

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

APPLICATION FOR BENEFICIAL WATER)	PRELIMINARY DETERMINATION TO GRANT PERMIT
USE PERMIT NO. 76H 30150412 BY PEAK)	
HEALTH MANAGEMENT COMPANY, LLC)	

On March 26, 2021, Peak Health Management Company, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76H 30150412 to the Missoula Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The application was submitted for additional commercial volume at Peak Health Management Company, LLC facilities and Watson Children’s Shelter. The Department published receipt of permit application 76H 30150412 on its website on April 5, 2021. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated September 10, 2021. The Applicant responded with information dated October 8, 2021. The Department met with the Applicant’s Representative Ross Miller and Consultant Julie Merritt on October 21, 2021. The application was determined to be correct and complete as of July 12, 2022. The Applicant requested additional time to provide information and/or meet with potential objectors. The Applicant submitted a waiver of timelines pursuant to § 85-2-307, MCA, on August 9, 2022. The Department sent a revised Technical Report for the permit application to the Applicant on November 9, 2022 to correct Department errors in the original dated July 12, 2022. The Applicant submitted an amendment to the permit application October 12, 2023. The amendment was deemed minor and timelines were not reset. Per the amended permit application, a memorandum with a Revised Depletion and Mitigation Report was sent to the Applicant on June 10, 2024. A Draft Preliminary Determination to Deny the permit was sent to the Applicant on January 31, 2025. The Applicant requested a second waiver of timelines for Application to Change a Water Right 76H 30150414 on February 13, 2025, and processing of permit application 76H 30150412 followed the statutory deadlines established for Application to Change a Water Right 76H 30171414. A second major amendment was submitted for change application no. 76H 30150414 on May 23, 2025 that reset the statutory timelines. Change application 76H 30150414 was determined to be correct and complete on November 19, 2025, and a new Surface Water Change Technical Analysis Report was sent to the Applicant for change application 76H 30150414 that addresses the three applications. An Environmental Assessment for this application was completed on January 18, 2026.

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 GW, 76H 30150412
- Attachments
 - Copy of Final Order on PRPM 76H 62593-00
 - DNRC Variance Approval Letter dated September 22, 2020
 - Form 633- Aquifer Test Data
 - May 24, 1988, Newman Report
 - July 24, 1987, WMSMFC Pump Test Report from Mark Shapley, WMB
 - Missoula City-County Health Dept Septic Permit No. 09-122
 - Well logs for Peak Wells #1 and #3
 - Water System Easement and Agreement B: 1050 P: 707
- Maps
 - GW.4 Map dated 2/10/2021
 - Hydrogeologic Report Map 1 dated 12/9/2020
 - Hydrogeologic Report Map 2 dated 12/9/2020
 - Hydrogeologic Report Map 3 dated 12/10/2020
 - Basin Closure Area Addendum Item 5. Map dated 3/22/2021
- Addendums
 - Basin Closure Area Addendum 600-BCA
 - Hydrogeologic Assessment Report Addendum 600-HRA

Information Received after Application Filed

- Waiver of 120 Days Statutory Timeline for Preliminary Determination Decision from Ross Miller on behalf of Applicant, received August 10, 2022
- Consent to Approval (MCA 85-2-402(1)(c)) and (19) received by the Department on September 29, 2023

Information within the Department's Possession/Knowledge

- Application to Change an Existing Irrigation Water Right, Form 606 IR, 76H 30150414
- Application to Change a Water Right, Form 606, 76H 30171414

- DNRC Water Management Bureau Aquifer Test Report by DNRC hydrologist Attila Fohnagy, dated August 5, 2021
- DNRC Water Management Bureau Depletion and Mitigation Report by DNRC hydrologist Attila Fohnagy, dated August 5, 2021
- DNRC Water Management Bureau Depletion and Mitigation Report (redone) by DNRC hydrologist Attila Fohnagy, dated November 16, 2021 (replaces August 5, 2021 report)
- DNRC Water Science Bureau Revised Depletion and Mitigation Report by DNRC hydrologist Melissa Brickl, dated June 5, 2024 (replaces November 16, 2021 report due to major amendment to application)
- DNRC Surface Water Change Technical Analysis Report for Application to Change a Water Right 76H 30150414, dated November 19, 2025

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).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert an annual volume of 19.86 AF from groundwater, by means of 120 feet (ft) deep well GWIC ID # 67088 in the NWNWSE Section (Sec) 2, Township (T) 12N, Range (R) 20W, Missoula County (hereafter Well #1), and 118.5 ft deep well GWIC ID #67089 in the SWNWSE Sec 2, T12N, R20W, Missoula County (hereafter Well #3), from January 1 to December 31. The proposed purpose is year-round Commercial use at Peak Health Management Company Facilities, including the Peak Health and Wellness Main Facility and Peak Racquet Club, and at Watson Children's Shelter, in the NESW Sec 2, T12N, R20W, Missoula County. This Application is for volume to supplement existing Provisional Permit 76H 62593-00 and Groundwater Certificate 76H 65902-00. No additional flow rate is proposed. The two wells are currently pumped at a rate of 120 GPM, and there are no plans to increase the flow rate diverted from the wells. A Water System Easement and Agreement recorded at the Missoula

County Courthouse, Book 1050, Page 707, gives the Applicant an easement across the property where the wells and water service lines are located.

2. The proposed points of diversion are located approximately 1,000 feet from the Bitterroot River. In previous applications, 76H 30046211 and 76H 30118748, the Department concluded that the Bitterroot River is hydraulically connected to the source aquifer the Applicant's wells are drilled into. Stream depletion from the proposed use is expected to occur in the Bitterroot River downstream of the southern boundary of Section 2, Township 12 North, Range 20 West, Missoula County.

3. The Applicant's Septic Permit from the Department of Environmental Quality is included in the Application.

4. Permit application 76H 30150412 was submitted in conjunction with two mitigation change applications, Application to Change a Water Right 76H 30150413 and Application to Change a Water Right 76H 30150414. Application to Change a Water Right 76H 30150413 was withdrawn by the Applicant on October 12, 2023. On October 3, 2025 the Applicant filed Application to Change a Water Right 76H 30171414 for additional mitigation water.

5. The Applicant submitted an amendment to the application on October 12, 2023. This amendment modified the original mitigation plan, included a Consent to Approve signed by Montana Fish, Wildlife, and Parks ("MT FWP") and the Confederated Salish and Kootenai Tribes ("CSKT"), and included a Conditional Modification/Reduction of Permit 76H 62593-00 if the DNRC grants this combined application. Due to the Consent to Approve written pursuant to MCA 85-2-402(1)(c) and (19) prior to statutory expiration, MT FWP and CSKT instream flow Statement of Claim ("Claim") numbers ("Nos.") 76H 151311-00, 76H 151312-00, and 76H 151313-00 were not considered by the Department for Adverse Effect.

6. The Applicant submitted a second amendment to the Application to Change a Water Right 76H 30150414 on May 23, 2025. This amendment changed the mitigation plan from mitigating by leaving water instream at the historical headgate used for Statement of Claim 76H 30122609 to relocating the diversion for Statement of Claim 76H 30122609 to a new location approximately 1.3 miles upstream and pumping water into an aquifer recharge facility. This is proposed to be done in conjunction with leaving a portion of the historical irrigation claim instream at the original headgate location.

7. The Applicant proposes that water usage can be restricted, initially focusing on reduction of lawn and garden irrigation, if mitigation water does not fully reduce water shortage.

8. The Applicant is held to the following water measurement and mitigation required conditions to meet the adverse effect criterion:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE PROVISIONAL PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT THE PERMITTED VOLUME HAS BEEN EXCEEDED DURING PERFECTION OF THE PROVISIONAL PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES VOLUME ACCURATELY.

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 11.08 AF OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE BITTERROOT RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATIONS 76H 30150414 AND 76H 30171414 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HERIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

Permit Application 76H 30150412
Peak Health Management Company LLC



Legend

- Proposed POD
- Peak Property



N

A north arrow pointing upwards and a scale bar below it. The scale bar is marked with 0, 250, and 500 feet.

0 250 500
Feet

Figure 1. Map of Proposed Appropriation

BASIN CLOSURE

FINDINGS OF FACT

9. This application is for commercial use and mitigation of depletions to the Bitterroot River. This application is located within the Legislative Bitterroot River Basin closure, which is closed to all new surface water appropriations (§ 85-2-344, MCA).

10. Applicant submitted a hydrogeologic assessment report per § 85-2-380 and 361, MCA, determined to be correct and complete by the Department.

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

GENERAL CONCLUSIONS OF LAW

11. 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 . . .

12. 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.” Section 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, 357 Mont. 438, 240 P.3d 628.

13. 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.

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

15. 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. Section 85-2-311(6), MCA.

16. 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

17. The Applicant proposes to divert an additional 19.86 AF from Peak Wells #1 and #3 to supplement existing Water Right Nos. 76H 65902-00 and 62593-00 (well #2 does not exist), with no additional flow rate. To demonstrate physical availability of water, the Applicant provided a 24-hour drawdown test of Peak Well #3 (GWIC ID #67089) from 4/16/1987, a letter from DNRC hydrologist Mark Shapley dated July 24, 1987 that reviews this pump test, a report by hydrologist Howard Newman dated May 24, 1988 that reviews this pump test and other aquifer data, and letters from the DNRC dated September 22, 2020 and July 20, 2022 granting variances to aquifer testing requirements in ARM 36.12.121.

18. DNRC hydrologist Attila Felnagy produced an Aquifer Test Report on August 5, 2021 which also reviewed the 1987 pump test data. In the Aquifer Test Report, Felnagy found the 1987 pump test provided a concrete enough basis for evaluating physical availability, adequacy of diversion, and adverse effect. With the assumed monthly pumping schedule, between 87.1 ft and 107 ft is the expected available drawdown above both Peak Well #1 and #3 well bottoms. Felnagy concluded that no water rights in the source aquifer are predicted to experience drawdown from the current appropriation and proposed appropriation. Both DNRC hydrologists who reviewed the

pump test concluded there was indication of physical availability in the aquifer at the proposed points of diversion.

19. To determine the physical availability of water at the point of diversion, the Department calculated the annual groundwater flux through the zone of influence in the Department's August 5, 2021 Aquifer Test Report. The Department calculated the zone of influence (ZOI) from the proposed point of diversion to be a maximum width of 1600 ft parallel to the Bitterroot River, in which existing groundwater rights would experience a drawdown of 0.01 foot or more. This was determined by the Department via the completed Aquifer Test Report, using the Theis (1935) solution, a constant pumping rate of 12.3 GPM (equivalent to the requested volume of 19.86 AF per annum), Transmissivity (T) = 37,530 ft²/day, Storativity (S) = 0.004, and a constant head boundary at Bitterroot River (1,000 feet to the south) to generate a distance-drawdown plot. The two existing wells were modeled as one well due to their proximity. The calculation for groundwater flux through the delineated zone of influence is 15,095 AF per year. The Applicant is requesting a total annual appropriation of 19.86 AF.

20. A variance was granted by the Department on September 22, 2020 from aquifer testing requirements in ARM 36.12.121(3)(c) because discharge rate was not measured with a reliable measuring device and recorded with the clock time according to the schedule on Form 633, ARM 36.12.121(3)(i) because the method of measuring groundwater levels was unclear, ARM 36.12.121(3)(j) because no collection of background static water levels prior to the pump test occurred, and ARM 36.12.121(3)(k) because water level measurements were not measured with 0.01-foot precision according to the schedule specified on Form No. 633. An additional variance was granted by the Department on July 20, 2022 from aquifer testing requirement ARM 36.12.121(3)(d) because the pump test was performed for 23.4 hours, rather than the required 24 hours.

21. The aquifer test and hydrogeologic assessment indicate physical availability in the aquifer at the point of diversion. The Department finds groundwater is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate.

LEGAL AVAILABILITY

FINDINGS OF FACT

22. Legal availability of groundwater is a comparison of physical availability to existing legal demands within the zone of influence ("ZOI") or area of interest. The ZOI consists of a 0.01-foot projected drawdown contour and considers all groundwater water rights within that area. The

proposed appropriation is for 19.86 AF diverted volume. For groundwater legal availability analysis, the Department first calculated groundwater flux (Q) in the source aquifer to determine physical availability, which was found to be 15,095 AF/year physical availability (see FOF 20). There are 13 groundwater rights within the ZOI, resulting in 42.79 AF of diversions to consider for legal availability (see Table 1).

Table 1. Groundwater Rights within the Zone of Influence

Water Right No.	Owner Name	Priority Date	Volume (AF)
76H 10631 00	E. T. LINJALA; S. L. LINJALA	12/6/1976	*1.65
76H 30108635	VAEROY ENTERPRISES LLC	9/27/2016	0.15
76H 61208 00	MR RIVER PROPERTY LLC	11/25/1985	1
76H 30151830	WATSON CHILDRENS SHELTER	3/26/2021	1.23
76H 30108637	VAEROY ENTERPRISES LLC	9/27/2016	1.33
76H 30125094	SANDRA J ZARBOLIAS	12/31/1955	1.5
76H 30151828	PEAK HEALTH M.C. LLC	3/26/2021	1.63
76H 116227 00	SPANISH SKIES LLC	7/16/2001	0.35
76H 79619 00	ECI CREDIT LLC	5/1/1967	3
76H 30108636	VAEROY ENTERPRISES LLC	9/27/2016	3.2
76H 62593 00	PEAK HEALTH M.C. LLC	5/5/1986	3.5
76H 38472 00	L. & R. MINIATI	12/8/1981	10.25
76H 65902 00	PEAK HEALTH LLC	8/3/1987	14
Total Volume (AF)			42.79

*Water right does not have a volume. Volume calculated using DNRC standards.

Table 2 below is a comparison of the physical water supply in the source aquifer and current legal demands for groundwater.

Table 2. Legal Availability in Source Aquifer

Physically Available (AF/year)	Existing Legal Demands (AF/year)	Groundwater Legal Availability (AF/year)
15,095 AF	42.79 AF	15,052.21 AF

23. The proposed appropriation from groundwater was determined to be hydraulically connected to Bitterroot River surface water. The Department’s original Depletion and Mitigation Report, drafted on November 16, 2021 by Groundwater Hydrologist Attila Felnagy, concluded that the Bitterroot River is hydraulically connected to the source aquifer, and that depletions are expected to accumulate in the Bitterroot River downstream of the southern boundary of Section 2, Township 12 North, Range 20 West. Due to the October 12, 2023 amendment filed for Change

Application 76H 30150414, the Department revised the original Depletion and Mitigation Report. The Revised Depletion and Mitigation Report made the same conclusion. The proposed appropriation would deplete the Bitterroot River from downstream of the southern boundary of Sec 2, T12N, R20W, Missoula County, to the confluence of the Bitterroot and Clark Fork Rivers in the NWNW of Section 27, Township 13 North, Range 20 West.

24. The Department assumes the proposed use from Peak Wells #1 and #3 to be constant year-round for commercial use, therefore, net depletions to the Bitterroot River are expected to be constant year-round and equal to the consumed volume of 1.99 AF. Monthly net depletions are calculated to be between 0.15-0.17 AF as indicated in Table 3 below.

Table 3. Net depletion to Bitterroot River for Permit Application No. 76H 30150412

Month	Consumed Volume (AF)	Net Depletion (AF)	Net Depletion (GPM)
January	0.17	0.17	1.23
February	0.15	0.15	1.23
March	0.17	0.17	1.23
April	0.16	0.16	1.23
May	0.17	0.17	1.23
June	0.16	0.16	1.23
July	0.17	0.17	1.23
August	0.17	0.17	1.23
September	0.16	0.16	1.23
October	0.17	0.17	1.23
November	0.16	0.16	1.23
December	0.17	0.17	1.23
Total	1.99	1.99	

25. For surface water legal availability analysis on the Bitterroot River, the Department first calculated physical availability using USGS gage No. 12352500 (Calculation Period: 1898-7-01 - > 2022-02-28) located on the Bitterroot River near Missoula, in the middle of the depleted reach. The Department added existing surface water rights between the gage site and the beginning (or upstream) extent of the depleted reach to the median of the mean monthly flow rate and volume of the gage during the appropriate periods of diversion to determine physical availability at the beginning (or upstream) of the depleted reach (Table 4).

Table 4. Bitterroot River Physical Availability for Permit Application No. 30150412

Physical Availability @ USGS 12352500 Bitterroot River near Missoula			Physical Availability @ beginning of depleted reach	
	Flow (CFS)	Volume (AF)	Flow (CFS)	Volume (AF)
JAN	782.70	48,042.13	782.92	48,055.63
FEB	820.00	45,460.80	820.22	45,473.00
MAR	1,185.00	72,735.30	1,186.33	72,816.94
APR	2,755.50	163,676.70	2,790.54	165,758.08
MAY	6,734.00	413,332.92	6,769.04	415,483.68
JUN	7,451.00	442,589.40	7,486.04	444,670.78
JUL	2,302.00	141,296.76	2,331.81	143,126.50
AUG	840.50	51,589.89	870.31	53,419.63
SEP	801.20	47,591.28	831.01	49,361.99
OCT	917.80	56,334.56	947.37	58,149.57
NOV	1,040.00	61,776.00	1,040.67	61,815.80
DEC	873.85	53,636.91	874.52	53,678.04

26. The Department then determined the area of potential impact for this application to be the Bitterroot River downstream of the southern boundary of Sec 2, T12N, R20W to the confluence with the Clark Fork River in the NWNW of Sec 27, T13N, R20W. This reach of the Bitterroot River is appropriate for analyzing potential impacts to surface water rights because depletions will manifest in this reach and propagate downstream. The Department used this area of potential impact to calculate legal demands in the Bitterroot River in this reach. These legal demands were then subtracted from physical availability at the beginning of the depleted reach to find legal availability in the Bitterroot River, as shown in Table 5 below.

Table 5. Legal Availability on the Bitterroot River

Month	Physical Availability (CFS) @ beginning of depleted reach	Existing Legal Demands (CFS)	Legal Availability (CFS)	Physical Availability (AF) @ beginning of depleted reach	Existing Legal Demands (AF)	Legal Availability (AF)
January	782.92	900.66	-117.74	48,055.63	55,282.51	-7,226.88
February	820.22	900.66	-80.44	45,473.00	49,932.59	-4,459.59
March	1,186.33	901.77	284.56	72,816.94	55,350.64	17,466.29
April	2,790.54	937.24	1,853.30	165,758.08	55,672.06	110,086.02
May	6,769.04	22,738.33	-15,969.29	415,483.68	504,723.70	-89,240.02
June	7,486.04	22,738.46	-15,252.42	444,670.78	489,409.52	-44,738.74
July	2,331.81	633.23	1,698.58	143,126.50	38,867.66	104,258.84
August	870.31	633.23	237.08	53,419.63	38,867.66	14,551.97
September	831.01	633.10	197.91	49,361.99	37,606.14	11,755.85
October	947.37	931.77	15.60	58,149.57	57,192.04	957.53
November	1,040.67	902.07	138.60	61,815.80	53,582.96	8,232.84
December	874.52	901.11	-26.59	53,678.04	55,310.13	-1,632.09

27. The comparison between physically available and legally available water in the Bitterroot River indicates that water is legally available in the amount of water modeled to be depleted during the months of March, April, July, August, September, October, and November, but not legally available during the rest of the year (the months of January, February, May, June, and December).

28. The Department finds the proposed appropriation of 19.86 AF of groundwater to be legally available during the proposed period of use.

29. The Department finds that surface water in the hydraulically connected Bitterroot River is not legally available in the amount modeled to be depleted during portions of the year.

30. Applicant addressed legal availability of surface water by providing a mitigation plan which proposes to change an existing Bitterroot River statement of claim for irrigation to aquifer recharge and mitigation (Change application 76H 30150412), and a portion of an existing groundwater provisional permit to mitigation (Change application 76H 3017414). The proposed mitigation plan proposes to fully mitigate the depletions to the Bitterroot River during months in which water is

not legally available. This aquifer recharge and mitigation plan is addressed under the “Adverse Effect” section below.

31. The Department finds that surface water in the hydraulically connected Bitterroot River is legally available when considering the aforementioned aquifer recharge and mitigation plan.

ADVERSE EFFECT

FINDINGS OF FACT

32. The Applicant plans to mitigate their depletions to the Bitterroot River with Statement of Claim 76H 30122609 via submitted Change Application 76H 30150414 and Provisional Permit 76H 62593-00 via submitted Change Application 76H 30171414. If water shortage occurs, the Applicant states that water usage can be restricted, initially reducing lawn and garden irrigation.

33. The Applicant can control the amount of water appropriated and can fully cease diversion if required. The Applicant’s plan of operation calls for a reduction of lawn and garden irrigation during times of water shortage if a call for water is made, and ultimately can discontinue pumping the wells in times of extreme water shortage if required.

34. The Applicant submitted a Consent to Approve signed by MT FWP and CSKT which waives their objections on the grounds of adverse effect for Statements of Claim 76H 151311-00, 76H 151312-00 and 76H 151313-00.

35. The Applicant provided the 1988 Newman Report (FOF’s 17 – 18) which concluded that the Applicant’s wells were not likely to have adverse effect on groundwater appropriators within the ZOI. The Department, in Fohnagy’s August 5, 2021 Aquifer Test Report, did not find any water rights with a source of groundwater within the ZOI that would experience drawdown of more than 1 foot by the proposed groundwater pumping. The Department does not consider drawdown of less than 1 foot to constitute adverse effect to existing groundwater users.

36. Approximately 90% of the Applicant’s requested 19.86 AF diverted volume would be returned to the source aquifer as treated wastewater via the onsite septic system. Approximately 10% of the Applicant’s requested diverted volume would be consumed, resulting in a proposed consumptive use of 1.99 AF (19.86 AF x 10% = 1.99 AF).

37. It should be noted that 90% of the requested volume will be returned to the adjacent groundwater via the onsite septic system which reduces the likelihood of the volume being requested with the permit application having an impact on the usage of nearby wells. The groundwater aquifer is hydraulically connected to the Bitterroot River, and the proposed appropriation will deplete the river during every month of the year. Annual depletions of 1.99 AF

are a result of the proposed consumptive use, which is calculated to be 10% of the diverted volume for commercial use.

38. The Applicant submitted Change Application No. 76H 30150414 to change the entire 10.3 AF of historically consumed volume of existing Claim 76H 30122609 from the purpose of irrigation to the purposes of aquifer recharge and mitigation. The proposed mitigation plan using Claim 76H 30122609 requires a change in point of diversion, place of use, and purpose. The Applicant proposes to add an additional point of diversion located in the SENWNE of Sec. 15, T12N, R20W consisting of a pump used to divert water out of the Bitterroot River and into an aquifer recharge facility constructed in the lower Miller Creek valley. At this site the Applicant proposes to divert 46.72 GPM up to 10.1 AF of historically consumed volume into the aquifer recharge facility, providing a total of 10.1 AF of mitigation water to the Bitterroot River over 12 months per year. In addition to the aquifer recharge component, the Applicant will also cease all diversions at the historical diversion site and leave the remaining historically consumed volume of 0.2 AF and the remaining historically diverted but not consumed volume of 2.57 AF of water in the Bitterroot River during the historical period of diversion, resulting in 2.77 AF left instream beginning at the historical point of diversion. This will result in an additional 0.20 AF of mitigation water provided to the Bitterroot River during the months of May through August through retirement of irrigation consumptive use. In total, the Applicant's mitigation plan described in Change Application No. 76H 30150414 provides 10.30 AF of mitigation water to the Bitterroot River. A more detailed explanation of the proposed mitigation plan using Claim 76H 30122609 is discussed in the Draft Preliminary Determination to Grant Change prepared for Application to Change A Water Right No. 76H 30150414.

39. The Applicant submitted Change Application No. 76H 30171414 to change a portion of existing Provisional Permit 76H 62593-00 from irrigation to mitigation. The proposed change in water use entails retiring 0.46 acres of irrigated landscaping at the Peak Health Management Facility. Reducing the irrigated acreage results in the historically consumed volume for that acreage being left in the groundwater aquifer where it will recharge the Bitterroot River. The proposed mitigation plan provides 0.78 AF and 0.5 GPM to the Bitterroot River spread over 12 months per year. A more detailed explanation of the proposed mitigation plan using Provisional Permit 76H 62593-00 is discussed in the Draft Preliminary Determination to Grant Change prepared for Application to Change A Water Right No. 76H 30171414.

40. Department Groundwater Hydrologist, Melissa Brickl, prepared a Surface Water Change Technical Analysis for amended change application 76H 30150412 that compared the mitigation

water made available in the Bitterroot River from retiring consumptive use associated with the two water rights to the new net depletions from this proposed appropriation to evaluate net effect to the Bitterroot River, see Tables 6 and 7 below.

Table 6: Combined Effects of Permit and Changes to the Bitterroot River (Volume).

Month	76H 30150412	76H 30171414	76H 30150414		Net Volume Change in Bitterroot River (AF)
	Volume of Depletions (AF)	Mitigation Volume (AF)	Mitigation Volume (AF)	Aquifer Recharge Volume (AF)	
January	-0.17	0.07	0	0.24	0.14
February	-0.15	0.06	0	0.17	0.08
March	-0.17	0.07	0	0.15	0.05
April	-0.16	0.06	0	0.13	0.03
May	-0.17	0.07	0.05	0.11	0.06
June	-0.16	0.06	0.05	0.1	0.05
July	-0.17	0.07	0.05	0.09	0.04
August	-0.17	0.07	0.05	0.09	0.04
September	-0.16	0.06	0	2.86	2.76
October	-0.17	0.07	0	5.17	5.07
November	-0.16	0.06	0	0.64	0.54
December	-0.17	0.07	0	0.35	0.25
Total	-1.99	0.78	0.2	10.1	9.11

Table 7: Combined Effects of Permit and Changes the Bitterroot River (Flow Rate).

Month	76H 30150412	76H 30171414	76H 30150414		Net Flow Rate Change in Bitterroot River (GPM)
	Flow Rate of Depletions (GPM)	Mitigation Flow Rate (GPM)	Mitigation Flow Rate (GPM)	Aquifer Recharge Flow Rate (GPM)	
January	1.23	0.5	0	1.7	1.0
February	1.23	0.5	0	1.4	0.6
March	1.23	0.5	0	1.1	0.4
April	1.23	0.5	0	1.0	0.2
May	1.23	0.5	0.36	0.8	0.5
June	1.23	0.5	0.38	0.8	0.4
July	1.23	0.5	0.36	0.7	0.3
August	1.23	0.5	0.36	0.6	0.3
September	1.23	0.5	0	21.6	20.9
October	1.23	0.5	0	37.8	37.1
November	1.23	0.5	0	4.8	4.1
December	1.23	0.5	0	2.5	1.8

41. Upon issuance of the permit application, the permit is subject to the following conditions to satisfy adverse effect criterion:

WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE PROVISIONAL PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT THE PERMITTED VOLUME HAS BEEN EXCEEDED DURING PERFECTION OF THE PROVISIONAL PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES VOLUME ACCURATELY.

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 11.08 AF OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE BITTERROOT RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATIONS 76H 30150414 AND 76H 30171414 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HERIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

42. The Department finds the proposed use of 19.86 AF diverted volume and 1.99 AF consumed volume will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

43. The Applicant requests additional volume, and no additional flow rate, from two existing groundwater supply wells, GWIC IDs 67088 and 67089, called Peak Wells #1 and #3, respectively. Camp Well Drilling constructed these wells with six-inch steel casing in 1986. Each well has a 10 HP, 230-volt submersible Gould model pump that pumps water SSE toward Highway 93, then adjacent to the highway through 4-inch supply line to the mechanical room on the NE side of the Peak Main Facility. The mechanical room contains controls for the pumps, ten hydropneumatics tanks, a water treatment apparatus, and a totalizer that measures all flow through the system. The hydropneumatics tanks allow the well pumps to cycle on and off. Six tanks create an 85-gallon capacity each and 4 tanks create a 120-gallon capacity each, totaling 990 gallons of capacity. The operator can manually switch between Peak #1 and #3 wells or operate both simultaneously. When there is constant water demand, the pumps run for 2.5 minutes, then shut down for 8 minutes. Under normal operations, minimum runtime is 1.75 minutes with a minimum drawdown storage of 210 gallons. A SeaMetrics MJ-Series pulse meter measures total flow from these wells. The Applicant records readings from this meter monthly.

44. The total current flow rate, served by Provisional Permit 76H 62593-00 and Groundwater Certificate 76H 65902-00, is 120 GPM and no additional flow rate is proposed via this permit application. Water moving through this mechanical room system is disinfected upon entry, then used in the Peak Health Management Company facilities and in the Watson Children's Shelter. One line enters the Peak Main Facility and a second line transports water to the other Peak facility and Watson Children's Shelter. Water from these three facilities is then discharged to an onsite septic system, permitted under DEQ permit no. 09-122. This system includes 4-inch gravity mains to two pump vaults with duplex grinder pumps that transport influent to an International

Wastewater Systems, Inc. Sequencing Batch Reactor (SBR) system through two 2" Sch. 40 PVC force mains with lengths of 900 ft and 194 ft. The SBR system is approved by MT DEQ for level II treatment and would serve as the primary and secondary treatment for the influent prior to pressure distribution discharge in the existing Peak drain field (see Applicant GW.8. Adequate Diversion Means and Operation). The Applicant has full control of the points of diversion and is able to completely cease diversions if necessary.

45. The Applicant is only requesting additional volume pumped from their existing wells. The wells were shown to be able to pump the permitted flow rate through original aquifer testing and years of continuous use. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed volume.

BENEFICIAL USE

FINDINGS OF FACT

46. The Applicant proposes to appropriate an additional 19.86 AF from two points of diversion in the NWNWSE Sec. 2, T12N, R20W, Missoula County and SWNWSE Sec. 2, T12N, R20W, Missoula County for commercial use in the NESW Sec. 2, T12N, R20W. No additional flow rate is requested, as the Applicant proposes to utilize the 120 GPM flow rate already authorized for the wells under existing Provisional Permit 76H 62593-00 and Ground Water Certificate 76H 65902-00. The requested volume is to support expansion of the Peak ("The Peak") Health Management Company facilities and connection of the Watson Children's Shelter to the Peak's public water supply wells.

47. The Peak Main Facility has a competition sized pool, day spa, men's and women's locker rooms with showers, toilets, and sinks, as well as equipment. The Peak Racquetball Club has 5 toilets, 8 showers, 2 saunas, and 6 sinks, a daycare, and, as of 2021 when this Application was submitted, they had planned an additional 4 toilets and 4 sinks for this facility. The Watson Children's Shelter is equivalent to a 16-bedroom house. The proposed volume is based on water measurements from 2019 and projected growth from this time. The 2019 measured volume equaled 22.2 AF, while projected future demand equals 6.66 AF. In total, the Peak foresees the need for 28.86 AF for commercial use. Subtracting out the existing 9 AF of currently permitted commercial use, the Applicant arrives at 19.86 AF proposed additional volume for the requested commercial purpose.

48. Applicant proposes to use water for Commercial use which is a recognized beneficial use § 85-2-102(5), MCA. Applicant has proven by a preponderance of evidence that commercial use is

a beneficial use and that 19.86 AF of diverted volume of water requested is the amount needed to sustain the beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

49. The Applicant signed the application form 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.

50. This application is also for sale, rental, or distribution, in which water is supplied from the Peak Management Health Company to another, Watson Children's Shelter. The Applicant provided the Peak Health Management Water System Easement and Agreement dated February 11, 2021, which demonstrates the written consent of the ultimate water users with possessory interest.

CONCLUSIONS OF LAW

BASIN CLOSURE

51. The Department may not grant an application for a permit to appropriate water or for a reservation to reserve water within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to § 85-2-344(5), MCA. The proposed appropriation is located within the Bitterroot River subbasin temporary closure. This combined application is for groundwater and includes a hydrogeologic assessment determined to be correct and complete. The application falls under the exceptions for the basin closure, § 85-2-344(2)(a), MCA.

52. Pursuant to § 85-2-360, MCA, a combined application for new appropriations of groundwater in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. E.g., *In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No. 76H-30046210 to Change a Non-filed Water Right by Patricia Skergen and and Jim Helmer* (DNRC Final Order 2010, Combined Application)(combined application under §85-2-363, MCA, reviewed as a single unit).

53. In reviewing an application for groundwater in a closed basin, the District Court in *Sitz Ranch v. DNRC* observed:

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The basin from which Applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an Applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§85-2-311, MCA) and placed the burden of proof squarely on the Applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an Applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7.

54. A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. § 85-2-311(8), MCA; *E.g., In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee* (DNRC Final Order 2011); *In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen*, (DNRC Final Order 2011).

PHYSICAL AVAILABILITY

55. 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.”

56. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987) (Applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

57. 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).

58. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF [17-21])

LEGAL AVAILABILITY

59. 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).

60. 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.

61. 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).

62. 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. Section 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.

63. 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*, 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*, 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*.

64. 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. Section 85-2-311(1)(a)(ii), MCA. (FOF [22-31].)

ADVERSE EFFECT

65. 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.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

66. 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).

67. 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*, 4 (2011).

68. 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*, 249 Mont. 425, 816 P.2d 1054 (1991).

69. 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*, 7 (2011) (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). 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.

70. 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*, 8 (2011).

71. Adverse effect not required to be measurable but must be calculable. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 12 (2011) ("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 depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also *Robert and Marlene Tackle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-G76L by Cross*, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

72. Pursuant to § 85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

73. Pursuant to § 85-2-362, MCA, an aquifer recharge plan must include: evidence that the appropriate water quality related permits have been granted pursuant to Title 75, chapter 5, and pursuant to §§ 75-5-410 and 85-2-364, MCA; where and how the water in the plan will be put to beneficial use when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the aquifer recharge plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; a description of the process by which water will be reintroduced to the aquifer; evidence of water availability; and evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface water in a manner that will offset any adverse effect on a prior appropriator.

74. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. *E.g.*, *In the*

Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC (DNRC Final Order 2008).

75. 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. Section 85-2-311(1)(b), MCA. (FOF [32-42])

ADEQUATE DIVERSION

76. 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.

77. 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.

78. 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. Section 85-2-311(1)(c), MCA (FOF [43-45]).

BENEFICIAL USE

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

80. 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; 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*, 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).

81. 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*, 3 (2011) (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).

82. It is the Applicant's burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 ("issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied"); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also *Royston; Ciotti*.

83. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that Commercial is a beneficial use and that 19.86 AF of diverted volume is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF [46-48])

POSSESSORY INTEREST

84. 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.

85. 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.

86. In *Town of Kevin v. DNRC*, 2024 MT 210, ¶ 31, 418 Mont. 131, 557 P.3d 913, the Court held that water service agreements satisfy the “written consent” under §§ 85-2-311(1)(e) and - 402(2)(d), MCA.

87. 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. Section 85-2-311(1)(e), MCA. (FOF [49-50])

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. 76H 30150412 should be GRANTED.

The Department determines the Applicant may divert 19.86 AF of groundwater, by means of a 120-foot deep well located in the NWNWSE of Sec 2, T12N, R20W (GWIC ID 67088), and a 118.5-foot deep well located in the SWNWSE of Sec 2, T12N, R20W (GWIC ID 67089), from January 1 to December 31 for Commercial purposes in the NESW in Sec 2, T12N R20W.

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

1. WATER MEASUREMENT-INLINE FLOW METER REQUIRED: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE PROVISIONAL PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT THE PERMITTED VOLUME HAS BEEN EXCEEDED DURING PERFECTION OF THE PROVISIONAL PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE MISSOULA WATER RESOURCES REGIONAL OFFICE. THE

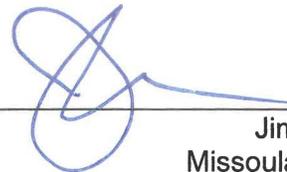
APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES VOLUME ACCURATELY.

2. THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 11.08 AF OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE BITTERROOT RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATIONS 76H 30150414 AND 76H 30171414 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HERIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

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 16th day of January, 2026.



Jim Nave, Manager
Missoula Regional Office
Montana 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 18th day of January, 2026, by first class United States mail.

MILLER LAW
ATTN: ROSS MILLER
708 LOLO STREET
MISSOULA, MT 59802



Missoula Regional Office, (406) 721-4284

