

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30165209 BY TOWN OF ALBERTON	)))	UPDATED DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT IN MODIFIED FORM
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On January 21, 2026, the Town of Alberton submitted Application for Beneficial Water Use Permit No. 76M 30165209 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 20 GPM for municipal purposes. The Department published receipt of the application on its website on January 30, 2026. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated January 30, 2026. The Applicant responded with information on May 8, 2026. Department employees Alex Dalglish, Benjamin Thomas and Jim Nave met with the Applicant's consultants Christina Eggensperger and Pat Thompson from Water and Environmental Technologies (WET) and conducted a preapplication meeting on January 21, 2025. At this meeting, the Applicant's consultants designated that the technical analyses for this application would be completed by the Department. The Applicant's consultant submitted the Preapplication Meeting Form on May 29, 2025. The Department returned the Preapplication Meeting Form to the consultant on May 30, 2025, because it was inadequately completed. The Applicant's consultant resubmitted the Preapplication Meeting Form on June 10, 2025, but the follow up signature page was incomplete. The Department received the completed signature page on July 16, 2026, and the preapplication materials were determined to be adequately completed on July 17, 2025. The Department delivered the Department-completed technical analyses on August 29, 2025. The application was determined to be correct and complete as of May 28, 2026. The Draft Preliminary Determination to Grant in Modified Form was sent to the Applicant on July 24, 2026. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on August 14, 2026, to which the Department granted 14 days to submit additional information. The Applicant submitted additional

information on August 28, 2026. An Environmental Assessment for this application was completed on June 1, 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
- Attachments:
 - Ultra Mag Flow Meter Specification Sheets
- Maps:
 - Spring Location Map, dated December 22, 2025
 - Spring Location Map, dated June 2, 2025
 - Maps showing conveyance infrastructure, undated
- Department-completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated August 29, 2025
- 2024 developed spring flow measurement data (Excel document) from Applicant, undated, received May 29, 2025

Information Received after Application Filed

- Department Deficiency letter, dated January 30, 2026
- Deficiency response, dated May 5, 2026, received by the Department May 8, 2026
- Email correspondence between consultants (Christina Eggensperger and Pat Thompson) and Department (Alex Dalgleish) RE: RE: Deficiency letter for Beneficial Water Use Permit Application No. 76M 30165209, dated May 13, 2026
- Email correspondence between consultants ((Christina Eggensperger and Pat Thompson) and Department (Alex Dalgleish) RE: Alberton Permit 76M 30165209 Correct & Complete, dated August 31, 2026

Information within the Department's Possession/Knowledge

- Email correspondence between consultant and Department, dated May 29, 2025

- Department Phone Memorandum, dated June 30, 2025
- Spring Schematic diagram and email correspondence, dated June 30, 2025
- Department Technical Analysis Deadline email correspondence, dated July 31, 2025
- Email correspondence between the Department and Christina Eggensperger RE: Alberton, dated July 16, 2025
- 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 Permit Application Manual, dated February 14, 2025

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

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; POU means place of use, POD means point of diversion, AF/YR means acre-feet per year, and Govt. means Government.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater up to 20 gallons per minute (GPM) for municipal purposes, by means of a developed spring. No volume is proposed under this permit. The period of diversion and period of use are year-round from January 1 through December 31. The developed spring point of diversion (POD) is in Government (Govt.) Lot 1 in the NWNENE of Sec. 3, T14N, R23W, Mineral County. The POD is in the Clark Fork, between Blackfoot and Flathead Rivers, sub-basin (76M), in an area that is not subject to water right basin closures or controlled ground water area restrictions. The proposed municipal place of use (POU) is in Govt. Lot 6 in the S2NENE Sec. 3, Govt. Lot 5 in the S2NWNW, Govt. Lot 12 in the N2SWNW, Govt.

Lot 11 in the SENW, Govt. Lot 10 in the S2SWNE, Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNENE Sec. 2, all in T14N, R23W, Mineral County. Table 1 below provides a summary of the proposed use.

Table 1: Summary of Proposed Use

Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
20 GPM	0 AF	Municipal	1/1 – 12-31	Govt. Lot 6 in the S2NENE Sec. 3, Govt. Lot 5 in the S2NWNW, Govt. Lot 12 in the N2SWNW, Govt. Lot 11 in the SENW, Govt. Lot 10 in the S2SWNE, Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNENE Sec. 2, all in T14N, R23W, Mineral County	Govt. Lot 1 in the NWNENE Section 3, Township 14N, Range 23W, Mineral County	1/21/2026

2. The developed spring POD is located approximately 0.40 miles (2,112 feet) northeast from the Clark Fork River.

3. The developed spring is an existing diversion that currently provides water to the Town of Alberton for municipal purposes under Statement of Claim 76M 45355-00 (priority 01/30/1923), authorizing 50 GPM and 80.86 AF/YR. Municipal water is also provided to the Town of Alberton by Provisional Permit 76M 13904-00 (priority 7/8/1977), which authorizes 120 GPM and 161.0 AF from a single groundwater well in the NWNENE of Sec. 3, T14N, R23W. The Applicant's proposed permit will provide supplemental flow rate to Statement of Claim 76M 45355-00 via the shared point of diversion, and is considered supplemental by purpose and place of use to Provisional Permit 76M 13904-00. Under this proposal, additional flow rate will be diverted from the developed spring and distributed across the same POU using the existing infrastructure. The proposed POU will be identical to that listed and authorized by the Applicant's existing municipal rights 76M 45355-00 and 76M 13904-00.

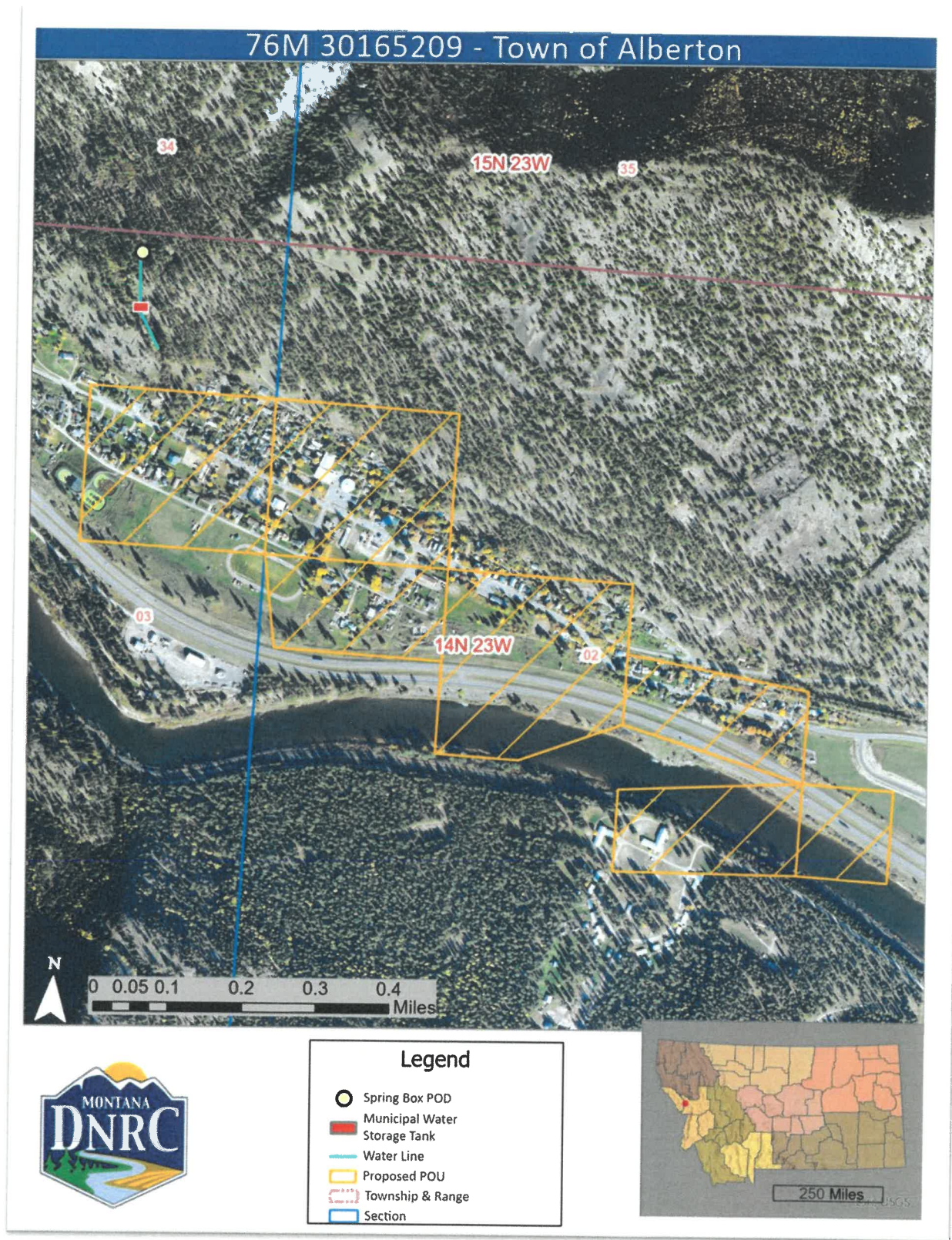


Figure 1. Map of Proposed Appropriation Under Permit 76M 30165209

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

GENERAL CONCLUSIONS OF LAW

4. 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 . . .

5. 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.

6. 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.

7. 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).

8. 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.

9. 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

10. The source of water is a developed spring and the Applicant requests to divert up to 20 GPM annually from January 1 through December 31 for municipal purposes. Per ARM 36.12.1703(1), Permit Application Criteria- Physical Groundwater Availability, Applications for

groundwater from a developed spring are required to collect monthly flow measurements during the proposed period of diversion. To satisfy this requirement, the Applicant's consultant submitted flow measurement data collected over 12 months during 2024. The data was recorded and collected daily at five-minute intervals with an Ultra Mag in-line flow meter, which is located on the water line below the spring source. As submitted, the Applicant's raw data contained over 100,000 measurements ranging from negative figures, up to a high of 154.8 GPM.

11. From the 2024 data, the Applicant's consultant explained that high values above 67 GPM and low values below 1 GPM were not representative of the developed spring's flow rate and further clarified that the diverse range of measurement data was the result of head pressure in the system. On the pipeline conveying water from the developed spring, an altitude valve is situated near the Ultra Mag flow meter in a chlorination shed. The valve opens and closes as water is needed. When the altitude valve closes, the flow meter records very low values (i.e. below 1 GPM), and when it opens, the built-up pressure results in high recorded values that are not representative of the flow rate. Once the pressure stabilizes, the valve remains open and water flows through the line at a steady rate of approximately 67 GPM. Based on the Applicant's description of the system and the flow data, this value is representative of the true flow rate of the developed spring.

12. The Applicant's consultant stated that the maximum value (within the open-flow period of the altitude valve when flow rate was steady) was taken for each day of the month and used to demonstrate physical availability. Of those values, the two highest values below 67 GPM were considered by the Applicant's consultant to be representative of the maximum flow rate for each month. These values are shown in Table 2 below.

Table 2. Two highest montly values below 67 GPM

Month	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Flow Rate	66.91	66.65	66.93	66.68	66.98	65.88	63.45	64.06	60.89	65.94	65.16	65.75
(GPM)	66.89	66.58	66.93	66.44	66.91	64.93	62.51	61	60.35	65.67	65.06	65.43

13. The Department finds groundwater to be physically available at the requested flow rate of 20 GPM.

LEGAL AVAILABILITY

FINDINGS OF FACT

14. The Applicant owns existing municipal Statement of Claim 76M 45355-00, which authorizes a flow rate of 50 GPM and a total diverted volume of 80.86 AF/YR from the developed spring proposed for use by this application. Using the monthly flow data represented in Table 2 of Finding of Fact No. 12, the Department evaluated the flow of water that is legally available for this proposed appropriation.

15. Per ARM 36.12.1704, the Department compared the physical water supply with the legal demands of the developed spring. This is represented in Table 3 below, and indicates that water is not legally available for the proposed appropriation of 20 GPM during any month of the year.

Table 3: Town of Alberton Developed Spring Legal Availability

Month	Maximum Measured Flow Rate (GPM)	Existing Legal Demands (GPM)	Legally Available Flow Rate (GPM)
January	66.91	50	16.91
February	66.65	50	16.65
March	66.93	50	16.93
April	66.68	50	16.68
May	66.98	50	16.98
June	65.88	50	15.88
July	63.45	50	13.45
August	64.06	50	14.06
September	60.89	50	10.89
October	65.94	50	15.94
November	65.16	50	15.16
December	65.75	50	15.75

16. The existing legal flow rate demands of the developed spring are 50 GPM while the maximum representative (below 67 GPM) flow rate of the spring was 66.98 GPM in May. The Department finds that the amount of groundwater the Applicant seeks to appropriate, 20 GPM,

is not legally available from the developed spring source due to a deficit (of legally available flow) in all 12 months of the proposed period of appropriation.

17. This application was filed to come into compliance with the Montana Water Use Act. The Applicant has historically diverted the entire flow of the developed spring into their municipal water supply system. Past water measurements taken by the Applicant show that they are exceeding the 50 GPM limitation of statement of claim 76M 45355-00. The Applicant has shown water is legally available in each month of the year, although in amounts less than requested. The Department finds the legal availability criterion for this application to be met with the modification of the maximum flow rate to 16.98 GPM for the municipal purpose and a variable monthly diversion rate based on the legally available flow rate values in Table 3 in Finding of Fact No. 15 above.

ADVERSE EFFECT

FINDINGS OF FACT

18. This proposed appropriation requests additional flow from the developed spring (no extra volume). This spring is used by existing Claim 76M 45355-00 (priority 1/30/1923) for municipal purposes. The Applicant owns this right for a flow rate up to 50 GPM and 80.86 AF.

19. The Applicant stated that if a call for water is made, they would close the altitude valve and the entirety of the flow from the spring would move down the drainage. Additionally, closure or adjustment of the valve could limit the flow rate to an average of 50 GPM to align with the maximum use under senior Claim 76M 45355-00.

20. The Applicant is the only water user on the source of supply (developed spring). Any impacts under the proposed permit would occur to the Applicant's own right. It is reasonable that the Applicant will operate their water system in a manner to optimize their municipal water needs.

21. The Department finds that the Applicant's plan to control their water use to not create adverse effect to prior appropriations meets the adverse effect criteria by a preponderance of evidence.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

22. The developed spring has existed since at least 1923 when the Applicant's first water right (76M 45355-00) was used on this source for 50 GPM and 80.86 AF/YR. The Applicant proposes to use the existing means of diversion and conveyance under Claim No. 76M 45355-00. The Applicant intends to obtain a new water to align their recorded water rights with their current water practices.

23. Groundwater from the developed spring is captured in three individual structures that are interconnected with a single waterline. From the most downgradient structure, water is conveyed to a chlorine shed where an Ultra Mag flow meter and altitude valve are situated on the water line. From the shed, the waterline flows into a large 300,000-gallon above ground storage tank.

24. From the storage tank, water is conveyed throughout the Applicant's underground distribution system. In their deficiency response, the Applicant's consultant discussed the system, stating *"The Town's current distribution system is fed by a new 12-inch PVC water main from the storage tank. At Railroad Avenue and Meadow View Lane the 12-inch transmission main connects to a new 10-inch PVC main that extends east to 3rd Street. West of Meadowview, the new PVC watermain in Railroad Ave is 8". The 10" and 8" mains then connect to a network of 6, 4", 2", 1¼" and ¾" lines. The older 4 and 6'inch pipes are cast iron while the newer 4 and 6'inch pipes are PVC, all pipes 2-inch and smaller are galvanized steel. New 8" PVC mains in Meadowview, Rockledge, Apple, Orchard and 2nd St. extend north from their connections to the new watermain in Railroad Ave and are looped at their north ends in order to minimize water stagnation and to enhance fire flow delivery. There are 21 fire hydrants in Alberton – 12 of which are new in 2025. The laterals north of Railroad Avenue, at the east end of Adams Street and the west end of Parkway Drive are generally 2'inch dead-end lines with no looping."*

25. The developed spring serves as a Public Water Supply (PWS), and the system is permitted with DEQ under file number EQ No. 24-1150. It is also associated with PWS ID No. MT 0000015.

26. According to the Applicant's consultant, the town of Alberton operates a three-cell aerated lagoon wastewater system with ultraviolet disinfection. The system has a design flow of 0.054 million gallons per day without effluent disinfection. The Town is authorized to discharge into the Clark Fork River (with effluent limitations) under DEQ permit No. MT 0021555.

27. At present, the Applicant's municipal system includes the developed spring and a supplemental groundwater well (Provisional Permit 76M 13904-00). The Applicant provided evidence that the system is capable of diverting a flow rate in excess of the 50 GPM under right 76M 45355-00, so it is reasonable that the diversionary and conveyance infrastructure can accommodate additional flow rate.

28. The application described a portion of the proposed place of use as being located in the Clark Fork River in Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE and across the river in Govt. Lot 15 in the N2NWSE, all in Section 2, T14N, R 23W. The application did not provide substantial and credible evidence of how the system would convey water to the aforementioned portions of the proposed place of use; as such, the Department proposes to modify the place of use to exclude Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE, both in Section 2, T14N, R23W.

29. Due to the physical availability of water from the spring, the maximum flow rate available each month will be limited to the highest amount legally available (see Table 3 in Finding of Fact No. 15).

30. The Department finds that the proposed means of diversion and conveyance can divert the modified maximum flow rate that is legally available each month (FOF 15) to the modified place of use.

BENEFICIAL USE

FINDINGS OF FACT

31. The Applicant proposes to divert groundwater from a developed spring from January 1 to December 31 annually at a maximum rate of 20 GPM for municipal purposes. The Applicant is requesting additional flow to match their present-day water use from the spring.

Due to the legally available water from the developed spring, the Applicant can divert a maximum flow rate of 16.98 GPM. Since the Application is not requesting additional volume, and to ensure the flow rate is not exceeded, the Applicant will be required to adhere to the following condition:

IMPORTANT INFORMATION

THIS WATER RIGHT CANNOT BE OPERATED WITHOUT THE USE OF DEVELOPED SPRING CLAIM 76M 45355-00.

32. Due to the legally appropriated water (50 GPM) under existing right 76M 45355-00 from the developed spring, the available flow rate each month is based on the measurement data provided by the Applicant's consultant. Table 4 represents the maximum available monthly flow rate.

Table 4. Maximum flow rate available each month

Month	Maximum Monthly Flow Rate Available (GPM)
January	16.91
February	16.65
March	16.93
April	16.68
May	16.98
June	15.88
July	13.45
August	14.06
September	10.89
October	15.94
November	15.16
December	15.75

33. The Department recognizes the 80.86 AF of municipal purpose under Claim No. 76M 45355-00 as a beneficial use of water. The year-round period of use and diversion from January 1 to December 31 are consistent with the use under the municipal purpose.

34. The Department finds that the amount of groundwater the Applicant seeks to appropriate, 20 GPM, is not legally available from the developed spring source in all 12 months of the proposed period of appropriation. The Applicant can only beneficially use the flow rate that is available based on the physical flow from the source and the existing legal demands.

35. The application described a portion of the proposed place of use as being located in the Clark Fork River in Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE and across the river in Govt. Lot 15 in the N2NWSE, all in Section 2, T14N, R 23W. The application did not provide substantial and credible evidence of how the applicant intended to beneficially use water on the aforementioned portions of the proposed place of use; as such, the Department proposes to modify the place of use to exclude Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE, both in Section 2, T14N, R23W.

36. The Department finds the beneficial use criterion for this application to be met with the modification (exclusion) of a portion of the place of use and the maximum flow rate of 16.98 GPM and 0 AF for municipal purpose. The beneficial use criterion can also be met with the limitation of the maximum available flow rate each month during the proposed period of diversion and use, as represented by Table 4 in FOF No. 32.

POSSESSORY INTEREST

FINDINGS OF FACT

37. This application is for municipal use in which water is supplied to another. The proposed POU is identical with the Applicant's existing municipal water rights (spring water right 76M 45355-00 from the developed spring and 76M 13904-00 from a groundwater well).

38. The application described a portion of the proposed place of use as being located outside of the municipal service area in Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE, both in Section 2, T14N, R23W. The application did not provide substantial and credible evidence of possessory interest in the aforementioned portions of the proposed

place of use; as such, the Department proposes to modify the place of use to exclude Govt. Lot 15 in the N2NWSE and Govt. Lot 16 in the NWNESE, both in Section 2, T14N, R23W.

39. The Applicant has possessory interest in the modified place of use as it is located within the existing municipal service area. The Department finds the possessory interest criterion to be met with modifications.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

40. 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.”

41. 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).

42. 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).

43. The Applicant has proven that water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 10-13).

LEGAL AVAILABILITY

44. 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).

45. 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.

46. 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).

47. 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.
48. 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 resulted 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*.

49. 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 maximum amount of 16.89 GPM, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 14-17).

ADVERSE EFFECT

50. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant’s plan for the exercise of the permit that demonstrates that the Applicant’s use of the water will be controlled so the water right of a prior appropriator will be satisfied. *See Montana Power Co.*, 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.

51. An Applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an Applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(5).

52. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 4 (2011).

53. In analyzing adverse effect to other appropriators, an Applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” *See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 816 P.2d 1054 (1991).

54. It is the Applicant's burden to produce the required evidence. *E.g., Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 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.

55. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 8 (2011).

56. 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 18-21).

ADEQUATE DIVERSION

57. 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.

58. 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.

59. 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 22-30).

BENEFICIAL USE

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

61. 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).

62. 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).

63. 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*.

64. Applicant proposes to use water for a municipal purpose which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence municipal is a beneficial use and with modifications, 16.98 GPM is the amount available to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 31-36).

POSSESSORY INTEREST

65. 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.

66. 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.

67. 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 37-39).

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 30165209 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicant may divert water from the developed spring, from January 1 to December 31, at a maximum overall flow rate of 16.98 GPM, from a point in Govt. Lot 1, in the NWNENE of Section 3, T14N, R23W, Mineral County for municipal use from January 1 to December 31. The monthly diverted flow rate authorized for each month is as follows: 16.91 GPM in January; 16.65 GPM in February; 16.93 GPM in March; 16.68 GPM in April; 16.98 GPM in May; 15.88 GPM in June; 13.45 GPM in July; 14.06 GPM in August; 10.89 GPM in September; 15.94 GPM in October; 15.16 GPM in November; and up to 15.75 GPM in December. The authorized place of use is located in Govt. Lot 6 in the S2NENE of Section 3, Govt. Lot 5 in the S2NWNW of Section 2, Govt. Lot 10 in the S2SWNE of Section 2, Govt. Lot 11 in the SENW of Section 2 and Govt. Lot 12 in the N2SWNW of Section 2, all in T14N, R23W, Mineral County.

This authorization is subject to the following condition to meet the beneficial use criterion:

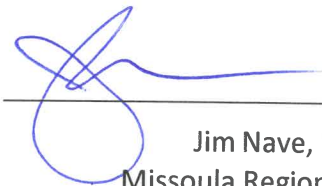
IMPORTANT INFORMATION

THIS WATER RIGHT CANNOT BE OPERATED WITHOUT THE USE OF DEVELOPED SPRING CLAIM 76M 45355-00.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant in Modified Form 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 15th day of September 2026



Jim Nave, Manager
Missoula Regional Office

Montana Department of Natural Resources and Conservation

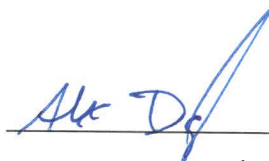
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Draft Preliminary Determination to Grant in Modified Form was served upon all parties listed below on this 15th day of September, 2026 by first class United States mail.

TOWN OF ALBERTON
PO BOX 115
ALBERTON, MT 59820-0115

AND

WATER AND ENVIRONMENTAL TECHNOLOGIES
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