

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30163329 BY MCKINNON FAMILY TRUST)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On January 2, 2025, McKinnon Family Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30163329 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 415 Gallons Per Minute (GPM) and 113.99 Acre-Feet (AF). The Applicant requests to irrigate a total of 47.3 acres. A preapplication meeting was held between the Department and the Applicant on March 20, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant submitted Preapplication Meeting Form 600P to the Department on May 31, 2024, and the 600P form was considered to be successfully completed the same day. The Department delivered its completed technical analysis to the Applicant on July 15, 2024. The Department published receipt of the application on its website on January 6, 2025. A deficiency letter was sent to the Applicant on January 22, 2025, based on criteria in § 85-2-302, Montana Code Annotated (MCA). The Department received the Applicant's deficiency response on May 22, 2025. The application was determined to be correct and complete as of June 17, 2025. An Environmental Assessment for this application was completed on June 18, 2025. Additional procedural history including events that occurred through the administrative hearings process is described in Finding of Fact 4.

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
- Addenda
 - Basin Closure Addendum, Form 600-BCA
 - Mitigation Purpose Addendum, Form 600-MIT

- Attachments:
 - Mitigation Purpose Addendum Attachment, undated
 - Pentair Pump Performance Datasheet, pump curves and technical specifications for Berkeley pump and Grundfos (62S50-12) 62 GPM 5 horsepower pump, undated
- Form 653 Variance Request for Aquifer Testing Requirements, dated May 20, 2024.
- Technical Memorandum prepared by NewFields titled Preliminary Groundwater Modeling Simulation Proposed Wells, Flynn-Lowney Ditch, Missoula, Montana, dated January 25, 2022, revised date April 6, 2022
- Aquifer Testing Addendum – Form 600-ATA
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- Maps:
 - Proposed Water Use Map, ESRI Basemap dated December 11, 2024
 - System Diagram Map, ESRI Basemap dated October 28, 2024
- Department completed Technical Analysis Report based on information provided in the Preapplication Meeting Form (Form 600P), dated July 15, 2024

Information Received after Application Filed

- Deficiency Response, dated May 22, 2025, received by the Department May 22, 2025
- Email correspondence between consultant and the Department, dated May 22, 2025
- Order Remanding to Regional Office and Dismissing Show-Cause Hearing, dated May 6, 2026

Information within the Department's Possession/Knowledge

- Application file for Change Application 76M 30165370
- Flow records and data from the mean monthly flow derived from USGS Gage for the Clark Fork above Missoula (Gage #12340500)
- Letter from the Department to Applicant's Consultant (WGM Group) dated June 2, 2022, granting variances to aquifer testing rules found in Administrative Rules of Montana (ARM) 36.12.121

- Letter from the Department to Applicant dated May 29, 2024, granting variances to Aquifer Testing Requirements found in ARM 36.12.121 (1), ARM 36.12.121(2)(a) through (c) and ARM 36.12.121(3)(a) through (h)
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents.
 - Department Technical Memorandum dated November 1, 2019, Physical Availability of Surface Water with Gage Data.
 - Department Memorandum dated June 9, 2008, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins.
 - Department Memorandum dated May 1, 2009, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins; Follow up to June 9, 2008, Memorandum.

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; AF/YR means acre-feet per year; and MI mean miles.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater for irrigation purposes, by means of two wells from April 15 to October 15 at a rate of 415 GPM and up to 113.99 AF. The first well, (GWIC ID 319686), is situated in the NENENE of Sec. 13, T13N, R20W, and will provide a flow rate of 350 GPM and a volume of 99.78 AF. The second well, (GWIC ID 319785) located in the SESWSE of Sec. 12, T13N, R20W, will provide 65 GPM and a volume of 14.21 AF. The irrigation place of use totals 47.3 AC, with 37.4 AC in the SESE of Sec. 12, 2.9 AC in the SESWSE of Sec. 12, and 7.0 AC in the N2NENE of Sec. 13, all in T13N, R20W.

2. The large 8-inch well (GWIC ID 319686 in the NENENE of Sec. 13) is located approximately 1.02 MI from the Clark Fork River channel while the the smaller secondary 6-inch well (GWIC ID 319785 in the SESWSE of Sec. 12) is approximately 1.12 MI from the Clark Fork. The Department determined the Clark Fork River to be the potentially affected surface water source by this proposed appropriation. The 8-inch main production well (GWIC 319686) and the secondary 6-inch well (GWIC 319785) are both drilled to 120 feet deep in unconsolidated sand and gravel deposits.

3. Total consumptive use under this proposed appropriation is 91.2 AF. Although the Applicant is proposing a period of diversion from April 15 through October 15, surface water depletions occur year round.

4. The Department issued a Draft Preliminary Determination to Deny Application dated August 15, 2025. The Department proposed to deny the application because the associated mitigation Change Application, 76M 30165370, was not yet received by the Department, and a Department Technical Analysis was not yet completed. Without a completed Technical Analysis for the mitigation change, the Applicant could not meet the adverse effect and legal availability criteria. The Applicant did not submit a written request for extension of time for Permit Application 76M 30163329, and the application was sent to the DNRC Office of Administrative Hearings for a show cause hearing. The Technical Analysis and Draft Preliminary Determination to Grant with Modifications for Change Application 76M 30165370 was completed on April 17, 2026. The Office of Administrative Hearings granted the Applicant an extension of time to submit additional information until June 15, 2026, and subsequently remanded the permit application back to the Missoula Regional Office to complete processing on May 6, 2026.

5. The Applicant is held to the following water measurement and mitigation conditions to meet 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 FLOW RATE AND 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 PERMITTED FLOW RATES AND/OR VOLUMES HAVE 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 FLOW RATE AND 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 FLOW RATE AND VOLUME ACCURATELY.

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 91.2 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE CLARK FORK RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 76M 30165370 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

Basin Closure

6. The proposed PODs are located within the Grant Creek Basin Administrative Closure boundary. The entire Grant Creek drainage, from its headwaters to its confluence with the Clark Fork River, including all named and unnamed tributaries, is contained within the closure area (ARM 36.12.1011). This Administrative Closure is relevant only to new surface water consumptive use between July 1-September 30 each year. The Applicant's proposal requests to appropriate groundwater.

7. The Applicant had a preapplication meeting and requested that the Department complete the Technical Analysis. This Technical Analysis was completed by the Department and provided to the Applicant who submitted it as part of their permit application. The Technical Analysis meets the requirements found in § 85-2-361, MCA for a hydrogeologic assessment. The Department's analysis found that Grant Creek surface water was hydraulically disconnected to the groundwater

source aquifer from which the Applicant proposes to divert water, and the proposed groundwater appropriation will not deplete Grant Creek surface water.



Figure 1. Map of Beneficial Use Permit No. 76M 30163339

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

GENERAL CONCLUSIONS OF LAW

8. 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 . . .

9. 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 to 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.

10. 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.

11. 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).

12. 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.

13. 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

14. The Applicant proposes to divert up to 113.99 AF from the Missoula Valley Aquifer (groundwater) at a flow rate of 415 GPM for irrigation of 47.3 AC. The application provided the well logs for the proposed points of diversion and for several other wells in the surrounding area.

15. The Applicant attempted to conduct an 8-hour pump test on the larger 8-inch well in Section 13 (GWIC ID 319686), but experienced technical difficulties. The pump installment and well construction prevented a water level measuring device to be inserted to monitor draw down of water levels. Therefore, the Applicant requested a variance from the requirements in ARM 36.12.121(2) and ARM 36.12.121(3).

16. In a letter dated June 2, 2022, the Department granted variances from all aquifer testing requirements in ARM 36.12.121. The ARMs were updated and a new variance request form was adopted by the Department on January 1, 2024. Since the Department did not receive the Application (Form 600) prior to those changes to ARM, a new variance request was required. The Department sent a new letter to the Applicant on May 29, 2024, granting variances to ARM 36.12.121(1), ARM 36.12.121 (2)(a) through (c), and ARM 36.12.121(3)(a) through (h). The variances granted excused the Applicant from all aquifer testing requirements in ARM 36.12.121. The variances were granted because the properties of the Missoula Valley Groundwater Aquifer are well studied. Further, the Department will typically not grant a variance from ARM 36.12.121(3)(e)(i) since this information is necessary to prove adequacy of diversion criteria. Though, due to the unique construction of the Applicant's well, which would not allow a transducer or tape to be inserted to obtain measurements, a variance from this ARM was granted by the Department.

17. The Missoula Valley aquifer is well studied and the Applicant cited data from multiple documented pump tests on adjacent wells in the same source aquifer (associated with Hellgate Elementary School District Provisional Permit 76M 77805-00, River Walk Estates Subdivision Provisional Permit 76M 30019449 and The Valley Subdivision Provisional Permit 76M 30023166). The wells associated with these permits are located within 2.0 MI of the proposed wells, and have similar characteristics (depth, lithology, etc.) to the two proposed wells under this application.

18. Citing those completed aquifer tests from nearby wells, the Applicant requested that the Department utilize Transmissivity values of 510,900 ft²/day for the small well (GWIC ID 319785) and 507,000 ft²/day for the large well (GWIC ID 319686).

19. The Department reviewed all aquifer tests conducted in the same source aquifer within 2.0 MI of the proposed wells. Based on these pump tests, the Department determined that the geometric mean aquifer transmissivity (T) value was 117,200 ft²/day. However, some of those aquifer tests were of poor quality, and the Department dismissed those datasets. To more accurately estimate a T value for the Applicant's proposal, the Department utilized data from three aquifer tests, described below in Finding of Fact (FOF) 19 and Table 2 in the Technical Analysis Report - Part A.

20. The Department evaluated the volume of water that is physically available from the source aquifer by calculating groundwater flux through the Zone of Influence (ZOI), determined by a 0.01-foot draw down contour surrounding the points of diversion. Department Groundwater Hydrologist Kim Bolhuis reviewed the aquifer tests completed on one well under River Walk Estates Subdivision Provisional Permit 76M 30019449 and two wells under The Valley Subdivision Provisional Permit 76M 30023166. The Department calculated a geometric mean of Transmissivity value 162,807 ft²/day. Using the Theis (1935) solution, the T value of 162,807 ft²/day, specific yield of 0.1 (Lohman, 1972), and a normalized pumping rate of 70.7 GPM required to produce the requested annual volume for the period of diversion, the predicted 0.01 ft drawdown contour, or ZOI, occurs 6,350 ft from the Applicant's well. Groundwater flux through the ZOI is equal to 69,418 AF/year. The wells were modeled as one well due to their proximity to each other.

21. The Department finds groundwater to be physically available at the requested annual volume of 113.99 AF during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

Legal Availability of Groundwater

22. The Department determined the legal availability of water in the source aquifer by subtracting the legal demands of existing water rights within the ZOI of the proposed PODs from the amount of water physically available in the source aquifer. The ZOI is the area surrounding the proposed PODs in which existing wells would experience drawdown of 0.01 foot or more.

23. The Department defined the ZOI to extend 6,350 feet from the Applicant's wells. The Department considers all active groundwater rights in that radius in its legal analysis. Within the ZOI, there are a total of 160 active groundwater rights on record with the Department that were evaluated for legal demands (reference Appendix A in Groundwater Permit Technical Analysis Part A). All water rights in Appendix A were Groundwater Certificates (Certificates).

24. The area of proposed water use is not within a controlled groundwater area. Currently under § 85-2-306, MCA, the maximum volume allowed under a Certificate outside a controlled groundwater area is 10 AF. Of the 160 Certificates in Appendix A, 135 had defined volumes. For those Certificates in the Technical Analysis Report – Part A, Appendix A without specific volumes, the Department assigned a volume of 10 AF to each.

25. Those groundwater rights within the ZOI have a total annual appropriation of 753.24 AF/YR. Subtracting the legal demands of 753.24 AF from the calculated groundwater flux of 69,418 AF/YR leaves 68,664.76 AF (69,418 AF physically available – 753.24 AF legal demands) of groundwater legally available for the proposed appropriation of 415 GPM and 113.99 AF.

26. The Department finds groundwater to be legally available in the aquifer at the requested annual diverted volume of 113.99 AF.

Legal Availability of Surface Water

27. The Department determined in its technical analysis that the Clark Fork River (approximately 1.2 MI south of the proposed wells) is hydraulically connected to the source aquifer. The location where surface depletions begin to accrue was identified as the western edge of Section 19, T13N, R19W, and the area of potential impact was defined as the reach between this point downstream to the confluence of the Clark Fork and Bitterroot Rivers.

28. To determine the depletions to the Clark Fork River, the consumptive use of the proposed permit was calculated. Using a diverted volume of 113.99 AF, 70% efficiency for sprinkler irrigation, and 10% irrecoverable losses, the Department calculated the consumptive volume of the proposal to be 91.2 AF. The timing of these depletions was modeled by the Department's technical analysis and are shown in table 1 below.

Table 1. Monthly depletions to the Clark Fork River.

Month	Depletions to Clark Fork (AF)	Depletions to Clark Fork (GPM)
January	6.5	47.3
February	5.2	37.7
March	5.2	37.7
April	4.6	33.7
May	5.0	36.5
June	6.2	45.2
July	8.6	62.6
August	10.9	79.6
September	11.5	84.3
October	11.2	81.5
November	8.9	65.2
December	7.6	55.5

29. The local area of potential impact is defined as the section of the Clark Fork River from the point where depletions begin, to the downstream confluence of the Clark Fork and Bitterroot Rivers. The legal demands of water rights with points of diversion in this local reach were analyzed to calculate the legal availability of water in the Clark Fork River at the point of depletions (Table 2 below). This analysis concluded that water is legally available in the local reach for the proposed appropriation in every month of the year.

Table 2. Clark Fork River legal availability in locally depleted reach.

Month	Physical Availability at Effective Reach (CFS)	Physical Availability at Effective Reach (AF)	Existing Legal Demands Effected Reach (CFS)	Existing Legal Demands Effected Reach (AF)	Physical Availability - Legal Demands (CFS)	Physical Availability - Legal Demands (AF)
Jan	1,225	75,190.50	8.10	497.19	1,216.9	74,693.31
Feb	1,378.5	76,424.04	8.10	449.08	1,370.4	75,974.96
Mar	1,794.5	110,146.41	8.10	497.19	1,786.4	109,649.22
Apr	3,422.5	210,073.05	114.24	6785.60	3,308.26	203,287.45
May	7,282	446,969.16	114.24	7011.79	7,167.76	439,957.37
Jun	7,677	471,214.26	114.24	6785.60	7,562.76	464,428.66

Jul	2,795	171,557.10	114.24	7011.79	2,680.76	164,545.31
Aug	1,436	88,141.68	114.24	7011.79	1,321.76	81,129.89
Sep	1,367	83,906.46	114.24	6785.60	1,252.76	77,120.86
Oct	1,518	93,174.84	114.24	7011.79	1,403.76	86,163.05
Nov	1,519	93,236.22	8.10	481.16	1,510.9	92,755.06
Dec	1,340	82,249.20	8.10	497.19	1,331.9	81,752.01

30. The Department must also consider downstream hydropower water rights owned by Avista Corporation (Avista) at Noxon dam per the final order issued for Application for Beneficial use Permit No. 76N 30010429 on December 21, 2006. In the final order, the Department found that surface water in the Clark Fork River was not legally available at Noxon Dam. For this subject application, the Department conducted a legal availability analysis of the Clark Fork River at Noxon Dam. To evaluate the legal availability of the lower reach of the Clark Fork River at Noxon Dam, the existing demands of Avista’s hydropower water rights were subtracted from the median of the monthly flow of the USGS gage at the Clark Fork River below Noxon Rapids Dam near Noxon (Gage # 12391400). Table 3 below lists the median of the mean monthly flow rates to quantify the legal availability of the Clark Fork River near the Noxon Rapids Dam. The analysis shows there is not sufficient legally available water in the lower reach of the Clark Forks River to satisfy Avista’s legal demands in any month of the year.

Table 3. Legal availability of Clark Fork River Near Noxon Rapids Dam

Month	Physical Availability (CFS) at USGS Gage 21391400	Avista Water Rights (CFS)	Legal Availability (CFS) at Gage 12391400
January	13,905	50,000	-36,095
February	12,890	50,000	-37,110
March	14,785	50,000	-35,215
April	21,160	50,000	-28,840
May	38,030	50,000	-11,970
June	47,320	50,000	-2,680
July	22,280	50,000	-27,720
August	10,720	50,000	-39,280
September	10,166	50,000	-39,834
October	11,240	50,000	-38,760
November	12,605	50,000	-37,395
December	13,335	50,000	-36,665

31. To address legal availability in the lower Clark Fork River near Noxon Rapids Dam, and to fully mitigate the 91.2 AF of consumed volume from the proposed appropriation, the Applicant will use mitigation water from associated Change Application 76M 30165370. Through Application 76M 30165370, there is sufficient mitigation volume available to offset the Applicant's depletions to the Clark Fork River. The mitigation plan is fully discussed in the "Adverse Effect" section below.
32. The Department finds the proposed appropriation of 415 GPM and up to 113.99 AF to be considered legally available with the mitigation plan during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

Groundwater Adverse Effects

33. In the event a legitimate call for water is made, the Applicant can shut off the pumps and cease diversions. The Department finds this is a reasonable plan of control.
34. To determine if the proposed water use will cause adverse effects to other water users, the Department modeled whether any existing water rights with wells in the source aquifer or without well depths near the proposed wells would experience a drawdown of one foot or more in its technical analysis. No wells were found to meet this criteria.
35. The Department finds that the proposed use of groundwater will not adversely affect other groundwater appropriators.

Surface Water Adverse Effects

36. The groundwater proposed to be appropriated by the Applicant is hydraulically connected to the Clark Fork River. The consumptive use (91.2 AF) is considered to deplete the Clark Fork River every month of the year (see Table 1 in Finding of Fact No. 27).
37. The Department's analysis shows that surface water in the Clark Fork River within the *locally* depleted reach is legally and physically available in excess of the predicted depletion for each month of the year. When comparing the physical availability and legal demands on the Clark Fork River in the local reach, the Department demonstrated that water is always available for appropriators in the Clark Fork River within this area (see Table 2 in Finding of Fact No. 28), and that additional depletions resulting from the proposed groundwater appropriation will not result in adverse effect in the local reach of the Clark Fork River.
38. The Department must also address downstream hydropower rights owned by Avista at Noxon Dam. The Department cited the June 9, 2008, and May 1, 2009, Tubbs Memoranda regarding water rights permitting in the lower Clark Fork River Basin. These memoranda state

that, for groundwater sources in Basin 76M, “when net depletions to surface water sources are calculated to be greater than 35 GPM or greater than 10 AF per year, the Department must consider the Thompson River Lumber Company as precedent”.

39. The Department analyzed adverse effects to Avista’s senior hydropower water rights by assessing the availability of surface water on the Clark Fork River using USGS Gage No. 12391400 “Clark Fork Below Noxon Rapids Dam near Noxon, MT”. Avista’s legal demands for hydropower were subtracted from the median monthly flow of the Gage 12391400 to understand water availability at Noxon dam. This data, which is included in the Department’s Technical Analysis – Part B and displayed in Table 3 of FOF 29, showed that water was not legally available to satisfy Avista’s Clark Fork River hydropower water rights in any month of the year.

40. To offset depletions to the Clark Fork River resulting in adverse effect to downstream hydropower water rights, the Applicant proposes to use mitigation from Change Application 76M 30165370. Through Application 76M 30165370, the purpose of use, place of use and point of diversion will be changed to the purposes of mitigation and marketing for mitigation. The proposed stream reach for these purposes will encompass the Clark Fork River between the historical POD in the SWNWNE Section 21, T13N, R19W, Missoula County, downstream to the Noxon Rapids Powerhouse in the S2S2 Section 33, T26N, R32W, Sanders County.

41. Under this change, the City of Missoula proposes to completely retire Statement of Claim Nos. 76M 123868-00, 76M 123869-00, 76M 118513-00, and 76M 123870-00 for the purpose of mitigation. The Department found a maximum of 2,287.5 irrigated acres under rights 76M 123868-00 and 76M 123869-00, and no historical use was found for right 76M 118513-00 (based on the capacity of the historical diversion). The historically consumed volume from the Claim Nos. 76M 123868-00, 76M 123869-00, and 76M 123870-00 was found to be 2,676.5 AF and the historically diverted volume was found to be 4,407.0 AF.

42. The historically consumed volume (of the irrigation and stock rights) will be available to mitigate the Applicant’s depletions (91.2 AF) to the Clark Fork River resulting from their groundwater pumping. The place of use for mitigation encompasses the location of the calculated depletions to the Clark Fork River from permit application 76M 30163329. Since Avista Corporation’s rights are for water storage for the purpose of hydropower generation, the Department finds it necessary for mitigation water to match the amount of depletions, but not the timing.

43. The Department finds that the Applicant’s plan to utilize mitigation water from Change Application 76M 30165370 is sufficient to offset the calculated groundwater depletions to the Clark

Fork River, and that there will be no adverse effect to those hydropower rights owned by Avista or other existing surface water users.

The Applicant will be held to the following conditions to ensure that the adverse effect criteria is met:

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 91.2 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE CLARK FORK RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 76M 30165370 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

44. To ensure that the proposed flow rate and volume of water are not exceeded, and that the amount of mitigation water provided to the Clark Fork River is adequate to offset adverse effect, the Applicant will be required to adhere to the following water measurement conditions:

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 FLOW RATE AND 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 PERMITTED FLOW RATES AND/OR VOLUMES HAVE 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 FLOW RATE AND 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 FLOW RATE AND VOLUME ACCURATELY.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

45. The means of diversion consists of two 120-foot wells (GWIC ID 319686 and GWIC ID 319785). GWIC ID 319686 has an 8-inch casing, fitted with a Berkeley pump while GWIC ID 319785 has a 6-inch casing, fitted with a Grundfos (62S50-12) 5 horsepower pump with a Franklin 3-phase 230V motor.

46. Water is conveyed from the 8-inch well by a 6-inch underground mainline with risers, running north and south along the eastern edge of the property and west along the fields to the house area. The smaller 6-inch well will convey water into an irrigation system that conveys water around the house and garden area using a 2-inch underground pipeline. This irrigation system will be manifolded with the 6-inch buried mainline and both wells will be able to irrigate the POU.

47. The place of use will be irrigated with a combination of wheel lines, hand lines and small sprinkler heads. Two wheel lines will connect to the risers on the 6-inch main line for irrigation of the central part of the POU. One section (of wheel line) will have 25 40-ft pieces and the other with 28 40-ft pieces. Each piece has a single 6 GPM sprinkler head. The hand lines will consist of two 4-inch pipes with 23 sprinkler heads. These lines will hook up to the risers in the fields north and south of the wheel line section (for irrigation of the northern and southern portions of the POU). Only one hand line will be used at the same time as the two wheel lines. The area near the house (on the western side of the POU) will be irrigated with 10 sprinkler heads, providing 5 GPM each.

48. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

49. Under this proposal, the Applicant is requesting to divert 415 GPM and 113.99 AF to irrigate 47.3 AC from April 15 to October 15, with a consumptive use of 91.2 AF.

50. The proposed place of use lies in USDA NRCS climatic area III. The proposed diversion of 113.99 AF falls within the Department's standards for climatic area III per ARM 36.12.115(2)(e), and the period of diversion complies with Department standards found in ARM 36.12.112(1)(c)(iii). The consumptive use was calculated using the USDA Irrigation Water Requirements program.

51. The place of use for irrigation applied for overlaps three water rights, Statement of Claim Nos. 76M 99118 00, 76M 30111895 and 76M 30111889. These water rights are for the purposes of domestic, lawn and garden irrigation and stock. Statement of Claim 76M 99118 00 is for domestic and 1.0 acre of lawn and garden that does not overlap with the proposed 47.3 acres of irrigation. Statement of Claim 76M 30111895 is for stock use and the proposed permit does not provide any supplemental stock water. Statement of Claim 76M 30111889 is for domestic and up to five acres of lawn and garden irrigation from a well that was hand-dug in 1883. The five acres claimed does overlap with the proposed place of use, however it is unclear if the hand-dug well is still in use. The proposed wells will be the primary source of irrigation water on the Applicant's property.

52. The Department finds the proposed water use is beneficial, and that the requested flow rate of 415 GPM and annual volume of 113.99 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

53. The Applicant signed the application form affirming that the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

BASIN CLOSURE

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

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.

55. 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. *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

56. 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.”

57. 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).

58. 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).

59. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001)

60. 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 14-21).

LEGAL AVAILABILITY

61. 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).

62. 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.

63. 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).

64. 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.

65. 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.

66. In analyzing legal availability for surface water, Applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under § 85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” *Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 6*

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

68. Based on the Applicant's proposed mitigation plan, the Department finds that the Applicant has proven by a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested. (FOF 22-32).

ADVERSE EFFECT

69. 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.

70. 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).

71. 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).

72. 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).

73. 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.

74. 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).

75. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain Applicant's burden of proof. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected Applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected Applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measurable," and that the depletion "won't change how things are administered on the source."). After calculating the projected depletion for the irrigation season, the District Court *in Sitz Ranch v. DNRC* explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3-4 (2011).

76. The Department can and routinely does, condition a new permit's use on use of that special management, technology, or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; *see, e.g., In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

77. It was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 10.

78. 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).

79. A plan to prove legal availability and prevent adverse effect can be to use mitigation or augmentation. Section 85-2-360, MCA; e.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC* (DNRC Final Order 2006) (permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed, Faust v. DNRC*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC* (DNRC Final Order 2007) (permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), *affirmed, Montana River Action Network v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12; *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC 2008) (permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (HB 831, DNRC Final Order 2009) (permit denied in part for failure to analyze legal availability for surface water for depletion of 1.31 AF to Bitterroot River); § 85-2-360, MCA. The Department has a history of approving new appropriations where Applicant will mitigate/augment to offset depletions caused by the new appropriation. *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods* (DNRC Final Order 2000); *In The Matter of Application To Change*

Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation (DNRC Final Order 2001); In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC (DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order (1988). Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See *Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148 Mont. 355, 423 P.2d 587. Augmentation/mitigation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the *department based on the amount*, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(Emphasis added.)

80. 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.

81. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of surface water depletions by the proposed appropriation in the full amount and location of the calculated depletions. 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).

82. The Applicant has proven by a preponderance of the evidence that all water rights of a prior appropriator under an existing water right, will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF 33-44).

ADEQUATE DIVERSION

83. 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.

84. 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.

85. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

86. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

87. 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 45-48).

BENEFICIAL USE

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

89. 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).

90. 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).

91. 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*.

92. 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 irrigation is a beneficial use and that 113.99 AF of diverted volume and 415 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 49-52).

POSSESSORY INTEREST

93. 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.

94. 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.

95. 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 53).

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. 76M 30163329 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of two 120-foot-deep wells from April 15 through October 15 at 415 GPM up to 133.99 AF. The first well, (GWIC ID 319686), is situated in the NENENE of Sec. 13, T13N, R20W, and will provide a flow rate of 350 GPM and a volume of 99.78 AF. The second well, (GWIC ID 319785) located in the SESWSE of Sec. 12, T13N, R20W, will provide 65 GPM and a volume of 14.21 AF. The Applicant may irrigate up to 47.3 acres. The place of use encompasses 37.4 AC in the SESE of Sec. 12, 2.9 AC in the SESWSE of Sec. 12, and 7.0 AC in the N2NENE of Sec. 13, all in T13N, R20W.

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

1. THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 91.2 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE CLARK FORK RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 76M 30165370 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

2. 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 FLOW RATE AND 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 PERMITTED FLOW RATES AND/OR VOLUMES HAVE 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 FLOW RATE AND 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 FLOW RATE AND VOLUME ACCURATELY.

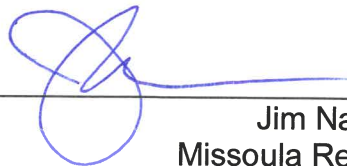
Diversion under this Permit may not commence until the mitigation or aquifer recharge plan described in this decision is legally implemented. Diversion under this Permit must stop if the mitigation or aquifer recharge plan as herein required in amount, location and duration ceases in whole or in part.

The area that will be depleted is located along the Clark Fork River; to mitigate the affected reach the appropriator will purchase mitigation water from the City of Missoula. Through Change Application 76M 30165370, the City retired irrigation rights 76M 123868 00, 76M 123869 00 and 76M 118513 00 and stock right 76M 123870 00. The historically consumed volume of these rights is adequate to mitigate the calculated depletions of 91.2 AF associated with this proposed appropriation.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 25th day of June 2026.



Jim Nave, Manager
Missoula Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

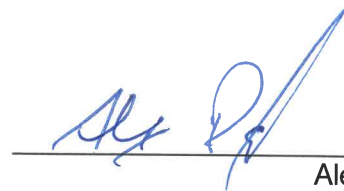
This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 25th day of June 2026, by first class United States mail.

MCKINNON FAMILY TRUST
2298 TIPPERARY WAY
MISSOULA, MT 59808-9405

AND

CC:

WGM GROUP
C/O JULIE MERRITT
1111 E BROADWAY ST
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