

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30163353 BY TIMOTHY P DONOVAN)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On January 2, 2025, Timothy P Donovan (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30163353 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 70 gallons per minute and 11.45 acre-feet. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on March 26, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on May 24, 2024. The Department delivered the Department-completed technical analysis on July 8, 2024. The application was determined to be correct and complete as of January 21, 2025. An Environmental Assessment for this application was completed on March 12, 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:
 - Aquifer Testing Addendum, Form 600-ATA
 - Basin Closure Addendum, Form 600-BCA
- Attachments:
 - Pump curves and technical specifications for Grundfos (62S50-12) 62GPM 5 horsepower pump
- Maps:
 - Map of Proposed Water Use (USDA NAIP 2023 Aerial Photo)
 - Map and Diagram of System (Undated ESRI basemap)
- Department-completed technical analyses based on information provided in the

Information within the Department's Possession/Knowledge

- USGS Gage #12340500 flow records
- Form 653 Variance Request for Aquifer Testing Requirements, dated May 14, 2024
- Letter from DNRC to Applicant dated May 16, 2024, granting variances to Aquifer Testing Requirements
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Missoula Regional Office at (406) 721-4284 to request copies of the following documents.
 - Technical Memorandum: Physical and Legal Availability of Ground Water, dated April 22, 2019
 - Department Memorandum: Permitting in the Open Clark Fork and Flathead Basins, dated June 9, 2008
 - Department Memorandum: Permitting in the Open Clark Fork and Flathead Basins Follow up to June 9, 2008, Memorandum, dated May 1, 2009

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

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missoula Valley Aquifer means of a 120-ft well, from April 15 to October 15 at 70 GPM up to 11.45 AF, with a consumptive use of 9.16 AF, from a point in the SWSWSE Sec. 11, T13N, R20W, Missoula County, for sprinkler irrigation use from April 15 to October 15. The Applicant proposes to irrigate 4.75 acres. The place of use is generally located in the S2SWSE Sec. 11 T13N R20W, Missoula County.

2. The proposed point of diversion is located approximately 580 ft and 6500 ft from Grant Creek and the Clark Fork River, respectively. The Department's technical analysis of the proposed appropriation determined that a 120-ft well in the Missoula Valley Aquifer will not be

hydraulically connected to Grant Creek, but that the Clark Fork River will be hydraulically connected.

3. The proposed irrigation purpose is supplemental by a shared place of use with three water rights, namely, Statements of Claim 76M 29120-00, 76M 29121-00, and 76M 29122-00. These rights historically diverted water from Grant Creek. However, water from Grant Creek is generally not available for irrigation on the property, and the pump and irrigation system have been disconnected.

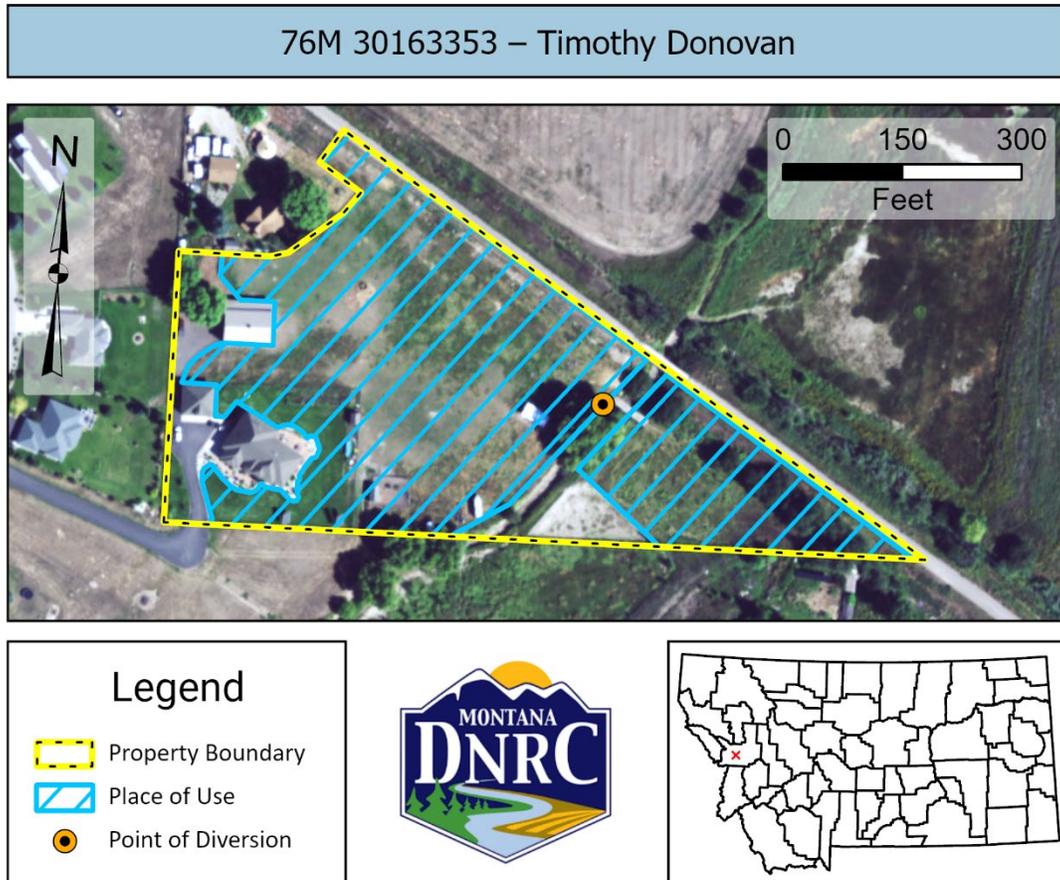


Figure 1. Map of proposal.

Basin Closure

4. This application is located within the Grant Creek Basin Administrative Closure, in which no new appropriations of surface water for consumptive use can be made from July 1 through September 30 each year per ARM 36.12.1011. The Department has determined in its technical analysis of the application that the proposed diversion is not hydraulically connected to Grant

Creek, thus, no surface waters in the Grant Creek Basin will be affected by the proposed diversion of groundwater, and the Applicant is not subject to the restrictions of this basin closure.

5. Because the source aquifer for this application is not hydraulically connected to the surface waters protected by the Grant Creek closure, the Department did not require the Applicant to submit a hydrogeologic assessment report.

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

GENERAL CONCLUSIONS OF LAW

6. 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 . . .

7. 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

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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.

8. 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.

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

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

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

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

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

10. 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.

11. 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

12. The Applicant proposes to divert up to 11.45 AF at a flow rate of 70 GPM for irrigation of 4.75 acres. The Applicant provided the well log for the proposed point of diversion and data from an 8-hour drawdown and yield test.

13. The Department evaluated the volume of water that is physically available from the source aquifer using applicant-supplied data from an 8-hour drawdown and yield test on the proposed well (GWIC ID 320565). Department Groundwater Hydrologist Melissa Brickl used data from said tests to produce the July 1, 2024 Groundwater Permit Technical Analysis Report Part A. A variance was granted by the Department from Aquifer Testing Requirements in ARM 36.12.121(3)(a-d), 36.12.121(3)(e)(ii-iii), and 36.12.121(3)(h) on May 16, 2024, allowing the Applicant to forgo a 24-hour aquifer test as the Department possessed sufficient testing data from other previous groundwater permit applications to determine the aquifer properties. The proposed well is located in the well-studied Missoula Valley Aquifer and aquifer properties obtained from previous permit applications are suitable for this site.

14. Using the Cooper-Jacob (1946) solution, an aquifer transmissivity (T) value of 162,807 ft²/day (regional value), specific yield of 0.1 (Lohman, 1972), and normalized pump schedule using the requested diverted volume, the model predicted the 0.01-foot drawdown contour or zone of influence (ZOI) occurs 585 ft from the Applicant’s well. Groundwater flux through the ZOI is equal to 4,788 AF/year.

15. The Department finds that groundwater is physically available during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

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

17. The Department defined the zone of influence to be the area within which existing wells would experience a drawdown of 0.01 feet or more. This was calculated to be the area within a 585-foot radius of the proposed point of diversion, as described in the Department’s technical analysis.

18. Four groundwater rights were identified within the zone of influence, listed in Table 1, below. Two of these rights, Ground Water Certificates 76M 30006817 and 76M 30006851, did not have specific volumes assigned to them. Both rights were filed for domestic use, and 1 acre of lawn & garden irrigation. For the purposes of this calculation, the Department assigned the rights 1 AF for domestic use, according to Department standards for a single dwelling, and 2.5 AF for lawn & garden irrigation.

Water Right Number	Volume (AF)
76M 62647-00	1.64
76M 30006817	3.50
76M 30006851	3.50
76M 30104028	2.25
Total:	10.89

Table 1. Legal Demands of Water Rights within the Zone of Influence.

19. The amount of water legally available in the source aquifer is 4,767.11 AF (4,778 AF physically available – 10.89 AF legal demands = 4,767.11 AF legally available).

20. The Department determined in its technical analysis that the Clark Fork River is hydraulically connected to the source aquifer. The location where depletions begin to accrue was identified as the western boundary of the NENE Sec. 23, T13N, R20W, and the area of potential impact was defined as the reach between this point and the confluence of the Clark Fork and Bitterroot Rivers.

21. The consumptive use of the proposed permit was calculated to determine the depletions to the Clark Fork River. Using a diverted volume of 11.45 AF, 70% efficiency for sprinkler irrigation, and 10% irrecoverable losses, the Department calculated the consumptive volume of the proposal to be 9.2 AF. The timing of these depletions was modeled in the Department’s technical analysis and are shown in Table 2.

Month	Depletions to Clark Fork (AF)	Depletions to Clark Fork (GPM)
January	0.3	2.0
February	0.2	1.9
March	0.2	1.5
April	0.2	1.4
May	0.4	3.1
June	1.0	7.9
July	1.7	12.5
August	1.9	14.1
September	1.5	11.4
October	0.8	6.1
November	0.5	3.5
December	0.3	2.5

Table 2. Timing of depletions to the Clark Fork River

22. The Department calculated the legal availability of water in the Clark Fork River at the point of depletions by subtracting the legal demands of water rights in the area of potential impact from the amount of water physically available at the point of depletions (Table 3). This analysis indicated that water is legally available for the proposed appropriation. A detailed methodology of the Department's calculation and a full list of the water rights used in its evaluation can be found in the Department's Technical Analysis of this proposal.

Month	Physically Available Water (CFS)	Physically Available Water (AF)	Legal Demands in Area of Potential Impact (CFS)	Legally Available Water (CFS)	Legally Available Water (AF)
January	1224.92	75321.21	137.81	1087.19	73844.21
February	1378.42	77240.47	137.81	1240.69	75763.46
March	1793.92	110307.66	141.14	1652.86	108826.9
April	3291.67	199142.29	611.77	2810.73	182326.2
May	7151.17	443242.13	611.83	6670.17	426424.1
June	7546.17	452302.62	611.85	7065.15	435482.4
July	2664.17	167347.25	611.85	2183.15	150527.0
August	1305.17	83785.60	611.85	824.15	66965.39
September	1236.17	76831.55	611.85	755.15	60011.34
October	1387.17	88827.58	611.85	906.15	72007.37
November	1493.92	90376.18	307.6	1211.4	80019.86
December	1314.92	82382.79	162.81	1177.19	80905.78

Table 3. Legal availability of water at the point of depletions.

23. The Department finds the proposed appropriation of 70 GPM and up to 11.45 AF of groundwater to be legally available during the proposed period of diversion and use.

24. The Department finds that surface water is legally available in the depleted reach in the amount and timing that depletions will occur.

ADVERSE EFFECT

FINDINGS OF FACT

25. In the event of a legitimate call for water is made, the Applicant can shut off the pump in the well and cease diversion. The Department finds this to be a reasonable plan of control.

26. To determine if the proposal will cause adverse effects to other water users, the Department modeled whether any extant wells near the proposed well would experience drawdown of 1 foot or more in its technical analysis. No wells met this criterion. The Department determined that no groundwater rights will be adversely affected by drawdown from the proposed diversion.

27. The Department's determination of an absence of adverse effect is based on its technical analysis of potential impacts on the groundwater aquifer and connected surface waters, and draws on previous studies of aquifer properties and USGS stream gage data.

28. Downstream hydropower rights owned by Avista Corporation at Noxon Dam were addressed in a policy memorandum dated June 9, 2008, titled: Permitting in the open Clark Fork and Flathead basins. A subsequent policy memorandum dated May 1, 2009 titled: Permitting in

the Open Clark Fork and Flathead Basins Follow-up to June 9, 2008, Memorandum established a policy for permitting groundwater rights in parts of the lower Clark Fork River Basin (including all of Basin 76M) that when the surface water depletions for an application amount to less than 35 GPM and 10 AF per year, the Department will not consider the 2006 Thompson River Lumber Company permit application 76N 30010429 final order as precedent when evaluating issuance criteria.

29. The depletions to the Clark Fork River resulting from this proposal are 9.2 AF per year, and the maximum monthly depleted flow rate is 14.1 GPM. As a result, this proposal falls under the guidance provided for in the May 1, 2009, policy memorandum.

30. The Department finds the proposed use of 11.45 AF diverted volume, 9.16 AF consumed volume, and 70 GPM will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

31. The means of diversion consists of a 120-foot well (GWIC ID 320565) fitted with a Grundfos (62S50-12) 62 GPM 5 horsepower pump with a Franklin 5HP 3-Phase 230V Motor. Water is conveyed via a buried 3-inch pipeline where it is directed by a valve to one of two fields. In the east field, the pipeline flows to a riser where 10 moveable K-Line sprinklers are connected, each with a maximum flow rate of 5 GPM. In the west field, the pipeline is attached with a hose to a 75 series Big Gun sprinkler on wheels, with a flow rate range of 25-165 GPM.

32. The Department's analysis of drawdown within the Applicant's well casing found that after one year of pumping at a schedule assumed from Irrigation Water Requirements, drawdown in the Applicant's well will not exceed 0.7 feet, and that at the end of the irrigation season there would be 83.8 feet of water remaining above the bottom of the perforated interval.

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

BENEFICIAL USE

FINDINGS OF FACT

34. The Applicant proposes to divert 11.45 AF at 70 GPM to irrigate 4.75 acres from April 15 through October 15, with a consumptive use of 9.16 AF. The proposed place of use lies in USDA NRCS climatic area III. The proposed diversion of 11.45 AF falls within the Department's standards for climatic area III per ARM 36.12.115(2)(e), and the period of diversion complies with

Department standards found in ARM 36.12.112(1)(c)(iii). The consumptive use was calculated using the USDA Irrigation Water Requirements program.

35. The requested flow rate of 70 GPM for irrigation of 4.5 acres equals 14.73 GPM per acre, which is reasonable for sprinkler irrigation.

36. The proposed appropriation is supplemental by a shared place of use with three water rights: Statements of Claim 76M 29120-00, 76M 29121-00, and 76M 29122-00, all of which divert surface water for irrigation from Grant Creek. However, surface water from Grant Creek is generally unavailable for irrigation on the property, resulting in the need for water from a different source.

37. The Department finds the proposed water use is beneficial, and that the requested flow rate of 70 GPM and annual volume of 11.45 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

39. 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.”

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

41. 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).

42. 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 12-15)

LEGAL AVAILABILITY

43. 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).

44. 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.

45. 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).

46. 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.

47. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. *Robert and Marlene Takle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted), *affirmed, Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of*

Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007)(permit granted), *affirmed, Montana River Action Network et al. v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; Applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, Applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. *Royston, supra*.

48. 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 16-24)

ADVERSE EFFECT

49. 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.

50. 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).

51. 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).

52. 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).

53. 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.

54. 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).

55. 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).

56. In regard to senior hydropower water rights, the facts in this application are distinguishable from those in *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Co* (2006) (TRLIC) concerning the Avista’s Noxon Reservoir that had an immediate calculable adverse impact on Avista’s water rights and power production. The proposed appropriation in this case is for irrigation more than 180 miles upstream of Noxon Reservoir. Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin, does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista’s prior appropriation in this basin which has not been closed to appropriation by the Legislature does not include the right to prevent this appropriation where Avista can reasonably exercise its hydropower water right.

57. 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 25-30)

ADEQUATE DIVERSION

58. 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.

59. 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.

60. 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 31-33).

BENEFICIAL USE

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

62. 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).

63. 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).

64. 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*.

65. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 11.45 AF of diverted volume and 70 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 34-37)

POSSESSORY INTEREST

66. 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.

67. 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.

68. 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 38)

PRELIMINARY DETERMINATION

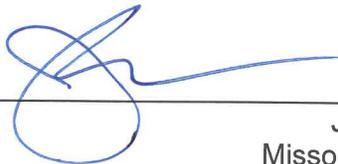
Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76M 30163353 should be GRANTED.

The Department determines the Applicant may divert water from the Missoula Valley Aquifer, by means of a 120-foot well (Include Well Depth), from April 15 to October 15 at 70 GPM up to 11.45 AF, from a point in the SWSWSE Sec. 11, T13N, R20W, for irrigation use from April 15 to October 15. The Applicant may irrigate lawn and garden on 4.75 acres. The place of use is located in the S2SWSE Sec. 11, T13N, R20W.

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 12th day of March, 2025.



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 12th day of March, 2025, by first class United States mail.

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