

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30164554 BY DAVID & SUSAN MILLER)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On October 21, 2025, David G Miller & Susan E Miller (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30164554 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 220 GPM and 55.43 AF for the purpose of irrigation. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 29, 2025. The Applicant responded with information dated November 26, 2025. A preapplication meeting was held between the Department and the Applicant on October 2, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on March 12, 2025. The Department delivered the completed technical analysis on May 1, 2025. The application was determined to be correct and complete as of December 26, 2025. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on March 9, to which the Department granted 7 days to submit additional information. The Applicant submitted additional information on March 9, 2026. An Environmental Assessment for this application was completed on February 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
- Addenda:
 - Basin Closure Addendum, Form 600-BCA
 - Mitigation Addendum, Form 600/606-MIT
- Attachments:
 - Pump Performance Datasheet for Franklin Electric 220 GPM 5" STS Sub-Turbine (Build Center)

- Maps:
 - Proposed Use, undated aerial imagery
 - System Diagram, undated aerial imagery
- Department-completed technical analyses based on information provided in the Preapplication Checklist, dated May 1, 2025

Information Received after Application Filed

- Deficiency response, dated November 26, 2025, received by the Department on November 26, 2025

Information within the Department's Possession/Knowledge

- 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.
 - Technical Memorandum: Physical and Legal Availability of Ground Water, dated April 22, 2019
 - Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
 - Department Memorandum: Permitting in the Open Clark Fork and Flathead Basins, dated June 9, 2008
 - Department Memorandum: Permitting in the Open Clark Fork and Flathead Basins Follow up to June 9, 2008, Memorandum, dated May 1, 2009

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 water from the Missoula Valley Aquifer by means of a 100-foot well from April 15 to October 15 at 220 GPM up to 55.43 AF, from a point in the SWNWSE Draft Preliminary Determination to GRANT

Section 14, T13N, R20W, Missoula County, for irrigation use from April 15 to October 15. The Applicant proposes to irrigate 23 acres. The place of use is located in the SWNWSE and W2SWSE of Section 14 and the NWNWNE of Section 23, all in Township 13 North, Range 20 West, Missoula County.

2. The proposed point of diversion is located approximately 60 feet to the southeast of an unnamed tributary of the Clark Fork River and approximately 4200 feet to the north of the Clark Fork River.

3. The consumptive volume of the proposed diversion is 38.8 AF. Depletions from the proposed use are expected to accrue to the Clark Fork River beginning at the northern edge of the SWNE of Section 23, T13N, R20W. The source aquifer is not hydraulically connected to Grant Creek; therefore, no depletions are expected to accrue to this source.

4. The proposed appropriation of water has a place of use which overlaps with that of Statement of Claim 76M 149678-00, a surface water right. Water availability in the source of supply for the existing claim is unreliable, with water generally being unavailable after May. The Applicant intends to rely solely on the proposed permit for irrigation and does not plan to supplement its use with water from the existing claim.

Basin Closure

5. This application is for the purpose of irrigation. This application is located within the Administrative Grant Creek Basin Closure, in which the Department must reject surface water permit applications for consumptive use and surface water permit applications for nonconsumptive use which decrease the source of supply, disrupt stream conditions below the point of return, or adversely effect prior appropriators within the reach of stream between the point of diversion and point of return per ARM 36.12.1011. The proposed application is for groundwater, and the Department-completed technical analysis shows that the source aquifer is not hydraulically connected to Grant Creek.

6. Applicant submitted a hydrogeologic assessment report per §§ 85-2-360 and -361, MCA, determined to be correct and complete by the Department.

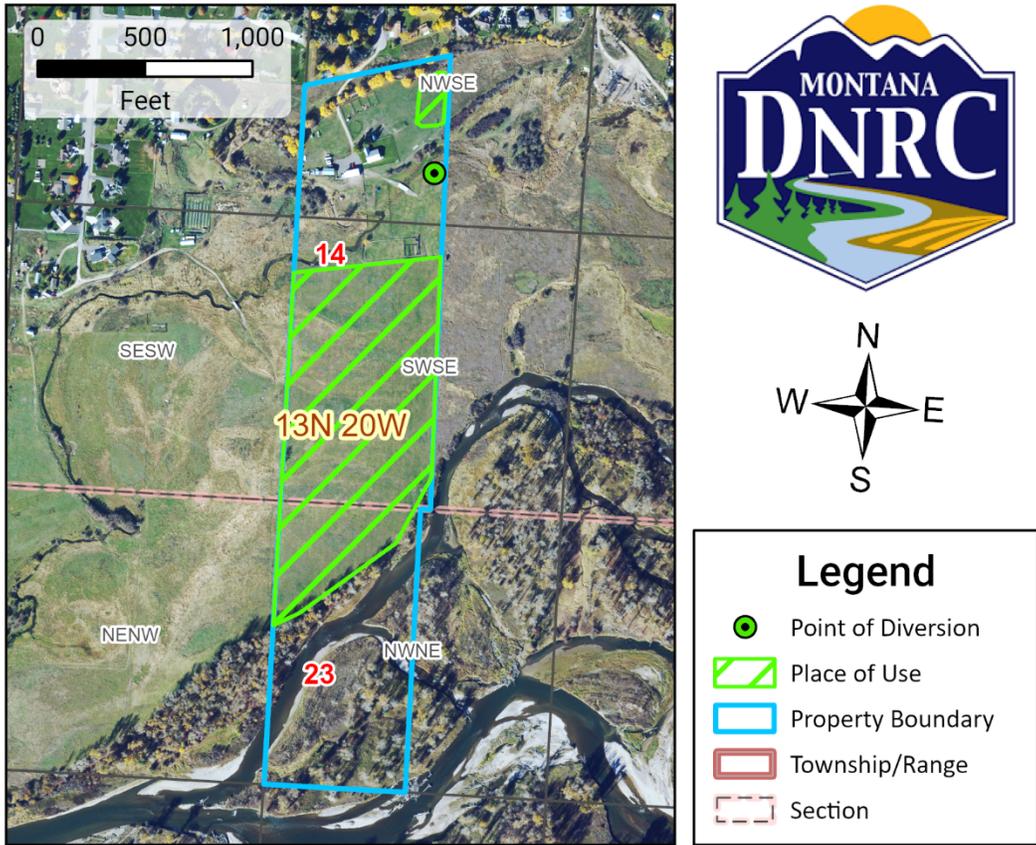


Figure 1. Map of proposed appropriation.

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

GENERAL CONCLUSIONS OF LAW

- 7. 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 . . .

8. 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.

9. 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.

10. 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).

11. 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.

12. 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

13. The Applicant proposes to divert up to 55.43 AF of water at a flow rate of 220 GPM for irrigation of 23 acres.

14. The Department evaluated the volume of water that is physically available from the source aquifer using applicant-supplied data from an 8-hour drawdown and yield test on the diversion well (GWIC ID 324678). Department Groundwater Hydrologist Melissa Brickl used the data from this test to produce the May 1, 2025 Groundwater Permit Technical Analysis Report Part A. A variance was granted by the Department from Aquifer Testing Requirements listed in sections (3)(a), (3)(d), (3)(e), and (3)(e)(iii) of ARM 36.12.121 on January 8, 2025. This variance allowed the Applicant to forgo a 72-hour test and submit data from a nonstandard 8-hour test. The proposed diversion is located in the well-studied Missoula Valley Aquifer. The Department determined that it possessed sufficient testing data from previous studies to identify aquifer properties in this location.

15. Using the Cooper-Jacob (1946) solution, an aquifer transmissivity (T) value of 150,000 ft²/day, specific yield of 0.1 (Lohman, 1972), and a pumping schedule modeled on irrigation requirements, the model predicted the 0.01-foot drawdown contour or zone of influence (ZOI) occurs 4,617 ft from the proposed well. Groundwater flux through the ZOI is equal to 46,421 AF/year.

16. The Department finds that groundwater is physically available in the amount the applicant seeks to appropriate during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

17. The Department determined the legal availability of water in the source aquifer by subtracting the legal demands of existing water rights within the zone of influence of the proposed point of diversion from the amount of water physically available in the source aquifer.

18. The Department defined the zone of influence to be the area within which existing wells would experience a drawdown of 0.01 feet or more as a result of the proposed diversion. This was calculated to be an approximately 2.40 square mile area around the proposed point of diversion, described in the Department's technical analysis. There are 321 active groundwater rights within the ZOI.

19. Of the 321 active groundwater rights within the ZOI, there are 271 with volumes assigned to them and 50 without. The combined legal demand of water rights with assigned volumes is 1146.9 AF.
20. The Department followed its standard practice for quantifying the legal demands of water rights without listed volume. The standard method is dependent on the kind and purpose of the water right.
21. Ground Water Certificates account for 48 of the 50 rights without assigned volumes. The remaining 2 are Statements of Claim: 76M 30134756, with a domestic use purpose, and 76M 149103-00, with an irrigation purpose on 6.9 acres.
22. Within the ZOI, there were 255 Ground Water Certificates with listed volumes; the average volume for these rights, 2.90 AF, was assigned to each of the Ground Water Certificates without a listed volume, resulting in an additional legal demand of 139.30 AF.
23. Statements of Claim with a domestic purpose are all assigned 1.5 AF. Claims with an irrigation purpose are assigned the lowest permissible value for 60% efficient irrigation for the climatic area in which their place of use lies. Statement of Claim 76M 149103-00 lies in climatic area III and was assigned 2.43 AF/ac per ARM 36.12.115(2)(e), for a total of 16.77 AF on 6.9 acres.
24. The total legal demands for all water rights within the ZOI was calculated to be 1304.47 AF. A list of all water rights within the ZOI can be found in the Department's technical analysis.
25. The amount of water legally available in the source aquifer is 45,116.53 AF (46,421 AF physically available - 1,304.47 AF legal demands = 45,116.53 AF legally available).
26. The Department determined in its technical analysis that the Clark Fork River is hydraulically connected to the source aquifer. The location where depletions begin to accrue was identified as the northern boundary of the SWNE Sec. 23, T13N, R20W, and the area of potential impact was defined as the reach between this point and the confluence of the Clark Fork River and the Bitterroot River.
27. The Department calculated the consumptive use of the proposal to determine the amount of depletions that would result in the Clark Fork River. The diverted volume proposed is 55.43. Using the proposed diverted volume of 55.43 AF and an irrigation efficiency of 70% for sprinkler systems, the consumptive volume for this permit would be 38.8 AF. The timing of these depletions was modeled in the Department's technical analysis and is shown in Table 1 of Part A.

28. The Department calculated the legal availability of water in the Clark Fork River at the point of depletions by subtracting the legal demands of water rights in the area of potential impact from the amount of water physically available at the point of depletions.

29. Physical availability of water at the point of depletions throughout the year was derived from the median of the mean monthly flow rate at USGS Gage #12340500 – Clark Fork above Missoula MT. This gage is located approximately 9 miles upstream of the location of depletions. The legal demands of water rights between the gage and the point of depletions were subtracted from the monthly flows recorded at the gage to arrive at the flow rate of water physically available at the point of depletions, as shown in Table 2.

Table 2. Physical Availability of Water for Proposed Permit

Month	Median of the Mean Monthly Flow at Gage 12340500 (CFS)	Existing Legal Demands from Gage 12340500 to Point of Depletions (CFS)	Physically Available Flow Rate at Point of Depletions (CFS)	Physically Available Volume at Point of Depletions (AF)
January	1221	30.24	1190.76	73088.85
February	1378.5	30.24	1348.26	74747.53
March	1794.5	33.58	1760.92	108085.3
April	3387	332.47	3054.53	181439.1
May	7281.5	332.53	6948.97	426527.8
June	7673.5	332.55	7340.95	436052.4
July	2786.5	332.55	2453.95	150623.5
August	1429.5	332.55	1096.95	67330.79
September	1354.5	332.55	1021.95	60703.83
October	1495.5	332.44	1163.06	71388.62
November	1509.5	135.04	1374.46	81642.92
December	1337	30.24	1306.76	80208.93

30. There are three water rights with points of diversion located within the area of potential impact: Statements of Claim 76M 110490-00, 76M 110493-00, and 76M 30122648. Two of these rights were for stock water with no flow rate listed; these were assigned a flow rate of 0.08 CFS, consistent with the methodology for calculating physical availability described in the Department’s technical analysis. The legal demands of these water rights were subtracted from the physical availability at the point of depletions to determine legal availability of water at the point of depletions, as shown in Table 3.

Table 3. Legal Availability of Water for Proposed Permit

Month	Physically Available Flow Rate at Point of Depletions (CFS)	Legal Demands on Flow Rate in Area of Potential Impact (CFS)	Legally Available Flow Rate at Point of Depletions (CFS)	Legally Available Volume at Point of Depletions (AF)
January	1190.76	0.08	1190.68	73083.94
February	1348.26	0.08	1348.18	74743.10
March	1760.92	0.08	1760.84	108080.36
April	3054.53	105.91	2948.62	175148.03
May	6948.97	105.91	6843.06	420027.02
June	7340.95	105.91	7235.04	429761.38
July	2453.95	105.91	2348.04	144122.70
August	1096.95	105.91	991.04	60830.04
September	1021.95	105.91	916.04	54412.78
October	1163.06	105.91	1057.15	64887.87
November	1374.46	0.16	1374.3	81633.42
December	1306.76	0.16	1306.6	80199.11

31. In addition to considering the area of potential impact local to the proposed appropriation, the Department must also consider downstream hydropower water rights owned by Avista Corporation at Noxon Dam per the final order issued for Application for Beneficial Water Permit No. 76N 30010429 on December 21, 2006.

32. To evaluate the legal availability of the Clark Fork River at Noxon Dam, the existing demands of Avista’s hydropower water rights were subtracted from the median of the mean monthly flow of the Clark Fork River as recorded at USGS gage #12391400 (Clark Fork bl Noxon Rapids Dam nr Noxon MT). Table 4, below, lists the median of the mean monthly flow rates used to quantify the legal availability of the Clark Fork River near the Noxon Rapids Dam. The analysis shows that there is not sufficient legally available water in the lower reach of the Clark Fork River to satisfy Avista’s legal demands in any month of the year.

Table 4. Legal Availability of Water on the Clark Fork River near Noxon Rapids Dam

Month	Median of the Mean Monthly Flow at USGS Gage (CFS)	Avista Water Right Demands (CFS)	Legal Availability at Gage (CFS)
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

33. The Applicant has addressed legal availability of surface water by providing a mitigation plan which proposes to mitigate the depletions to surface water in full. This mitigation plan is fully addressed under the “Adverse Effect” section below.

34. The Department finds the proposed appropriation of 220 GPM and up to 55.43 AF to be legally available in the groundwater aquifer during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

35. To determine if the proposed application would adversely affect other water users, the Department’s Water Science Bureau modeled whether any extant wells near the proposed point of diversion would experience drawdown of 1 foot or more in its technical analysis. No wells met this criterion. It was therefore determined that no groundwater rights would be adversely affected by drawdown from the proposed diversion.

36. The Department’s technical analysis also identified the Clark Fork River as a surface water hydraulically connected to the source aquifer. Surface water was analyzed using USGS stream gage and DNRC water rights data, proving that water is physically and legally available for use

and that the depletions arising from this application will not result in adverse effect on prior appropriators (Tables 2, 3).

37. In the event that a legitimate call for water is made, the Applicant plans to cease diversion by shutting off the well pump.

38. Because the depletions resulting from the proposed application are greater than 10 AF and 35 GPM, the Department must also consider downstream hydropower rights. The Department used USGS stream gage data and information about Avista Corporation's water rights to analyze physical and legal availability. The Department determined that water is not legally available in any month of the year, and that Avista Corporation's hydropower water rights would be adversely affected by the proposed appropriation.

39. The Applicant proposed to mitigate their depletions to the Clark Fork River using water made available in Change Application 76M 30165370. The proposed change retires 2287.5 irrigated acres under Statements of Claim 76M 123868-00, 76M 123869-00, and 76M 118513-00. Statement of Claim 76M 123870-00, which is for stock water, will also be retired. The historically consumed volume for these rights is 2,676.5 AF, and the historically diverted volume is 4407 AF. The water made available by the retirement of these rights will be used for the mitigation of this permit, Permit Applications 76M 30163329 and 76M 30165615, and for marketing for mitigation.

40. Statement of Claim 76M 118513-00 is the most junior retired right under Change Application 76M 30165370, with a priority date of July 28, 1919. The most senior of Avista Corporation's hydropower rights is Statement of Claim 125799-00, which has a priority date of February 20, 1951. The most junior retired right has priority over the most senior of Avista Corporation's rights, the retired rights will successfully mitigate the hydropower rights.

41. The 38.8 AF depletions arising from this Permit Application will be entirely offset by 38.8 AF of mitigation water made available under Change Application 76M 30165370.

42. 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 the Applicant's mitigation plan to be adequate to prevent adverse effect to existing water users as the plan will offset depletions to surface water in the necessary amount and location.

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

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 38.8 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.

THE APPROPRIATOR SHALL MAINTAIN CURRENT ELECTRICAL INFORMATION SO AVERAGE SYSTEM DISCHARGE AND PUMP MOTOR POWER CONSUMPTION MAY BE CALCULATED. A RECORD OF ANY SYSTEM CHANGES ALONG WITH WRITTEN RECORDS OF THE DIVERSION SCHEDULE SHALL ALSO BE MAINTAINED. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL OBTAIN ELECTRICAL CONSUMPTION RECORDS AND FROM THOSE RECORDS CALCULATE THE VOLUME OF WATER DIVERTED. 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. IF CONDITION IS MET AND THE APPROPRIATION IS PERFECTED PURSUANT TO THE AUTHORIZATION, THE DEPARTMENT WILL REMOVE THE CONDITION UPON VERIFICATION OF THE PERMIT. 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 WATER RESOURCES REGIONAL OFFICE.

45. The Department finds the proposed use of 55.43 AF of diverted volume, 38.8 AF of consumed volume, and 220 GPM will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

46. The means of diversion consists of a 100-foot well (GWIC ID 324678) fitted with a Franklin Electric 5" STS pump. Water is conveyed from the well by a buried 6-inch pipeline that directs

water both north and south. The southern portion of the place of use consists of 22.5 acres serviced by a wheel line sprinkler system with 30 heads, each requiring a flow rate of 5 GPM. Water delivered to the north irrigates 0.5 acres by means of a big gun sprinkler requiring a flow rate of 25 GPM.

47. The Department's analysis of drawdown within the Applicant's well found that after one year of pumping, drawdown in the Applicant's well will be 3.7 ft, leaving 92.3 ft of water above the bottom of the perforated interval.

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. The Applicant proposes to divert 55.43 AF of water at 220 GPM to irrigate 23 acres from April 15 to October 15, with a consumptive use of 38.8 AF.

50. The Department's permitting standards for volume and period of use are listed in ARM 36.12.115(2)(e) and ARM 36.12.112(1)(c), respectively. The proposed diversion of 55.43 AF and period of use of April 15 to October 15 are in accord with DNRC's standards for USDA NRCS climatic area III, in which the proposed place of use lies.

51. The requested flow rate of 220 GPM is the flow rate required to run the irrigation system at full capacity. The wheel line is fitted with 30 sprinkler heads, each requiring a flow rate of 5 GPM, while the big gun requires a flow rate of 25 GPM. In total, this amounts to a flow requirement of 175 GPM. The additional 45 GPM is necessary to offset pressure loss due to elevation gain and distance travelled through the conveyance system.

52. The consumptive use was calculated by the Department based on the diverted volume standards for climatic area III and 70% irrigation efficiency, per Department standards for sprinkler irrigation.

53. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 220 GPM, diverted volume of 55.43 AF, and consumed volume of 38.8 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

54. 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.

CONCLUSIONS OF LAW

BASIN CLOSURE

55. The Department shall reject applications for surface water permits within the Grant Creek Basin for any diversions, including infiltration galleries, for consumptive uses during the period from July 1 through September 30 per ARM 36.12.1011. The Grant Creek Basin consists of the Grant Creek drainage area, from its headwaters to its confluence with the Clark Fork River. The proposed well is located within the Grant Creek Basin Closure.

56. This application is for groundwater, and no depletions to Grant Creek will result from the proposed appropriation. Therefore, the application does not meet the conditions for restriction in the Grant Creek Basin Closure. ARM 36.12.1011(4).

57. 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.

58. 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

59. 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.”

60. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

61. 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).

62. 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)

63. 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. (FOFs 14-16)

LEGAL AVAILABILITY

64. 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).

65. 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.

66. 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).

67. 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.

68. 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*.

69. 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.

70. 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);

71. 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 33)

72. 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 34)

ADVERSE EFFECT

73. 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.

74. 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).

75. 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).

76. 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).

77. 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.

78. 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).

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 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).

82. 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 45)

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 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 that irrigation is a beneficial use and that 55.43 AF of diverted volume and 220 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 53)

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. (54)

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 30164554 should be GRANTED.

The Department determines the Applicant may divert water from the groundwater aquifer, by means of a 100-ft well, from April 15 to October 15 at 220 GPM up to 55.43 AF, from a point in the SWNWSE Section 14, T13N, R20W, Missoula County, for irrigation use from April 15 to October 15. The Applicant may irrigate crops on 23 acres. The place of use is located in the SWNWSE and W2SWSE of Section 14 and the NWNWNE of Section 23, all in Township 13N, Range 20W, Missoula County.

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 38.8 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 MAINTAIN CURRENT ELECTRICAL INFORMATION SO AVERAGE SYSTEM DISCHARGE AND PUMP MOTOR POWER CONSUMPTION MAY BE CALCULATED. A RECORD OF ANY SYSTEM CHANGES ALONG WITH WRITTEN RECORDS OF THE DIVERSION SCHEDULE SHALL ALSO BE MAINTAINED. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL OBTAIN ELECTRICAL CONSUMPTION RECORDS AND FROM THOSE RECORDS CALCULATE THE VOLUME OF WATER DIVERTED. 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. IF CONDITION IS MET AND THE APPROPRIATION IS PERFECTED PURSUANT TO THE AUTHORIZATION, THE DEPARTMENT WILL REMOVE THE CONDITION UPON VERIFICATION OF THE PERMIT. 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 WATER RESOURCES REGIONAL OFFICE.

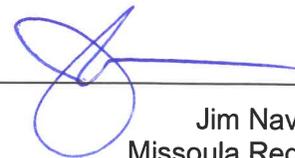
Diversion under this Permit may not commence until the mitigation or aquifer recharge plan described in this decision is legally implemented. Diversion under this Permit must stop if the mitigation or aquifer recharge plan as herein required in amount, location and duration ceases in whole or in part.

The area that will be depleted is located along the Clark Fork River; to mitigate the affected reach the appropriator will obtain mitigation water from the City of Missoula. Through Change Application 76M 30165370, the City retired irrigation rights 76M 123868 00, 76M 123869 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 38.8 AF that are 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 10th day of March, 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 DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 10th day of March, 2026, by first class United States mail.

DAVID & SUSAN MILLER
6610 MULLAN RD
MISSOULA, MT 59808-5654

ATTN: JULIE MERRITT
WGM GROUP
1111 E BROADWAY
MISSOULA, MT 59802-4909

A handwritten signature in blue ink that reads "Benjamin Thomas". The signature is written in a cursive style and is positioned above a horizontal line.

Benjamin Thomas
Missoula Regional Office
(406) 542-5883