." ARM 36.12.1706.

4. Objectors argue the issues presented in this hearing are similar to the issues presented in *Flathead Lakers v. Montana Dep't of Nat. Res. And Conservation*, 2020 MT 132. In that case, Montana Supreme Court reviewed a § 85-2-309, MCA, Hearing on Objection in which Form 633 discharge rate data was incomplete or lacking. *Flathead Lakers, Inc. v. Montana Dep't of Nat. Res. And Conservation*, 2020 MT 132, ¶ 13. The Montana Supreme Court held that the aquifer testing requirements in ARM 36.12.121, are not mandatory requirements that must be satisfied before a permit can be granted. *Flathead Lakers*, ¶ 18. Rather, they are "designed to elicit pertinent information necessary for DNRC to evaluate the -311 criteria." *Id.* The Court remanded to case to district court to determine whether "DNRC's consideration of the application without [] additional aquifer testing was arbitrary and capricious and whether its evaluation was clearly erroneous in light of the record." *Flathead Lakers*, ¶ 20.

5. Therefore, establishing that Applicants in this matter failed to comply with the requirements described in ARM 36.12.121 does not require the DNRC to reject the Application. Instead, the hearing examiner must determine whether the DNRC can grant the Application without making a decision which is arbitrary and capricious or clearly erroneous in light of the record. *Id.* However, the hearing examiner must also assess this question with the understanding

that the ARM 36.12.121 standards are "designed to elicit pertinent information necessary for DNRC to evaluate the -311 criteria." *Flathead Lakers*, ¶ 18.

6. Objectors argue Applicants' aquifer testing data, and the manner in which the data was collected, do not satisfy the requirements described in ARM 36.12.121. Objector Ruth argues that the testing that occurred in this matter did not follow required standard procedures, was not appropriately supervised by a hydrogeologist, did not occur at a constant discharge rate, and was not reported correctly on the Applicants Form 633s. *See Objector Ruth's Closing Brief*. Objector Wilson argues that ARM 36.12.121 requirements were not met because discharge rate data was not reported correctly on the Applicants Form 633s, the tests were not constant discharge rate tests, and flow meters failed during the testing. *See Objector Wilson's Closing Brief*.

7. ARM 36.12.121 describes requirements for aquifer testing performed to support applications for beneficial water use permits. Among other requirements, this regulation states that applicants must submit "Form 633[s], in electronic format, with all information and data provided." ARM 36.12.121(2)(f). Further, during an aquifer test, "[p]umping must be maintained at a constant discharge rate." ARM 36.12.121(3)(a). Additionally, "[a]quifer testing must follow standard procedures that are discussed in hydrogeology textbooks and professional literature. A hydrogeologist, hydrologist, or engineer familiar with aquifer testing procedures must supervise the aquifer test; however, the supervisor does not need to be on site." ARM 36.12.121(1).

8. The Applicants did not prove by a preponderance of evidence that the NS-6, NS-7, and NS-8 aquifer tests utilized standard procedures that are discussed in hydrogeology textbooks and professional literature. Although Mr. Bennett testified that he uses standard procedures, he indicated they were not formally written anywhere. *FOF* 13. Further, the Applicants did not provide persuasive testimony or evidence that Mr. Bennett's methodology for determining a

constant discharge rate by reviewing water levels in the production wells is an accepted methodology discussed in hydrogeology textbooks and professional literature for confirming constant discharge rate.

9. The Applicant did not prove by a preponderance of evidence that the NS-6, NS-7, and NS-8 aquifer tests were supervised by a hydrogeologist. Testimony and review of the field notes generated from the NS-6, NS-7, and NS-8 tests reveal that Mr. Bennett and his staff do not know who visited or monitored the testing sites when Mr. Bennett, Mr. Thomsen, or Ms. Graham were absent from the site. *FOF* 19, 43, 47. Some of the confirmatory, direct-read flow rate measurements Applicants claimed to use to verify their method of measuring flow rates during the test were taken by unidentified persons not named in the field notes. *Id.* Although ARM 36.12.121(1) provides that the supervising hydrogeologist, hydrologist, or engineer does not need to be on site, the record demonstrates that there were significant stretches of time during which Applicants could not prove that *any* member of Mr. Bennett's staff was on site. *Id.* Moreover, the Applicants conceded several times during the hearing that unknown, identified persons not only visited the site, but also moved equipment and took measurements which were included in the field notes. *Id.* Considering these facts, the hearing examiner concludes the tests were not conducted and appropriately supervised by a hydrogeologist, hydrologist, or engineer familiar with aquifer testing procedures.

10. The Objectors arguments regarding whether the NS-6, NS-7, and NS-8 tests were conducted at constant discharge rates depends entirely on the reliability of the data Mr. Bennett collected and the methodology Mr. Bennett utilized. It is undisputed that direct flow rate measurements from meters affixed to the discharge pipe were not observed and recorded at the intervals required by DNRC's Form 633. *FOF* 16, 52. Of the direct measurements that were taken,

some were not recorded at all, and others were recorded by persons unidentified in the field notes or hearing testimony. *FOF* 19, 42, 43. Importantly, Form 633 indicates that discharge must be reported in gallons per minute "if using flow meter." *OR - 2*, p. 1. The hearing examiner notes that the Applicants clearly state that the gallons per minute records of the Form 633s provided for the NS-6, NS-7, and NS-8 tests are not all derived from direct flow meter readings, but rather the Applicants methodology for establishing constant discharge rate. *FOF* 16. DNRC staff indicated the tests appeared to be constant discharge rate tests, but DNRC also confirmed they rely entirely on data provided to the DNRC by applicants and that DNRC does no follow-up investigation to confirm the reliability or accuracy of that data. *FOF* 30, 40, 41. Based on the totality of review of the record and testimony regarding the reliability of the testing and data collected, the hearing examiner concludes that the Applicants have not demonstrated that the NS-6, NS-7, and NS-8 tests were conducted as constant rate discharge tests.

11. The Applicants do not dispute that they did not provide complete Form 633s for the DNRC to use in its analysis. *FOF* 52 ("The fact that there was information missing from Lodestone's Form 633 does not equate to inadequate proof of the criteria.").

12. For the reasons above, the hearing examiner holds that the NS-6, NS-7, and NS-8 aquifer tests conducted in this matter did not satisfy the requirements described in ARM 36.21.121.

13. DNRC employees Melissa Schaar and Melissa Brickl confirmed they were able to perform appropriate modeling and analysis to reach the conclusion that Applicants satisfied the adverse effect criterion. FOF 28, 31, 32, 38. However, their conclusion relied on the data Applicants supplied. FOF 27, 40, 41. DNRC staff repeatedly emphasized that DNRC does nothing to verify data provided by Applicants. *Id.* The hearing revealed, through questions asked by Objectors, that

the manner in which NS-6, NS-7, and NS-8 aquifer test data was collected and recorded indicates the data may not be reliable.

14. Although the Applicants failure to test and provide data in compliance with ARM 36.12.121 is not dispositive, it does indicate that the DNRCs preliminary determination to grant may be based on unreliable data. As the Court noted in *Flathead Lakers*, the requirements in ARM 36.12.121 are "designed to elicit pertinent information necessary for DNRC to evaluate the -311 criteria." *Flathead Lakers*, ¶ 18. Importantly, the elements of ARM 36.12.121 with which Applicants did not comply – adequate supervision of the test and providing complete Form 633s - are elements which by their plain-language appear to be crafted to ensure the DNRC is provided reliable, complete data upon which to make a determination.

15. Further, the plan which Applicants proposed to mitigate potential adverse effect during times of water shortage was not proved to be reliable, feasible, or possible. "[A]dverse 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." § 85-2-311(1)(b), MCA. "Adverse effect for permit applications is based on the applicant's plan showing diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied." ARM 36.12.1706. Although the Applicants informed DNRC in their application that they planned to truck in water from the town of Eureka, Mr. Bennett testified that the town of Eureka had not yet agreed to supply water. FOF 25. Based on this testimony, the DNRC, which must consider this plan in its adverse effect determination, cannot be assured that the Applicants' plan is feasible. The risk of adverse effect to the Objectors raised by such an emergency is not mitigated by a plan which Applicants have not proved is

possible. The lack of proof that Applicants can obtain water from the Town of Eureka strongly weighs against the Applicants' argument that they have proved lack of adverse effect by a preponderance of evidence.

16. Upon review of the record, evidence, and testimony presented in this hearing, and for the reasons discussed above, the hearing examiner concludes the Applicants have not proved lack of adverse effect by a preponderance of evidence.

Have Applicants proved there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate by a preponderance of the evidence?

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. The DNRC has promulgated a rule describing how it determines whether physical ground water is available during the permit application process:

> (1) Applicants for groundwater must follow aquifer testing requirements and provide to the department, at minimum, information and data in conformance with ARM 36.12.121.
>
> (2) The department will complete an evaluation of drawdown in the applicant's production well for the maximum pumping rate and total volume requested in the permit application using the information provided from the aquifer test.
>
> (3) The department will compare the drawdown projected for the proposed period of diversion to the height of the water column above the pump in the proposed production well to determine if the requested appropriation can be sustained.

(4) The requirements of ARM 36.12.121 must be followed, unless a variance has been granted by the department.

ARM 36.12.1703.

19. Objector Ruth, who objected to the physical availability criterion, argues that "[t]he department did not compare the drawdown projected for the proposed period of diversion to the height of the water column *above the pump* in the proposed production wells to determine if the requested appropriate can be sustained." *Objector Ruth's Closing Brief*, p. 12. Neither the Groundwater Permit Technical Report, the Aquifer Test Report, nor the preliminary determination to grant the Application contain a comparison of the drawdown projected for the proposed period of diversion to the height of the water column *above the pump* in the proposed production wells to determine if the requested appropriate can be sustained. Ms. Schaar, who authored the technical report apparently most suitable for this analysis, objected to questions regarding this issue on the ground that she was not subpoenaed as a technical expert. FOF 32.

20. The requirements in ARM 36.12.121 are dissimilar to the requirement described in ARM 36.12.1703(3) because the 36.12.1703(3) requirement describes what the DNRC "will" do in determining whether an application satisfies the § 85-2-311, MCA, criterion regarding physical availability. The hearing examiner cannot conclude that Applicants have satisfied the physical availability criterion when mandatory DNRC analysis has not occurred.

21. Further, to prove water is physically available, ARM 36.12.1703 explicitly states that Applicants "must" comply with the requirements of ARM 36.12.121, unless a variance has been granted by the DNRC. The aquifer testing performed by the Applicant, and the data reported from those tests, did not comply with ARM 36.12.121. Although, pursuant to *Flathead Lakers*, the Applicants failure to test and provide data in compliance with ARM 36.12.121 is not dispositive,

it does indicate that the DNRCs preliminary determination to grant may be based on unreliable data. As the Court noted in *Flathead Lakers*, the requirements in ARM 36.12.121 are "designed to elicit pertinent information necessary for DNRC to evaluate the -311 criteria." *Flathead Lakers*, ¶ 18. Importantly, the elements of ARM 36.12.121 with which Applicants did not comply – adequate supervision of the test and providing complete Form 633s - are elements which by their plain language appear to be crafted to ensure the DNRC is provided reliable, complete data upon which to make a determination.

22. Upon review of the record, evidence, and testimony presented in this hearing, and in light of the Objectors' arguments regarding the reliability of the aquifer test data collected, the hearing examiner concludes the Applicants have not satisfied the physical availability criterion by a preponderance of evidence.

CONCLUSION

As the Montana Supreme Court noted in *Flathead Lakers*, the ARM 36.12.121 requirements are "designed to elicit pertinent information necessary for DNRC to evaluate the -311 criteria." *Flathead Lakers, Inc. v. Montana Dep't of Nat. Res. And Conservation*, 2020 MT 132, ¶ 18. The totality of the record, evidence, and testimony in this matter convinces the hearing examiner not only that Applicants did not satisfy the aquifer test requirements in ARM 36.21.121, but also that the Applicant's failures to comply with ARM 36.12.121 result in an aquifer test data that was not proved to be reliable at the hearing. The lack of clear records demonstrating who monitored the site in the supervising hydrogeologist's absence, the lack of proper Form 633 discharge rate records, the inability of Applicants to identify who took measurements that appear in the field notes, and the paucity of evidence demonstrating the reliability of Applicants' methodology for proving constant rate discharge without direct flow meter measurements, together

persuade the hearing examiner that the Applicants have not provided data upon which the DNRC can conclude the Applicants proved the applicable criteria by a preponderance of evidence.

FINAL ORDER

Application for Beneficial Water Use Permit No. 76D-30147623 is DENIED.

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

DATED this 28th day of April 2022.

/Original signed by Cameron Boster/
Cameron Boster, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6615

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW; FINAL ORDER was served upon all parties listed below on this 28th day of April 2022 by first class United States mail and/or by electronic mail (e-mail).

RICHARD C TAPPAN JR - ATTORNEY
TAPPAN LAW FIRM PLLC
7 W 6TH AVE STE 516
HELENA, MT 59601-5036
rctappan@tappanlawfirm.com

JOSEPH L PURDY
RITA A PURDY
RYAN D PURDY
390 PURDY DR
EUREKA, MT 59917 9492
ryan@framptonpurdy.com

JOHN H RUTH
PO BOX 2375
EUREKA, MT 59917 2375
wildmt55@aol.com

WILSON, RANDY LEE LIVING TRUST
PO BOX 1471
EUREKA, MT 59917
rwilson9@msn.com

/Original signed by Jamie Price/
Jamie Price, OAH Hearing Assistant
(406) 444-6615; jsprice@mt.gov