

Draft Preliminary Determinations

- **Draft PD**
- **Draft PD cover letter**
- **Updated Draft PD**
- **Updated Draft PD cover letter**
- **Any correspondence with the applicant regarding the draft PDs**

Draft Preliminary Determinations



Missoula Water Resources Regional Office
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March 10, 2026

John Stahl

5647 Mullan Rd

Missoula, MT 59808-5647

Subject: Updated Draft Preliminary Determination to Grant Beneficial Water Use Permit
Application No. 76M 30165615

Dear Applicants,

The Department of Natural Resources and Conservation (Department or DNRC) has reviewed any information submitted to your application during the granted extension. This review consists of an updated evaluation of the criteria for issuance of a permit found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the updated Draft Preliminary Determination (PD) to Grant your application is attached.

The Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA. If no public comments are received, the Department will issue the updated Draft PD as final pursuant to §85-2-307(5)(c), MCA. If public comments are received, the Department will consider the public comments and issue a non-draft PD within 30 days of the closing date of the public comment period.

Please let me know if you have any questions.



Sincerely,

Benjamin Thomas

Benjamin Thomas

Water Conservation Specialist II

Missoula Regional Office

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30165615 BY JOHN STAHL)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On October 27, 2025, John Stahl (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30165615 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1.78 cubic feet per second (CFS) and a volume of 361.5 acre-feet (AF). The Department published receipt of the application on its website on November 12, 2025. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated November 13, 2025. The Applicant responded with information dated November 26, 2025, and corresponded by email on December 1, 2025. Department employees Jim Nave, Alex Dalglish, Evan Norman met with the Applicant's consultant (Julie Merritt of WGM Group) on March 27, 2025 and conducted a preapplication meeting. At the preapplication meeting, 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 28, 2025. The Department delivered the Technical Analyses on May 16, 2025. The application was determined to be correct and complete as of December 15, 2025. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on March 9, 2026, 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 December 15, 2025.

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
 - Water Marketing Purpose Addendum, Form 600-WMA

- Aquifer Testing Addendum, Form 600-ATA
- Attachments:
 - Berkeley 7TMH-750 Performance Pump Curve
- Well logs from nearby groundwater permits to the proposed groundwater well
- Form 653 Variance Request for Aquifer Testing Requirements, dated December 20, 2024
- Form 653 Variance Request for Aquifer Testing Requirements, dated November 25, 2024
- Technical Memorandum prepared by NewFields titled Preliminary Groundwater Modeling Simulation Proposed Wells, Flynn-Lowney Ditch, Missoula, Montana, dated January 25, 2022, revised date April 6, 2022
- Maps:
 - System Diagram Map, dated 10/15/2025
 - Proposed Use Map, dated 10/15/2025
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated May 16, 2025
- Production Well log (GWIC ID 330004)

Information Received after Application Filed

- Deficiency response, dated November 26, 2025, received by the Department November 26, 2025
- Email correspondence between consultant (Patrick Doyle) and the Department (Alex Dalglish), dated December 3, 2025, RE: Deficiency Response for 76M 30165615

Information within the Department's Possession/Knowledge

- Flow records and data from the mean monthly flow derived from USGS Gage for the Clark Fork above Missoula (Gage # 12340500)
- Letter from the Department to Applicant's consultant (WGM Group) dated January 8, 2025, granting variance to aquifer testing rules found in Administrative Rules of Montana (ARM) 36.12.121(3)(a), 36.12.121(3)(d), 36.12.121(3)(e) and 36.12.121(3)(e)(iii)
- Department Aquifer Testing Variance Grant Letter
- Aquifer Testing Addendum
- Aquifer Testing Variance Requests

- Email correspondence between consultant (Patrick Doyle) and the Department (Jim Nave), dated December 19, 2024, RE: Stahl Variance Request
- Department (Water Sciences Bureau) variance review sheets
- 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. The Department Standard Practice for Determining Physical Availability of Surface Water and Area of Potential Impact Analysis can also be found in the Department's Permit Manual.
 - Department Technical Memorandum dated November 1, 2019, Physical Availability of Surface Water with Gage Data
 Department Memorandum dated June 9, 2008, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins
 - Department Memorandum dated May 1, 2009, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins; Follow up to June 9, 2008, Memorandum
 - Department Standard Practice for Determining Physical Availability of Surface Water
 - Department Standard Practice for Determining Area of Potential Impact Analysis

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater for irrigation purposes, by means of a single well (GWIC ID 330004) from April 15 to October 15 at a rate of 1.78 CFS and up to 361.5 AF. The well has a 10-inch casing and is a total of 135 feet deep. It is located in the NWNESW of Section 13, Township 13 North, Range 20 West, Missoula County. The Applicant proposes to irrigate 150

acres, with 40 acres in the W2SE, 70 acres in the E2SW, 30 acres in the NWSW and 10 acres in the S2S2NW, all in Section 13, Township 13 North, Range 20 West, Missoula County.

2. The proposed point of diversion (POD) is located approximately 0.68 miles north from the Clark Fork River. The Department determined that the source aquifer from which the Application proposes to divert water from is hydraulically connected to the Clark Fork River (a perennial surface water source).

3. Total consumptive use under this proposed appropriation is 253.1 AF. The Applicant is proposing a period of diversion from April 15 through October 15, but depletions to the Clark Fork River occur year round.

4. The Applicant owns water right Statement of Claims 76M 123893 00 and 76M 125124 00, which both authorize irrigation at the proposed place of use (POU). The Applicant states that these two rights will not contribute water to the proposed irrigation since the proposed water right and its infrastructure will be capable of supplying and distributing water more efficiently and reliably.

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

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.

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 253.1 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE CLARK FORK RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 76M 30165370 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

Basin Closure

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

7. The Applicant had a preapplication meeting and requested that the Department complete the Technical Analysis. This Technical Analysis was completed by the Department and provided to the Applicant who submitted it as part of their permit application. The Technical Analysis meets the requirements found in § 85-2-361, MCA for a hydrogeologic assessment. The Department's analysis found that Grant Creek surface water was not hydraulically connected to the groundwater source aquifer from which the Applicant proposes to divert water, and the proposed groundwater appropriation will not deplete Grant Creek surface water.



Figure 1. Map of Proposed Beneficial Use Permit No. 76M 30165615

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

GENERAL CONCLUSIONS OF LAW

8. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of

the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, § 3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

9. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An Applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator

- will be satisfied;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
 - (d) the proposed use of water is a beneficial use;
 - (e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;
 - (f) the water quality of a prior appropriator will not be adversely affected;
 - (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
 - (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- (2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

10. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

- (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to

terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); *see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; *see also* Mont. Const. art. IX §3(1).

12. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. Section 85-2-311(6), MCA.

13. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

PHYSICAL AVAILABILITY

FINDINGS OF FACT

14. The Applicant proposes to divert up to 361.5 AF of groundwater from the Missoula Valley Aquifer at a flow rate of 1.78 CFS for irrigation of 150 AC. The application materials included the well log for the proposed POD and well logs for several other adjacent groundwater permits in the surrounding area.

15. To meet the aquifer testing requirements of Administrative Rules of Montana (ARM) 36.12.121, the Applicant filed three separate variance requests (Form 653). All three requests were reviewed by Department groundwater hydrologist Evan Norman. The first request was received by the Department on October 14, 2024, in which the Applicant requested variances from ARM 36.12.121(2)(a), (2)(b), (3)(e), (3)(e), (3)(f) and (3)(g). The Applicant argued that since the characteristics of the Missoula Aquifer have been extensively studied and are well known, the requisite 72-hour aquifer test was not necessary. Further they opined that the financial cost to the Applicant of conducting a 72-hour aquifer test would not yield any additional information on the aquifer itself. The Department reviewed the October 14, 2024, variance request and granted the variance request from the aforementioned sections of ARM 36.12.121. The Department also recommended the applicant request an additional variance from ARM 36.12.121(3)(e), which requires a minimum duration of 72 hours for a proposed pumping rate greater than 150 GPM. On November 5, 2024, the Department informed the Applicant's consultant via email that they would need to submit additional information to receive this variance.

16. On November 24, 2025, the Department received the second variance request from the Applicant on behalf of ARM 36.12.121 (3)(e) and (3)(e)(iii). The Department reviewed this request and again recommended additional variances from the requirements found in ARM 36.12.121 (3)(a) and (3)(d).

17. The Applicant submitted their third and final variance request to the Department on December 20, 2024. This request identified variances from the prior requirements of ARM 36.12.121(3)(e) and (3)(e)(iii), as well as (3)(a) and (3)(d). The Department reviewed the request and sent a letter to the Applicant on January 8, 2025, granting variances to ARM 36.12.121(3)(a), (3)(d), (3)(e), and (3)(e)(iii).

18. The variances granted by the Department were on behalf of preapplication No. 76M 30164602, which is not the same preapplication/Application number of this current proposal (76M 30165615). The Department held a preapplication meeting with the Applicant's consultant on October 8, 2024, where the Applicant requested to divert 400 GPM and up to 361.5 AF. This request was assigned preapplication No. 76M 30164602. The Department determined that the flow rate of 400 GPM was inadequate to provide the requested volume. Therefore, preapplication No. 76M 30164602 was withdrawn, and the Applicant submitted a new preapplication form. This new preapplication (76M 30165615) requested to increase the flow rate to 1.78 CFS (800 GPM). All prior variances and preapplication follow-up information submitted to the Department were related to withdrawn preapplication No. 76M 30164602. The Department determined that an increase in flow rate did not alter the prior requested variances. The Department's approval of ARM 36.12.121(3)(a), (3)(d), (3)(e), and (3)(e)(iii) were applied to superseding preapplication No. 76M 30165615.

19. Although the Applicant was granted a variance from completing an aquifer test, they did conduct a 9.5 hour drawdown and yield test on the production well (GWIC ID 330004). A drawdown yield test is meant to evaluate the well's construction and the aquifer's ability to yield water to the well whereas an aquifer test is conducted to provide data on the aquifer properties, which can be gathered from existing well data.

20. The Department modeled the aquifer's properties using nearby aquifer tests greater than 24-hours (Table 3 of Groundwater Permit Technical Analyses Report – Part A), existing publications (Table 2 of Groundwater Permit Technical Analyses Report – Part A) and information submitted by the Applicant.

21. The Department determined that the proposed well is appropriating water from the Missoula Valley Aquifer, which is unconfined. Physical groundwater availability in the aquifer was evaluated by calculating groundwater flux through the Zone of Influence (ZOI) determined by the 0.01-foot drawdown contour surrounding the POD. The Applicant provided a report from Newfields (2022), which estimated aquifer transmissivity values ranging from 121,000 to 836,600 ft²/day. The 0.01-foot drawdown contour, or ZOI was calculated using the Lohman (1972) report with values of transmissivity (T) of 150,000 ft²/day and specific yield (S_y) of 0.1. With a constant pumping rate of 382.3 GPM for the production well during the proposed period of diversion (April 15 – October 15), the ZOI has a modeled distance of 25,500 feet from the proposed production well. The modeled drawdown from pumping through the proposed well at the requested diverted volume of 361.5 AF is the largest at the end of July during the fifth year of simulated pumping (using the monthly schedule represented in Table 4 of Groundwater Permit Technical Analyses Report – Part A).

22. Groundwater flux through the ZOI is equal to 165,909.1 AF/YR (19,800,000 ft³/day). The Applicant is requesting a total diverted volume of 361.5 AF.

23. The Department determined that groundwater is physically available at the requested annual diverted volume of 361.5 AF during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

Legal Availability of Groundwater

24. The Department determined the legal availability of water in the source aquifer by subtracting (or comparing) the legal demands of existing water rights within the Zone of Influence (ZOI) of the proposed POD from the amount of water that was determined to be physically available in the source aquifer. The ZOI is the area surrounding the proposed POD in which existing wells would experience drawdown of 0.01 foot or more.

25. The Department determined that the ZOI extended 25,500 feet from the Applicant's proposed well. The Department considered all active and severed groundwater rights within that radius for its legal availability analysis. Within the ZOI, there are a total of 899 active groundwater rights on record with the Department that were evaluated for legal demands (reference Appendix A in Groundwater Permit Technical Analyses Report – Part A).

26. The area of proposed water use is not within a controlled groundwater area. Currently under § 85-2-306, MCA, the maximum volume allowed under a Groundwater Certificate (Certificate) outside of a controlled groundwater area is 10 AF. For those Certificates in Appendix A of the Department's Groundwater Technical Analyses Report – Part A without specific volumes, the Department assigned a volume of 10 AF. For those Statement of Claims (Claims) in Appendix A that did not have a volume assigned, the Department allocated the volume listed on the original claim form, if it was reasonable with the Department's standards for that purpose found in ARM 36.12.115. If the claimed volume was not reasonable, the Department calculated the volume based on the standards in ARM 36.12.115. For irrigation Claims without assigned volumes, the Table in ARM 36.12.115(2)(e) was used, based on the appropriate irrigation method (sprinkler vs flood) efficiency and the lower number of the range given for that efficiency in the appropriate climatic area/region. The Claims with unassigned volumes are all in Climatic Area III. If the purpose was not described in ARM 36.12.115 (i.e. fire protection), the Department assigned the claimed volume. A list of all water rights evaluated for legal demand (both those with assigned volumes and those without) are located in the administrative file for this Application and is available upon request.

27. Those groundwater rights within the ZOI were calculated to have a total annual appropriation of 38,128.24 AF/YR. Subtracting the legal demands of 38,128.24 AF/YR from the calculated groundwater flux of 165,909.1 AF/YR yields 127,780.86 AF (165,909.1 AF/YR – 38,128.24 AF/YR) of groundwater legally available for the proposed appropriation of 1.78 CFS and 361.5 AF.

28. The Department finds groundwater to be legally available at the requested annual diverted volume of 361.5 AF/YR.

Legal Availability of Surface Water

29. The Department determined in its Technical Analyses- Part A that the perennial flowing Clark Fork River (located approximately 0.68 miles south of the proposed well) is hydraulically connected to the source aquifer. The amount of water depleted from the Clark Fork River by the Applicant’s appropriation is equal to the calculated 253.1 AF of consumed volume.

30. The Department determined that depletions would begin depleting the Clark Fork River at the western edge of the NESEW of Section 24, Township 13 North, Range 20 West, Missoula County. The timing of net depletions to the Clark Fork River was modeled in the Department’s Technical Analyses – Part A and are shown in **Table 1** below. (**Table 1** can also be found in the Department’s Technical Analyses – Part A).

Table 1. Monthly depletions to the Clark Fork River

Month	Clark Fork Depletions (AF)	Clark Fork Depletions (GPM)
January	4.2	30.5
February	3.3	26.3
March	3.2	23.1
April	7.8	58.5
May	26.1	190.5
June	41.4	312
July	57.9	422.3
August	52.8	385.2
September	32.6	245.8
October	12.3	89.9
November	6.6	49.7
December	5.1	37.3

31. The Clark Fork River will be depleted year-round by the proposed groundwater appropriation, and the depletions were modeled to occur simultaneously with the Applicant’s consumption of groundwater.

32. The local area of potential impact on the Clark Fork River is defined as the section from the point where depletions begin (western edge of the NESENW of Section 24, Township 13 North, Range 20 West, Missoula County), to the confluence of the Clark Fork and Bitterroot Rivers. The legal demands of water rights with points of diversion in this local reach were analyzed to calculate the legal availability of water in the Clark Fork River at the point of depletions (Table 2 below).

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

Month	Physical Availability at Effective Reach (CFS)	Physical Availability at Effective Reach (AF)	Existing Legal Demands Effected Reach (CFS)	Existing Legal Demands Effected Reach (AF)	Physical Availability - Legal Demands (CFS)	Physical Availability - Legal Demands (AF)
January	1,221.00	74,944.98	8.82	541.39	1,212.18	74,403.59
February	1,378.50	76,424.04	8.82	489.00	1,369.68	75,935.04
March	1,794.00	110,115.72	8.82	541.39	1,785.18	109,574.33
April	3,422.50	203,296.50	114.57	6805.47	3,307.93	196,491.03
May	7,282.00	446,969.16	114.57	7032.32	7,167.43	439,936.84
June	7,677.00	456,013.80	114.57	6805.47	7,562.43	449,208.33
July	2,795.00	171,557.10	114.57	7032.32	2,680.43	164,524.78
August	1,436.00	88,141.68	114.57	7032.32	1,321.43	81,109.36
September	1,367.00	81,199.80	114.57	6805.47	1,252.43	74,394.33
October	1,518.00	93,174.84	8.82	541.39	1,509.18	92,633.45
November	1,519.00	90,228.60	8.82	523.92	1,510.18	89,704.68
December	1,334.00	81,880.92	8.82	541.39	1,325.18	81,339.53

33. The Department's analyses concluded that water is legally available in the local reach of the Clark Fork River for the proposed appropriation in every month of the year beyond the calculated annual stream depletion of 253.1 AF.

34. The Department must also consider downstream hydropower water rights owned by Avista at Noxon Dam per the final order issued for Application for Beneficial Water Permit No. 76N 30010429 on December 21, 2006. In the final order, the Department found that surface water in the Clark Fork River was not legally available at Noxon Dam. For this subject application, the Department conducted a legal availability analysis of the Clark Fork River at Noxon Dam. To evaluate the legal availability of the lower reach of the Clark Fork River at Noxon Dam, the existing demands of Avista's hydropower water rights were subtracted from the median of the monthly flow of the USGS gage at the Clark Fork River below Noxon Rapids Dam near Noxon (Gage #

12391400). Table 3 below lists the median of the mean monthly flow rates to quantify the legal availability of the Clark Fork River near the Noxon Rapids Dam. The analysis shows there is not sufficient legally available water in the lower reach of the Clark Fork River to satisfy Avista’s legal demands in any month of the year.

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

Month	Physical Availability (CFS) at USGS Gage	Avista Water Rights (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

35. The Applicant has addressed legal availability of surface water by providing a mitigation plan, which proposes to offset their total depletions of 253.1 AF to the Clark Fork River at Noxon Dam. The Applicant will use mitigation water from associated Change Application 76M 30165370. The Department received this Application on November 18, 2025 and determined it to be correct and complete on December 19, 2025. Under the Change Application, there is sufficient mitigation volume available to offset the Applicant’s depletions to the Clark Fork River. Change Application 76M 30165370 and the mitigation plan are fully discussed under the “Adverse Effect” section below.

36. The Department finds the proposed appropriation of 1.78 CFS and up to 361.5 AF to be considered legally available with the mitigation plan during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

Groundwater Adverse Effects

37. In the event a legitimate call for water is made, the Applicant can shut off the pump in the well to cease diversions. Irrigation use can cease in order to satisfy existing water rights during times of water shortage. The Department finds the Applicant's plan to be a reasonable plan of control.

38. To determine if the proposed water use would cause adverse effects to other water users, the Department modeled whether any existing water rights with wells in the source aquifer near the proposed well would experience drawdown of one foot or more in its technical analyses. No wells were found to meet this criteria.

39. The Department finds that the proposed use of groundwater will not adversely affect other groundwater appropriators.

Surface Water Adverse Effects

40. The groundwater proposed to be appropriated by the Applicant is hydraulically connected to the Clark Fork River. The Applicant's consumptive use (253.1 AF) is considered to deplete the Clark Fork River in every month of the year (see Table 1 above).

41. The Department's analysis shows that surface water in the Clark Fork River within the locally depleted reach is physically and legally available in excess of the predicted depletion for each month of the year. When comparing the physical availability and legal demands on the Clark Fork River in the local reach, the Department demonstrated that water is always available for appropriators in the Clark Fork River within this area (see Table 2 in Finding of Fact No. 33), and that additional depletions resulting from the proposed groundwater appropriation will not result in adverse effect.

42. The Department must also address downstream hydropower rights owned by Avista at Noxon Dam. The Department cited the June 9, 2008, and May 1 2009, Tubbs Memoranda regarding water rights permitting in the lower Clark Fork River Basin. These memoranda state that for groundwater sources in Basin 76M, "when depletions to surface water sources are calculated to be greater than 35 GPM or greater than 10 AF per year, the Department must consider the Thompson River Lumber Company as precedent".

43. The Department analyzed adverse effects to Avista's senior hydropower water rights by assessing the availability of surface water on the Clark Fork River using USGS Gage No. 12391400 "Clark Fork Below Noxon Rapids Dam near Noxon, MT". Avista's legal demands for hydropower were subtracted from the median monthly flow of USGS Gage No. 12391400 to assess water availability at Noxon Dam. This data, which is included in the Department's

Technical Analyses – Part B and displayed in Table 3 of Finding of Fact (FOF) 33, showed that water was not legally available to satisfy Avista’s Clark Fork River hydropower water rights in any month of the year.

44. To offset the Applicant’s depletions to the Clark Fork River resulting in adverse effect to downstream hydropower water rights, the Applicant proposes to use mitigation from Change Application 76M 30165370. Through Application 76M 30165370, the place of use and point of diversion of four historical irrigation water rights will be changed to the purposes of mitigation and marketing for mitigation. The proposed stream reach for these purposes will encompass the Clark Fork River between the historical POD in the SWNWNE Section 21, Township 13 North, Range 19 West, Missoula County, downstream to the Noxon Rapids Powerhouse in the S2S2 Section 33, Township 26 North, Range 32 West, Sanders County.

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

46. The historically consumed volume (of the irrigation and stock rights) will be available for mitigating the Applicant’s depletions (253.1 AF) to the Clark Fork River as a result of their groundwater pumping.

47. The Department finds that the Applicant’s plan to utilize mitigation water from Change Application 76M 30165370 is sufficient to offset the calculated groundwater depletions to the Clark Fork River, and that there will be no adverse effect to those hydropower rights owned by Avista or other existing surface water users.

48. To ensure that the amount of mitigation water provided to the Clark Fork River is adequate to offset adverse effect, the Applicant will be required to adhere to the following conditions:

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 253.1 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.

49. To ensure that the proposed flow rate and volume of water are not exceeded, resulting in inadequate mitigation of depletions, the Applicant will be required to adhere to the following condition:

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.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

50. The Applicant is requesting to divert up to 1.78 CFS and 361.5 AF from a single well (GWIC ID 330004). This well was completed in 2022 to a total depth of 135 feet.

51. The well pump is a Berkeley 7TMH-750 and based on a pump curve provided with the application materials, the pump is capable of diverting the requested flow rate of 1.78 CFS.

52. From the POD, water will be pumped to an 8-inch buried PVC pipeline that will be used to further distribute water into 6-inch PVC buried pipelines that branch off into the various fields across the POU.

53. Water will be applied to the POU through K-Line sprinkler systems hooked up to the buried pipelines. There are 150 5 GPM sprinkler heads that can be moved around as needed to obtain full irrigation coverage.

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

BENEFICIAL USE

FINDINGS OF FACT

55. Under this proposed appropriation, the Applicant is requesting to divert 1.78 CFS and 361.5 AF to irrigate 150 acres from April 15 to October 15, with a consumptive use of 253.1 AF.

56. The proposed irrigation POU is located in USDA NRCS Climatic Area III. The requested volume for crop irrigation of 361.5 AF corresponds with the high end of the Department's standards for Climatic Area III for 70% sprinkler irrigation (2.08 – 2.41 AF/AC), per ARM 36.12.115(2)(e). This results in a consumptive use of 253.1 AF (361.5 AF x 0.7 = 253.1 AF). The proposed period of diversion of April 15 to October 15 complies with the Department standards for Climatic Area III found in ARM 36.12.112(1)(c)(iii).

57. The requested flow rate of 1.78 CFS for 150 acres results in a ratio of 0.01 cfs/acre (or 5.33 GPM/acre). The Applicant's consultant stated that the POU will not be simultaneously irrigated all at once. Rather, they explained that water will be distributed through K-Line sprinkler systems hooked up to buried pipelines and there will be 150 5 GPM sprinkler heads that can be moved as needed to obtain full coverage of the POU. The consultant provided an example from the K-Line sprinkler manual stating that the sprinklers can cover 4.5 acres with 8 sprinklers, and they stated the Applicant intends to irrigate on average of 13.4 hours per day through the period of diversion (184 days). With 8 sprinklers at 5 GPM (40 GPM) for irrigation of 4.5 acres, this results in a ratio of 8.89 GPM/acre (8 sprinklers * 5 GPM each /4.5 acres). The Applicant will have the ability to use up to 150 K-Line sprinklers at once, resulting in a flow rate of 750 GPM (150 * 5 GPM). Applicant can adjust and control their infrastructure in order to provide adequate irrigation across the POU.

58. The Applicant owns existing groundwater irrigation Statement of Claims 76M 123893-00 and 76M 125124-00 that overlap with the proposed POU. Claim 76M 123893-00 authorizes a flow rate of 1.83 CFS for 73 acres and 76M 125124-00 authorizes a flow rate of 1.40 CFS for 56 acres. The Applicant states that these rights will not contribute to the proposed irrigation and that the proposed appropriation can supply and distribute the required amount of water more efficiently/reliable than the overlapping water rights.

59. The Department finds the proposed water use is beneficial, and that the requested flow rate of 1.78 CFS and annual volume of 361.5 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

60. The Application materials were signed by John Stahl. Current Montana Cadastral property records show that the place of use and point of diversion are owned by *Farmer Johns Sustainable Farming LLC*. A search of the Montana Secretary of State records show that John Stahl is a managing member. Mr. Stahl 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

61. 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.

62. 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

63. 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.”

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

65. 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).

66. 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).

67. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 14-23).

LEGAL AVAILABILITY

68. 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).

69. 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.

70. 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).

71. 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.

72. 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 Kooconusa 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*.

73. 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.

74. 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);

75. 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 29-35).

76. 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 24-36).

ADVERSE EFFECT

77. 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.

78. 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).

79. 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).

80. 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).

81. 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.

82. 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).

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

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

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

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

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

86. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992) (Applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

87. Adverse effect not required to be measurable but must be calculable. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 12 (2011) ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; Applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River*

Lumber Company (DNRC Final Order 2006); see also *Robert and Marlene Tackle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-G76L by Cross*, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

88. 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.)

89. 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.

90. 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).

91. 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 37-49).

ADEQUATE DIVERSION

92. 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.

93. 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.
94. 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).
95. 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).
96. Specific ditch segments would be adequate after completion of maintenance and rehabilitation work. *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005).
97. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).
98. 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 50-54).

BENEFICIAL USE

99. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
100. 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).

101. 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).

102. 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*.

103. The Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 361.5 AF of diverted volume and 1.78 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 55-59).

POSSESSORY INTEREST

104. 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.

105. 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.

106. 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 60).

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 30165615 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of a 135-ft deep well from April 15 through October 15 at 1.78 CFS up to 361.5 AF, from a point in the NWNESW, Section 13, Township 13 North, Range 20 West, for irrigation use from April 15 through October 15. The Applicant may irrigate 150 acres of crop. The place of use is located in the W2SE, E2SW, NWSW and S2S2NW, all in Section 13, Township 13 North, Range 20 West, 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 253.1 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 purchase 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 253.1 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.

A handwritten signature in blue ink, consisting of a large loop and a horizontal stroke extending to the right.

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

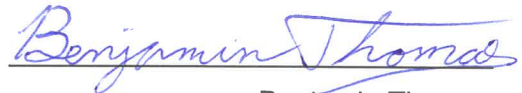
CERTIFICATE OF SERVICE

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.

JOHN STAHL
5905 MULLAN RD
MISSOULA, MT 59808

and

WGM GROUP
C/O JULIE MERRITT
1111 E BROADWAY ST
MISSOULA, MT 59802



Benjamin Thomas
Water Conservation Specialist
Missoula Regional Office
benjamin.thomas@mt.gov | (406) 542-5883



Missoula Water Resources Regional Office
PO Box 5004
2705 Spurgin Road, Bldg. C
Missoula, MT 59806-5004
(406) 721-4284

March 10, 2026

John Stahl

5905 Mullan Rd

Missoula, MT 59808-5647

Subject: Request for extension of time to submit additional information for Beneficial Water Use Permit Application No. 76M 30165615

Dear Applicants,

The Department of Natural Resources and Conservation (Department or DNRC) has granted your request for an extension of time for the purpose of submitting additional information for the consideration of Beneficial Water Use Permit Application No. 76M 30165615.

You have 7 days to submit additional information to the Missoula Regional Office. Please note that additional information submitted may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401. Should the Department consider additional information submitted to be an amendment to the application, the applicant will be required to submit an Application Amendment Form (Form 655).

Pursuant to §85-2-307(3)(b), MCA, the Department shall issue an updated Draft Preliminary Determination (PD) within 60 days of the earliest date of either the extension deadline set, or the Department's receipt of written notice from Applicant attesting that all information to be considered has been submitted to the Department.



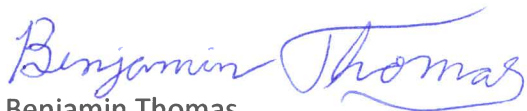
If the Department's updated Draft PD is to deny the application, you will be notified, and your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be denied, per §85-2-310(1), MCA.

If the Department's updated Draft PD is to grant the application or to grant the application in modified form, you will be notified, and the Department will then prepare a notice of opportunity to provide public comment on the updated Draft PD to Grant or Grant in Modified Form, per §85-2-307(4), MCA.

If you determine that you do not intend to further pursue this application, you can request the application to be withdrawn at any time during this process.

Please let me know if you have any questions

Sincerely,



Benjamin Thomas

Water Conservation Specialist II

Missoula Regional Office

benjamin.thomas@mt.gov | (406) 542-5883



Thomas, Benjamin

From: Patrick Doyle <pdoyle@wgmgroup.com>
Sent: Wednesday, February 25, 2026 3:46 PM
To: Thomas, Benjamin
Cc: Julie Merritt
Subject: [EXTERNAL] Stahl Preliminary Determination to Grant Application 76M 30165615

Good afternoon, Benjamin,

I have reviewed the Preliminary Determination document for John Stahl's permit application for 76M 30165615. I found one error regarding the place of use on page 31 of the document (page 33 of the PDF). The place of use is listed as the **S2SE**, E2SW, NWSW and S2S2NW, all in Section 13, Township 13 North, Range 20 West, Missoula County. The S2SE should instead be the **W2SE**, which is listed correctly on page 3 of the document (page 5 of the PDF).

Thank you for your attention to this matter,

Patrick

Patrick Doyle

Water Rights Technician & GIS Coordinator

M: [406-665-5727](tel:406-665-5727) O: [406-728-4611](tel:406-728-4611)
1111 East Broadway
Missoula, Montana 59802
www.wgmgroup.com [[wgmgroup.com](http://www.wgmgroup.com)]





Missoula Water Resources Regional Office
PO Box 5004
2705 Spurgin Road, Bldg. C
Missoula, MT 59806-5004
(406) 721-4284

February 13, 2026
John Stahl
5905 Mullan Rd
Missoula, MT 59808

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 76M 30165615

Dear Mr. Stahl,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no written request for an extension is received by March 9, 2026, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.



Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Benjamin Thomas". The signature is written in a cursive style with a large, sweeping "B" and "T".

Benjamin Thomas

Water Conservation Specialist II

Missoula Regional Office

benjamin.thomas@mt.gov | (406) 542-5883



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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30165615 BY JOHN STAHL)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On October 27, 2025, John Stahl (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30165615 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1.78 cubic feet per second (CFS) and a volume of 361.5 acre-feet (AF). The Department published receipt of the application on its website on November 12, 2025. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated November 13, 2025. The Applicant responded with information dated November 26, 2025, and corresponded by email on December 1, 2025. Department employees Jim Nave, Alex Dalglish, Evan Norman met with the Applicant's consultant (Julie Merritt of WGM Group) on March 27, 2025 and conducted a preapplication meeting. At the preapplication meeting, 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 28, 2025. The Department delivered the Technical Analyses on May 16, 2025. The application was determined to be correct and complete as of December 15, 2025. An Environmental Assessment for this application was completed on December 15, 2025.

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
 - Water Marketing Purpose Addendum, Form 600-WMA
 - Aquifer Testing Addendum, Form 600-ATA

- Attachments:
 - Berkeley 7TMH-750 Performance Pump Curve
- Well logs from nearby groundwater permits to the proposed groundwater well
- Form 653 Variance Request for Aquifer Testing Requirements, dated December 20, 2024
- Form 653 Variance Request for Aquifer Testing Requirements, dated November 25, 2024
- Technical Memorandum prepared by NewFields titled Preliminary Groundwater Modeling Simulation Proposed Wells, Flynn-Lowney Ditch, Missoula, Montana, dated January 25, 2022, revised date April 6, 2022
- Maps:
 - System Diagram Map, dated 10/15/2025
 - Proposed Use Map, dated 10/15/2025
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated May 16, 2025
- Production Well log (GWIC ID 330004)

Information Received after Application Filed

- Deficiency response, dated November 26, 2025, received by the Department November 26, 2025
- Email correspondence between consultant (Patrick Doyle) and the Department (Alex Dalglish), dated December 3, 2025, RE: Deficiency Response for 76M 30165615

Information within the Department's Possession/Knowledge

- Flow records and data from the mean monthly flow derived from USGS Gage for the Clark Fork above Missoula (Gage # 12340500)
- Letter from the Department to Applicant's consultant (WGM Group) dated January 8, 2025, granting variance to aquifer testing rules found in Administrative Rules of Montana (ARM) 36.12.121(3)(a), 36.12.121(3)(d), 36.12.121(3)(e) and 36.12.121(3)(e)(iii)
- Department Aquifer Testing Variance Grant Letter
- Aquifer Testing Addendum
- Aquifer Testing Variance Requests
- Email correspondence between consultant (Patrick Doyle) and the Department (Jim Nave), dated December 19, 2024, RE: Stahl Variance Request
- Department (Water Sciences Bureau) variance review sheets

- 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. The Department Standard Practice for Determining Physical Availability of Surface Water and Area of Potential Impact Analysis can also be found in the Department's Permit Manual.
 - Department Technical Memorandum dated November 1, 2019, Physical Availability of Surface Water with Gage Data
 - Department Memorandum dated June 9, 2008, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins
 - Department Memorandum dated May 1, 2009, from John E. Tubbs, Administrator, regarding Permitting in the Open Clark Fork and Flathead Basins; Follow up to June 9, 2008, Memorandum
 - Department Standard Practice for Determining Physical Availability of Surface Water
 - Department Standard Practice for Determining Area of Potential Impact Analysis

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater for irrigation purposes, by means of a single well (GWIC ID 330004) from April 15 to October 15 at a rate of 1.78 CFS and up to 361.5 AF. The well has a 10-inch casing and is a total of 135 feet deep. It is located in the NWNESW of Section 13, Township 13 North, Range 20 West, Missoula County. The Applicant proposes to irrigate 150 acres, with 40 acres in the W2SE, 70 acres in the E2SW, 30 acres in the NWSW and 10 acres in the S2S2NW, all in Section 13, Township 13 North, Range 20 West, Missoula County.

2. The proposed point of diversion (POD) is located approximately 0.68 miles north from the Clark Fork River. The Department determined that the source aquifer from which the Application proposes to divert water from is hydraulically connected the Clark Fork River (a perennial surface water source).

3. Total consumptive use under this proposed appropriation is 253.1 AF. The Applicant is proposing a period of diversion from April 15 through October 15, but depletions to the Clark Fork River occur year round.

4. The Applicant owns water right Statement of Claims 76M 123893 00 and 76M 125124 00, which both authorize irrigation at the proposed place of use (POU). The Applicant states that these two rights will not contribute water to the proposed irrigation since the proposed water right and its infrastructure will be capable of supplying and distributing water more efficiently and reliably.

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

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.

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 253.1 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE CLARK FORK RIVER. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED AND APPROVED THROUGH CHANGE AUTHORIZATION 76M 30165370 IS LEGALLY IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION, AND DURATION CEASES.

Basin Closure

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

7. The Applicant had a preapplication meeting and requested that the Department complete the Technical Analysis. This Technical Analysis was completed by the Department and provided to the Applicant who submitted it as part of their permit application. The Technical Analysis meets the requirements found in § 85-2-361, MCA for a hydrogeologic assessment. The Department's analysis found that Grant Creek surface water was not hydraulically connected to the groundwater source aquifer from which the Applicant proposes to divert water, and the proposed groundwater appropriation will not deplete Grant Creek surface water.



Figure 1. Map of Proposed Beneficial Use Permit No. 76M 30165615

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

GENERAL CONCLUSIONS OF LAW

8. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of

the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, § 3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

9. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An Applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator

- will be satisfied;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
 - (d) the proposed use of water is a beneficial use;
 - (e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;
 - (f) the water quality of a prior appropriator will not be adversely affected;
 - (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
 - (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- (2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

10. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

- (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to

terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); *see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; *see also* Mont. Const. art. IX §3(1).

12. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. Section 85-2-311(6), MCA.

13. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

PHYSICAL AVAILABILITY

FINDINGS OF FACT

14. The Applicant proposes to divert up to 361.5 AF of groundwater from the Missoula Valley Aquifer at a flow rate of 1.78 CFS for irrigation of 150 AC. The application materials included the well log for the proposed POD and well logs for several other adjacent groundwater permits in the surrounding area.

15. To meet the aquifer testing requirements of Administrative Rules of Montana (ARM) 36.12.121, the Applicant filed three separate variance requests (Form 653). All three requests were reviewed by Department groundwater hydrologist Evan Norman. The first request was received by the Department on October 14, 2024, in which the Applicant requested variances from ARM 36.12.121(2)(a), (2)(b), (3)(e), (3)(e), (3)(f) and (3)(g). The Applicant argued that since the characteristics of the Missoula Aquifer have been extensively studied and are well known, the requisite 72-hour aquifer test was not necessary. Further they opined that the financial cost to the Applicant of conducting a 72-hour aquifer test would not yield any additional information on the aquifer itself. The Department reviewed the October 14, 2024, variance request and granted the variance request from the aforementioned sections of ARM 36.12.121. The Department also recommended the applicant request an additional variance from ARM 36.12.121(3)(e), which requires a minimum duration of 72 hours for a proposed pumping rate greater than 150 GPM. On November 5, 2024, the Department informed the Applicant's consultant via email that they would need to submit additional information to receive this variance.

16. On November 24, 2025, the Department received the second variance request from the Applicant on behalf of ARM 36.12.121 (3)(e) and (3)(e)(iii). The Department reviewed this request and again recommended additional variances from the requirements found in ARM 36.12.121 (3)(a) and (3)(d).

17. The Applicant submitted their third and final variance request to the Department on December 20, 2024. This request identified variances from the prior requirements of ARM 36.12.121(3)(e) and (3)(e)(iii), as well as (3)(a) and (3)(d). The Department reviewed the request and sent a letter to the Applicant on January 8, 2025, granting variances to ARM 36.12.121(3)(a), (3)(d), (3)(e), and (3)(e)(iii).

18. The variances granted by the Department were on behalf of preapplication No. 76M 30164602, which is not the same preapplication/Application number of this current proposal (76M 30165615). The Department held a preapplication meeting with the Applicant's consultant on October 8, 2024, where the Applicant requested to divert 400 GPM and up to 361.5 AF. This request was assigned preapplication No. 76M 30164602. The Department determined that the flow rate of 400 GPM was inadequate to provide the requested volume. Therefore, preapplication No. 76M 30164602 was withdrawn, and the Applicant submitted a new preapplication form. This new preapplication (76M 30165615) requested to increase the flow rate to 1.78 CFS (800 GPM). All prior variances and preapplication follow-up information submitted to the Department were related to withdrawn preapplication No. 76M 30164602. The Department determined that an increase in flow rate did not alter the prior requested variances. The Department's approval of ARM 36.12.121(3)(a), (3)(d), (3)(e), and (3)(e)(iii) were applied to superseding preapplication No. 76M 30165615.

19. Although the Applicant was granted a variance from completing an aquifer test, they did conduct a 9.5 hour drawdown and yield test on the production well (GWIC ID 330004). A drawdown yield test is meant to evaluate the well's construction and the aquifer's ability to yield water to the well whereas an aquifer test is conducted to provide data on the aquifer properties, which can be gathered from existing well data.

20. The Department modeled the aquifer's properties using nearby aquifer tests greater than 24-hours (Table 3 of Groundwater Permit Technical Analyses Report – Part A), existing publications (Table 2 of Groundwater Permit Technical Analyses Report – Part A) and information submitted by the Applicant.

21. The Department determined that the proposed well is appropriating water from the Missoula Valley Aquifer, which is unconfined. Physical groundwater availability in the aquifer was evaluated by calculating groundwater flux through the Zone of Influence (ZOI) determined by the 0.01-foot drawdown contour surrounding the POD. The Applicant provided a report from Newfields (2022), which estimated aquifer transmissivity values ranging from 121,000 to 836,600 ft²/day. The 0.01-foot drawdown contour, or ZOI was calculated using the Lohman (1972) report with values of transmissivity (T) of 150,000 ft²/day and specific yield (S_y) of 0.1. With a constant pumping rate of 382.3 GPM for the production well during the proposed period of diversion (April 15 – October 15), the ZOI has a modeled distance of 25,500 feet from the proposed production well. The modeled drawdown from pumping through the proposed well at the requested diverted volume of 361.5 AF is the largest at the end of July during the fifth year of simulated pumping (using the monthly schedule represented in Table 4 of Groundwater Permit Technical Analyses Report – Part A).

22. Groundwater flux through the ZOI is equal to 165,909.1 AF/YR (19,800,000 ft³/day). The Applicant is requesting a total diverted volume of 361.5 AF.

23. The Department determined that groundwater is physically available at the requested annual diverted volume of 361.5 AF during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

Legal Availability of Groundwater

24. The Department determined the legal availability of water in the source aquifer by subtracting (or comparing) the legal demands of existing water rights within the Zone of Influence (ZOI) of the proposed POD from the amount of water that was determined to be physically available in the source aquifer. The ZOI is the area surrounding the proposed POD in which existing wells would experience drawdown of 0.01 foot or more.

25. The Department determined that the ZOI extended 25,500 feet from the Applicant's proposed well. The Department considered all active and severed groundwater rights within that radius for its legal availability analysis. Within the ZOI, there are a total of 899 active groundwater rights on record with the Department that were evaluated for legal demands (reference Appendix A in Groundwater Permit Technical Analyses Report – Part A).

26. The area of proposed water use is not within a controlled groundwater area. Currently under § 85-2-306, MCA, the maximum volume allowed under a Groundwater Certificate (Certificate) outside of a controlled groundwater area is 10 AF. For those Certificates in Appendix A of the Department's Groundwater Technical Analyses Report – Part A without specific volumes, the Department assigned a volume of 10 AF. For those Statement of Claims (Claims) in Appendix A that did not have a volume assigned, the Department allocated the volume listed on the original claim form, if it was reasonable with the Department's standards for that purpose found in ARM 36.12.115. If the claimed volume was not reasonable, the Department calculated the volume based on the standards in ARM 36.12.115. For irrigation Claims without assigned volumes, the Table in ARM 36.12.115(2)(e) was used, based on the appropriate irrigation method (sprinkler vs flood) efficiency and the lower number of the range given for that efficiency in the appropriate climatic area/region. The Claims with unassigned volumes are all in Climatic Area III. If the purpose was not described in ARM 36.12.115 (i.e. fire protection), the Department assigned the claimed volume. A list of all water rights evaluated for legal demand (both those with assigned volumes and those without) are located in the administrative file for this Application and is available upon request.

27. Those groundwater rights within the ZOI were calculated to have a total annual appropriation of 38,128.24 AF/YR. Subtracting the legal demands of 38,128.24 AF/YR from the calculated groundwater flux of 165,909.1 AF/YR yields 127,780.86 AF (165,909.1 AF/YR – 38,128.24 AF/YR) of groundwater legally available for the proposed appropriation of 1.78 CFS and 361.5 AF.

28. The Department finds groundwater to be legally available at the requested annual diverted volume of 361.5 AF/YR.

Legal Availability of Surface Water

29. The Department determined in its Technical Analyses- Part A that the perennial flowing Clark Fork River (located approximately 0.68 miles south of the proposed well) is hydraulically connected to the source aquifer. The amount of water depleted from the Clark Fork River by the Applicant’s appropriation is equal to the calculated 253.1 AF of consumed volume.

30. The Department determined that depletions would begin depleting the Clark Fork River at the western edge of the NESEW of Section 24, Township 13 North, Range 20 West, Missoula County. The timing of net depletions to the Clark Fork River was modeled in the Department’s Technical Analyses – Part A and are shown in **Table 1** below. (**Table 1** can also be found in the Department’s Technical Analyses – Part A).

Table 1. Monthly depletions to the Clark Fork River

Month	Clark Fork Depletions (AF)	Clark Fork Depletions (GPM)
January	4.2	30.5
February	3.3	26.3
March	3.2	23.1
April	7.8	58.5
May	26.1	190.5
June	41.4	312
July	57.9	422.3
August	52.8	385.2
September	32.6	245.8
October	12.3	89.9
November	6.6	49.7
December	5.1	37.3

31. The Clark Fork River will be depleted year-round by the proposed groundwater appropriation, and the depletions were modeled to occur simultaneously with the Applicant’s consumption of groundwater.

32. The local area of potential impact on the Clark Fork River is defined as the section from the point where depletions begin (western edge of the NESENW of Section 24, Township 13 North, Range 20 West, Missoula County), to the confluence of the Clark Fork and Bitterroot Rivers. The legal demands of water rights with points of diversion in this local reach were analyzed to calculate the legal availability of water in the Clark Fork River at the point of depletions (Table 2 below).

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

Month	Physical Availability at Effective Reach (CFS)	Physical Availability at Effective Reach (AF)	Existing Legal Demands Effected Reach (CFS)	Existing Legal Demands Effected Reach (AF)	Physical Availability - Legal Demands (CFS)	Physical Availability - Legal Demands (AF)
January	1,221.00	74,944.98	8.82	541.39	1,212.18	74,403.59
February	1,378.50	76,424.04	8.82	489.00	1,369.68	75,935.04
March	1,794.00	110,115.72	8.82	541.39	1,785.18	109,574.33
April	3,422.50	203,296.50	114.57	6805.47	3,307.93	196,491.03
May	7,282.00	446,969.16	114.57	7032.32	7,167.43	439,936.84
June	7,677.00	456,013.80	114.57	6805.47	7,562.43	449,208.33
July	2,795.00	171,557.10	114.57	7032.32	2,680.43	164,524.78
August	1,436.00	88,141.68	114.57	7032.32	1,321.43	81,109.36
September	1,367.00	81,199.80	114.57	6805.47	1,252.43	74,394.33
October	1,518.00	93,174.84	8.82	541.39	1,509.18	92,633.45
November	1,519.00	90,228.60	8.82	523.92	1,510.18	89,704.68
December	1,334.00	81,880.92	8.82	541.39	1,325.18	81,339.53

33. The Department's analyses concluded that water is legally available in the local reach of the Clark Fork River for the proposed appropriation in every month of the year beyond the calculated annual stream depletion of 253.1 AF.

34. The Department must also consider downstream hydropower water rights owned by Avista at Noxon Dam per the final order issued for Application for Beneficial Water Permit No. 76N 30010429 on December 21, 2006. In the final order, the Department found that surface water in the Clark Fork River was not legally available at Noxon Dam. For this subject application, the Department conducted a legal availability analysis of the Clark Fork River at Noxon Dam. To evaluate the legal availability of the lower reach of the Clark Fork River at Noxon Dam, the existing demands of Avista's hydropower water rights were subtracted from the median of the monthly flow of the USGS gage at the Clark Fork River below Noxon Rapids Dam near Noxon (Gage #

12391400). Table 3 below lists the median of the mean monthly flow rates to quantify the legal availability of the Clark Fork River near the Noxon Rapids Dam. The analysis shows there is not sufficient legally available water in the lower reach of the Clark Fork River to satisfy Avista’s legal demands in any month of the year.

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

Month	Physical Availability (CFS) at USGS Gage	Avista Water Rights (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

35. The Applicant has addressed legal availability of surface water by providing a mitigation plan, which proposes to offset their total depletions of 253.1 AF to the Clark Fork River at Noxon Dam. The Applicant will use mitigation water from associated Change Application 76M 30165370. The Department received this Application on November 18, 2025 and determined it to be correct and complete on December 19, 2025. Under the Change Application, there is sufficient mitigation volume available to offset the Applicant’s depletions to the Clark Fork River. Change Application 76M 30165370 and the mitigation plan are fully discussed under the “Adverse Effect” section below.

36. The Department finds the proposed appropriation of 1.78 CFS and up to 361.5 AF to be considered legally available with the mitigation plan during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

Groundwater Adverse Effects

37. In the event a legitimate call for water is made, the Applicant can shut off the pump in the well to cease diversions. Irrigation use can cease in order to satisfy existing water rights during times of water shortage. The Department finds the Applicant's plan to be a reasonable plan of control.

38. To determine if the proposed water use would cause adverse effects to other water users, the Department modeled whether any existing water rights with wells in the source aquifer near the proposed well would experience drawdown of one foot or more in its technical analyses. No wells were found to meet this criteria.

39. The Department finds that the proposed use of groundwater will not adversely affect other groundwater appropriators.

Surface Water Adverse Effects

40. The groundwater proposed to be appropriated by the Applicant is hydraulically connected to the Clark Fork River. The Applicant's consumptive use (253.1 AF) is considered to deplete the Clark Fork River in every month of the year (see Table 1 above).

41. The Department's analysis shows that surface water in the Clark Fork River within the locally depleted reach is physically and legally available in excess of the predicted depletion for each month of the year. When comparing the physical availability and legal demands on the Clark Fork River in the local reach, the Department demonstrated that water is always available for appropriators in the Clark Fork River within this area (see Table 2 in Finding of Fact No. 33), and that additional depletions resulting from the proposed groundwater appropriation will not result in adverse effect.

42. The Department must also address downstream hydropower rights owned by Avista at Noxon Dam. The Department cited the June 9, 2008, and May 1 2009, Tubbs Memoranda regarding water rights permitting in the lower Clark Fork River Basin. These memoranda state that for groundwater sources in Basin 76M, "when depletions to surface water sources are calculated to be greater than 35 GPM or greater than 10 AF per year, the Department must consider the Thompson River Lumber Company as precedent".

43. The Department analyzed adverse effects to Avista's senior hydropower water rights by assessing the availability of surface water on the Clark Fork River using USGS Gage No. 12391400 "Clark Fork Below Noxon Rapids Dam near Noxon, MT". Avista's legal demands for hydropower were subtracted from the median monthly flow of USGS Gage No. 12391400 to assess water availability at Noxon Dam. This data, which is included in the Department's

Technical Analyses – Part B and displayed in Table 3 of Finding of Fact (FOF) 33, showed that water was not legally available to satisfy Avista’s Clark Fork River hydropower water rights in any month of the year.

44. To offset the Applicant’s depletions to the Clark Fork River resulting in adverse effect to downstream hydropower water rights, the Applicant proposes to use mitigation from Change Application 76M 30165370. Through Application 76M 30165370, the place of use and point of diversion of four historical irrigation water rights will be changed to the purposes of mitigation and marketing for mitigation. The proposed stream reach for these purposes will encompass the Clark Fork River between the historical POD in the SWNWNE Section 21, Township 13 North, Range 19 West, Missoula County, downstream to the Noxon Rapids Powerhouse in the S2S2 Section 33, Township 26 North, Range 32 West, Sanders County.

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

46. The historically consumed volume (of the irrigation and stock rights) will be available for mitigating the Applicant’s depletions (253.1 AF) to the Clark Fork River as a result of their groundwater pumping.

47. The Department finds that the Applicant’s plan to utilize mitigation water from Change Application 76M 30165370 is sufficient to offset the calculated groundwater depletions to the Clark Fork River, and that there will be no adverse effect to those hydropower rights owned by Avista or other existing surface water users.

48. To ensure that the amount of mitigation water provided to the Clark Fork River is adequate to offset adverse effect, the Applicant will be required to adhere to the following conditions:

THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 253.1 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.

49. To ensure that the proposed flow rate and volume of water are not exceeded, resulting in inadequate mitigation of depletions, the Applicant will be required to adhere to the following condition:

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.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

50. The Applicant is requesting to divert up to 1.78 CFS and 361.5 AF from a single well (GWIC ID 330004). This well was completed in 2022 to a total depth of 135 feet.

51. The well pump is a Berkeley 7TMH-750 and based on a pump curve provided with the application materials, the pump is capable of diverting the requested flow rate of 1.78 CFS.

52. From the POD, water will be pumped to an 8-inch buried PVC pipeline that will be used to further distribute water into 6-inch PVC buried pipelines that branch off into the various fields across the POU.

53. Water will be applied to the POU through K-Line sprinkler systems hooked up to the buried pipelines. There are 150 5 GPM sprinkler heads that can be moved around as needed to obtain full irrigation coverage.

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

BENEFICIAL USE

FINDINGS OF FACT

55. Under this proposed appropriation, the Applicant is requesting to divert 1.78 CFS and 361.5 AF to irrigate 150 acres from April 15 to October 15, with a consumptive use of 253.1 AF.

56. The proposed irrigation POU is located in USDA NRCS Climatic Area III. The requested volume for crop irrigation of 361.5 AF corresponds with the high end of the Department's standards for Climatic Area III for 70% sprinkler irrigation (2.08 – 2.41 AF/AC), per ARM 36.12.115(2)(e). This results in a consumptive use of 253.1 AF (361.5 AF x 0.7 = 253.1 AF). The proposed period of diversion of April 15 to October 15 complies with the Department standards for Climatic Area III found in ARM 36.12.112(1)(c)(iii).

57. The requested flow rate of 1.78 CFS for 150 acres results in a ratio of 0.01 cfs/acre (or 5.33 GPM/acre). The Applicant's consultant stated that the POU will not be simultaneously irrigated all at once. Rather, they explained that water will be distributed through K-Line sprinkler systems hooked up to buried pipelines and there will be 150 5 GPM sprinkler heads that can be moved as needed to obtain full coverage of the POU. The consultant provided an example from the K-Line sprinkler manual stating that the sprinklers can cover 4.5 acres with 8 sprinklers, and they stated the Applicant intends to irrigate on average of 13.4 hours per day through the period of diversion (184 days). With 8 sprinklers at 5 GPM (40 GPM) for irrigation of 4.5 acres, this results in a ratio of 8.89 GPM/acre (8 sprinklers * 5 GPM each /4.5 acres). The Applicant will have the ability to use up to 150 K-Line sprinklers at once, resulting in a flow rate of 750 GPM (150 * 5 GPM). Applicant can adjust and control their infrastructure in order to provide adequate irrigation across the POU.

58. The Applicant owns existing groundwater irrigation Statement of Claims 76M 123893-00 and 76M 125124-00 that overlap with the proposed POU. Claim 76M 123893-00 authorizes a flow rate of 1.83 CFS for 73 acres and 76M 125124-00 authorizes a flow rate of 1.40 CFS for 56 acres. The Applicant states that these rights will not contribute to the proposed irrigation and that the proposed appropriation can supply and distribute the required amount of water more efficiently/reliable than the overlapping water rights.

59. The Department finds the proposed water use is beneficial, and that the requested flow rate of 1.78 CFS and annual volume of 361.5 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

60. The Application materials were signed by John Stahl. Current Montana Cadastral property records show that the place of use and point of diversion are owned by *Farmer Johns Sustainable Farming LLC*. A search of the Montana Secretary of State records show that John Stahl is a managing member. Mr. Stahl 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

61. 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.

62. 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

63. 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.”

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

65. 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).

66. 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).

67. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 14-23).

LEGAL AVAILABILITY

68. 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).

69. 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.

70. 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).

71. 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.

72. 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 Kooconusa 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*.

73. 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.

74. 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);

75. 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 29-35).

76. 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 24-36).

ADVERSE EFFECT

77. 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.

78. 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).

79. 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).

80. 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).

81. 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.

82. 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).

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

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

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

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

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

86. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992) (Applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

87. Adverse effect not required to be measurable but must be calculable. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 12 (2011) ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; Applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River*

Lumber Company (DNRC Final Order 2006); see also *Robert and Marlene Tackle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-G76L by Cross*, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

88. 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.)

89. 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.

90. 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).

91. 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 37-49).

ADEQUATE DIVERSION

92. 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.

93. 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.
94. 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).
95. 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).
96. Specific ditch segments would be adequate after completion of maintenance and rehabilitation work. *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005).
97. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).
98. 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 50-54).

BENEFICIAL USE

99. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
100. 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).

101. 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).

102. 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*.

103. The Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 361.5 AF of diverted volume and 1.78 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 55-59).

POSSESSORY INTEREST

104. 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.

105. 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.

106. 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 60).

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 30165615 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of a 135-ft deep well from April 15 through October 15 at 1.78 CFS up to 361.5 AF, from a point in the NWNESW, Section 13, Township 13 North, Range 20 West, for irrigation use from April 15 through October 15. The Applicant may irrigate 150 acres of crop. The place of use is located in the S2SE, E2SW, NWSW and S2S2NW, all in Section 13, Township 13 North, Range 20 West, 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 253.1 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.

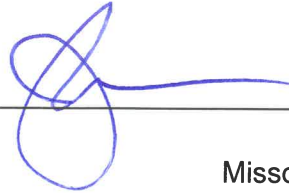
The area that will be depleted is located along the Clark Fork River; to mitigate the affected reach the appropriator will purchase mitigation water from the City of Missoula. Through Change Application 76M 30165370, the City retired irrigation rights 76M 123868 00, 76M 123869 and 76M 118513 00 and stock right 76M 123870 00. The historically consumed volume of these rights is adequate to mitigate the calculated depletions of 253.1 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 13th day of February, 2026.

A handwritten signature in blue ink, consisting of a large loop followed by a horizontal line extending to the right.

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 13th day of February, 2026, by first class United States mail.

JOHN STAHL
5905 MULLAN RD
MISSOULA, MT 59808

and

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C/O JULIE MERRITT
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MISSOULA, MT 59802



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