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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30102978 BY Montana Artesian Water Company	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On June 24, 2015, Montana Artesian Water Company (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30102978 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1 CFS (450 GPM) up to 710.53 acre-feet (AF) diverted volume for commercial and geothermal use in a water bottling plant. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated August 28, 2015. The Applicant responded with information received September 25, 2015. The Application was determined to be correct and complete as of December 30, 2015. An Environmental Assessment for this Application was completed on January 7, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

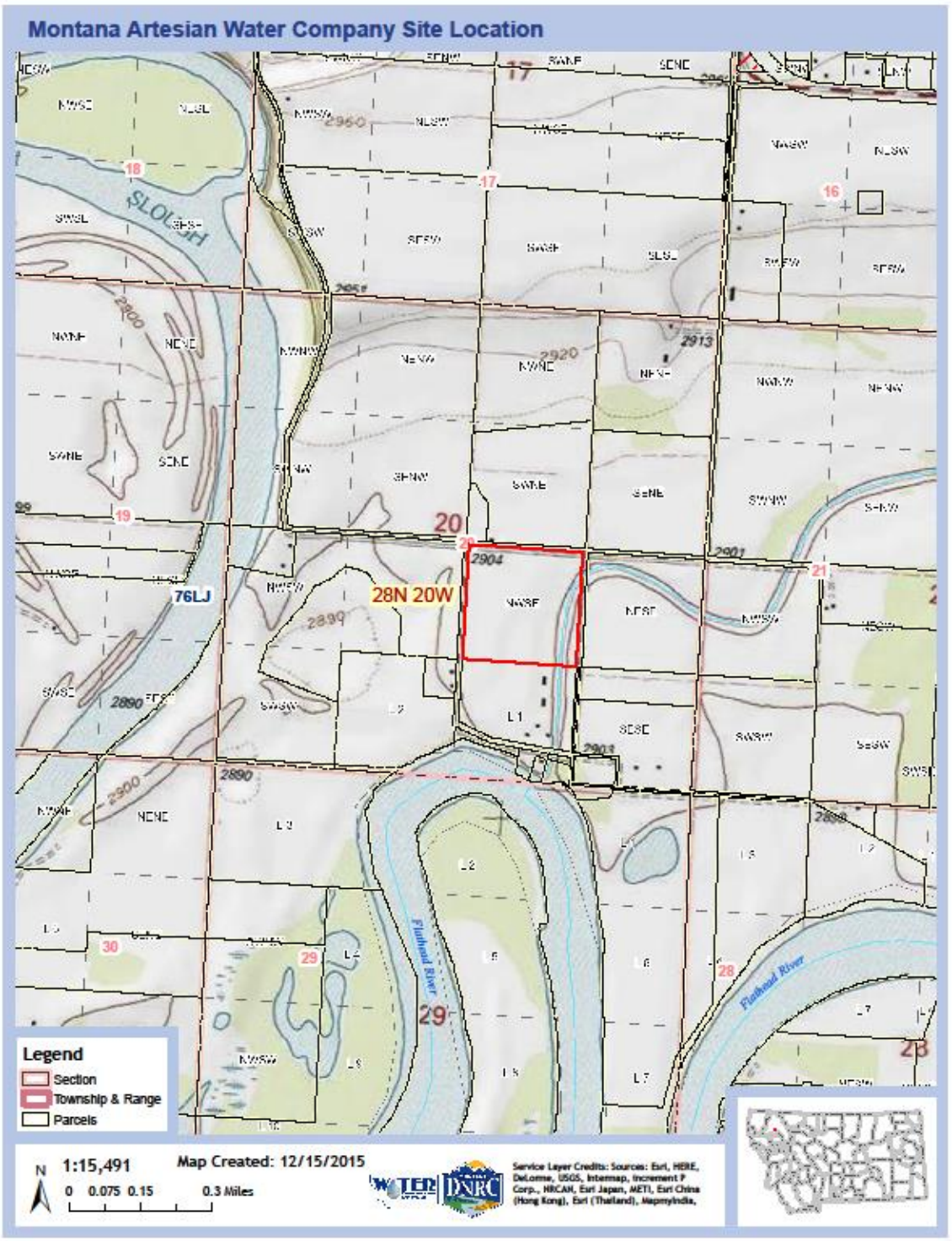
- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Topographic map showing parcel location
  Aerial photo showing site layout
- Electronic copy of Form 633
- Minor amendment (reduction of requested volume, temporary geothermal use) received September 25, 2015

- Deficiency response received September 25, 2015
    - Additional information regarding GW.6.B
    - Additional information regarding GW.6.D
    - Additional information regarding GW.7.A
    - Additional information regarding GW.9.

Information within the Department's Possession/Knowledge

- Department memo dated January 10, 2011 entitled "Legal Availability of Groundwater in the Flathead Deep Aquifer" written by Russell Levens and James Heffner; Groundwater Hydrologists for the Water Management Bureau
- Aquifer Test Report by DNRC groundwater Hydrologist Attila Folnagy, dated August 10, 2015
- Depletion Report by DNRC groundwater Hydrologist Attila Folnagy, dated August 11, 2015
- Department record of existing water rights
- USGS records for gaging station #12363000, Flathead River at Columbia Falls
- USGS records for gaging station #12372000, Flathead River near Polson

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).


Montana Artesian Water Company Site Location
28N 20W
76LJ
SLOUGH
Flathead River
Legend
Section
Township & Range
Parcels
N
1:15,491
0 0.075 0.15 0.3 Miles
Map Created: 12/15/2015
Service Layer Credits: Sources: Esri, HERE, DeLorme, USGS, Intermap, increment P Corp., NRCAN, Esri Japan, METI, Esri China (Hong Kong), Esri (Thailand), MapmyIndia,

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The applicant proposes to pump 1 CFS (450 GPM) up to 710.53 Acre-Feet (AF) annually from a well for commercial and geothermal use in a water bottling plant. The well is 222 feet deep and completed in a deep alluvial aquifer of the Flathead Valley commonly referred to by the Montana Bureau of Mines and Geology (MBMG) as the Deep Aquifer. The proposed point of diversion is located in the SENWSE Section 20, Township 28N, Range 20W, Flathead County. The proposed period of diversion is January 1-December 31. The proposed period of use for commercial and geothermal use at the water bottling facility is January 1-December 31. The place of use is generally located in the SENWSE Section 20, Township 28N, Range 20W, Flathead County.

2. Under the proposed commercial use of up to 710.53 AF per year, water will be used for facility water for bathrooms, break room, etc. (0.76 AF), equipment rinsing and facility washing (1.12 AF), water bottle washing and rinsing water (120.57 AF), and water bottling (588.08 AF).

3. The proposed geothermal use is for 60 GPM up to 12.28 AF per annum and is planned as a temporary use. The volume appropriated for geothermal use will count against the volume bottled; the maximum combined appropriation of these two uses will be 588.08 AF per annum. Upon full buildout, the Applicant plans to bottle the entire volume of 588.08 AF, however as the water bottling plant develops, up to 12.28 AF per annum will be used for the geothermal purpose. During build out, the flow rate of all uses will be managed to not exceed 1 CFS.

4. The total proposed appropriation is for 1 CFS diverted flow up to 710.53 AF diverted volume per annum. Consumptive use of bottled water is expected to be 100% and is equal to 588.08 AF per year. Water used for the geothermal purpose will ultimately end up being used for bottling; therefore no consumptive use is assigned for the geothermal purpose. Water used for bottle rinsing, facility washing, and on-site worker uses will be discharged into a drain field; therefore the consumptive use is estimated to be 10% of the total requirements of 122.45 AF for these uses, or 12.25 AF per year. The total annual consumptive use is calculated to be 600.33 AF which equals an average consumption rate of 372.2 GPM.

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

The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written *monthly* record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by January 31st of each year and upon request at other times during the year until certification. 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 shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

§ 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 resources conservation service and other specific field studies." § 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.

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 (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *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. § 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 proposed well (MAWC #1) is 222 feet deep, has an inner casing diameter of 10 inches, and a shut-in pressure of 12.5 psi or -28.8 feet static water level (flowing well). The well is completed in a confined aquifer referred to by MBMG as the Deep Aquifer. Hydrogeologic information indicates that this aquifer extends across the Flathead valley underlying an area approximately 300 square miles and is up to 3,000 feet thick.

13. Prior to the aquifer test, background groundwater levels were monitored in the Koch Well (GWIC #155346) and Nickol Well between March 6, 2015 and March 9, 2015. There was a slight increasing trend in the Deep Aquifer; however the trend was not significant enough in amplitude compared to the drawdown measured during the aquifer test to affect the aquifer test analysis.

14. Prior to the 72-hour aquifer test, MAWC #1 was allowed to flow at 175 GPM from the time the well was completed on February 18, 2015. By the start of the aquifer test, the flow rate had stabilized at 153 GPM. The. 72-hour aquifer test started on March 9, 2015 at 1:10 PM and

continued without interruption until 1:10 PM on March 12, 2015, at an average flow rate of 455 GPM. The Koch Well and Nickol Well were monitored for drawdown during the aquifer test.

15. An Aquifer Test Report and Depletion Report were completed by DNRC groundwater Hydrologist Attila Folnagy on August 10, 2015 and August 11, 2015, respectively. The Aquifer Test Report confirmed that the aquifer test performed was adequate.

16. The recommended aquifer properties based on modeling analysis of the aquifer test using the Neuman-Witherspoon (1969) solution calculates an average transmissivity of 1,600 ft^2/day and a storativity of 1.4×10^{-5}.

17. MAWC #1 was evaluated with a 72-hour aquifer test at 455 GPM with a maximum drawdown of 121.9 feet below the static water level of -4.28 feet below ground surface (bgs), leaving 104.4 feet of water column above the bottom of the well. In order to determine the drawdown during the period of diversion, the Department modeled the period of diversion for MAWC #1 using a constant pumping rate of 440.5 GPM and adding drawdown from daily pumping. The aquifer will experience the largest drawdown of 55 feet at the end of the period of diversion. The total maximum drawdown of 174.7 feet for MAWC #1 is the sum of the modeled aquifer drawdown at the end of one year (55 feet), and the drawdown (119.7 feet) at 1,394 minutes (time it takes to pump the daily volume of 634,320 gallons) into the 72-hour aquifer test. This would leave 51.6 feet of water column above the bottom of MAWC #1.

18. The well is completed in a confined sand and gravel aquifer known as the Deep Aquifer. A Department memo dated January 10, 2011, entitled "Legal Availability of Groundwater in the Flathead Deep Aquifer" states groundwater levels in the Deep Aquifer are effectively controlled by the Flathead River and Flathead Lake and a new groundwater use will not alter the regional gradient, and thus the aquifer flux. New groundwater use will reduce discharge from the aquifer to the Flathead River and Flathead Lake in the amount equivalent to the consumptive use of the proposed diversion. Pursuant to this memo, physical availability of water will be evaluated for hydraulically connected Flathead River and Flathead Lake. No additional modeling, evaluation of the zone of influence or aquifer flux calculations are needed to prove groundwater's physical availability.

19. The following USGS gages were utilized to quantify median of mean monthly flows and volumes on the Flathead River and Flathead Lake: USGS Station #12363000, Flathead River at Columbia Falls which has a period of record from October 1951- September 2014, and USGS Station #12372000, Flathead River near Polson which has a period of record from October 1938-April 2015. The following tables summarize physical availability of water for the Flathead River and Flathead Lake for the year-round period of depletion from the proposed appropriation.

Table 1: Flathead River at Columbia Falls USGS Gage # 12363000

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	5,607.0	4,869.0	4,772.0	10,535.0	22,645.0	24,940.0
Volume (AF)	344,157.7	269,937.4	292,905.4	625,779.0	1,389,950.1	1,481,436.0
	Jul	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**
Flow (CFS)	11,605.0	5,798.0	5,071.0	5,166.5	4,626.5	6,036.0
Volume (AF)	712,314.9	355,881.2	301,217.4	317,119.8	274,814.1	370,489.7

Table 2: Flathead River near Polson USGS Gage # 12372000

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	10,380.0	9,234.0	7,778.0	9,223.0	18,960.0	25,820.0
Volume (AF)	637,124.4	511,933.0	477,413.6	547,846.2	1,163,764.8	1,533,708.0
	Jul	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**
Flow (CFS)	13,605.0	6,317.0	6,092.5	7,369.0	8,838.0	10,070.0
Volume (AF)	835,074.9	387,737.5	361,894.5	452,309.2	524,977.2	618,096.6

20. The Department finds that the proposed diversion of 1 CFS up to 710.53 AF of volume annually is physically available from Flathead River and Flathead Lake.

CONCLUSIONS OF LAW

21. 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."

22. 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).

23. 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).

24. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seek to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 12-20)

Legal Availability

FINDINGS OF FACT

25. Pursuant to a Department memo dated January 10, 2011, the Flathead valley's Deep Aquifer is controlled by the Flathead River and Flathead Lake, and therefore these two sources will be evaluated for legal availability of water. The area of potential impact for this application will be from USGS gage #12363000 at Columbia Falls on the Flathead River to the inlet of Flathead Lake, and Flathead Lake downstream to USGS gage #12372000 on the Flathead River near Polson. Seasonal fluctuations of drawdown from groundwater pumping are expected to be dampened resulting in a constant year-round rate of depletion equal to the annual rate of consumption. The following table includes a breakdown of monthly depletions expected to occur within the Flathead River and Flathead Lake.

Table 3. Summary of anticipated monthly net depletions (flow and volume) from hydraulically connected surface waters affected by the proposed groundwater appropriation

Month	Consumption (AF)	Depletion (AF)	Depletion (GPM)
January	50.0	50.0	372.2
February	50.0	50.0	372.2
March	50.0	50.0	372.2
April	50.0	50.0	372.2
May	50.0	50.0	372.2
June	50.0	50.0	372.2
July	50.0	50.0	372.2
August	50.0	50.0	372.2
September	50.0	50.0	372.2
October	50.0	50.0	372.2
November	50.0	50.0	372.2
December	50.0	50.0	372.2
TOTAL	**600.3**	**600.3**	

26. The Department assessed all surface water legal demands from the Flathead River at Columbia Falls, USGS gage #12363000, to the Inlet of Flathead Lake and on Flathead Lake to USGS gage # 12372000, on the Flathead River near Polson. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st. This is done because all of the legal demands exist within irrigation climatic area three which has a standard period of use from April 1st to October 31st. All other water uses were analyzed as year-round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users. A summary of all legal demands over the proposed period of depletion for the Flathead River and Flathead Lake are presented in Tables 4-5 below.

Table 4: Flathead River at Columbia Falls USGS Gage # 12363000 minus legal demands on Flathead River to inlet of Flathead Lake.

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	5,607.00	3,615.34	1,991.66	122,248.09
February	4,869.00	3,615.34	1,253.66	69,502.91
March	4,772.00	3,615.34	1,156.66	70,995.79
April	10,535.00	6,768.09	3,766.91	223,754.45
May	22,645.00	8,243.09	14,401.91	883,989.24
June	24,940.00	8,243.09	16,696.91	991,796.45
July	11,605.00	5,520.09	6,084.91	373,491.78
August	5,798.00	3,618.09	2,179.91	133,802.88
September	5,071.00	3,618.09	1,452.91	86,302.85
October	5,166.50	3,618.09	1,548.41	95,041.41
November	4,626.50	3,615.34	1,011.16	60,062.90
December	6,036.00	3,615.34	2,240.66	148,580.11

Table 5: Flathead River near Polson USGS Gage # 12372000 minus legal demands on Flathead Lake

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,270.00	98.68	10,171.32	624,309.87
February	9,207.50	98.68	9,108.82	504,987.79
March	7,731.50	98.68	7,632.82	468,496.74
April	9,214.50	169.13	9,045.37	538,396.48
May	18,960.00	169.13	18,790.87	1,154,720.78
June	25,720.00	169.13	25,550.87	1,518,919.56
July	13,570.00	169.13	13,400.87	823,783.21
August	6,312.00	169.13	6,142.87	378,287.17
September	6,109.00	169.13	5,939.87	354,026.16
October	7,342.00	169.13	7,172.87	441,508.57
November	8,864.50	98.68	8,765.82	520,684.14
December	9,953.50	98.68	9,854.82	604,883.10

27. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

28. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

29. Pending an adjudication of Confederated Salish & Kootenai Tribes hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in the Flathead River and Flathead Lake can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

CONCLUSIONS OF LAW

30. 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).

31. 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.

32. 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.) 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.§ 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.

33. 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 *et al.*, 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 et al., 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.

34. 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.§ 85-2-311(1)(a)(ii), MCA. (FOF 25-29)

Adverse Effect

FINDINGS OF FACT

35. The Applicant has the ability to regulate the volume of water diverted during times of water shortage so that the water rights of prior appropriators may be satisfied. During times of water shortage, they will initially reduce production by 50%. If the reduction in production is not enough, the Applicant has the ability to cease diversion altogether until water becomes available.

36. Attila Folnagy, groundwater Hydrologist for the Water Management Bureau of the DNRC, modeled drawdown of the aquifer by the proposed pumping of the Applicant's well. The evaluation of drawdown was completed using the Neuman-Witherspoon (1969) solution with the following parameters: T=1,600 ft^2/day and S=1.4x10^{-5}. After five years of pumping, drawdown in excess of 1 foot occurs in wells that are 36,000 feet from the Applicant's wells. There are 2,089 water rights and 1,294 water rights that have a known well depth greater than 100 feet that are predicted to experience drawdown greater than one foot. The largest modeled drawdown experienced is 20.5 feet and occurs in a well (Water Right # 76LJ 30071877) that is approximately 635 feet away from the proposed well. The smallest predicted available water

column is 11.5 feet after a modeled drawdown of 3.5 feet and occurs in Water Right # 76LJ 72529 00.

37. Depletion by pumping in the Deep Aquifer primarily occurs through propagation of drawdown through the overlying confining layer to the Flathead River downstream of Columbia Falls, and Flathead Lake. The proposed appropriation is year-round so the timing of total depletion will be constant year-round and equal to the average depletion rate of 372.2 GPM. The following table shows the expected depletion effects.

Table 6. Summary of anticipated monthly net depletions (flow and volume) from hydraulically connected surface waters affected by the proposed groundwater appropriation

Month	Consumption (AF)	Depletion (AF)	Depletion (GPM)
January	50.0	50.0	372.2
February	50.0	50.0	372.2
March	50.0	50.0	372.2
April	50.0	50.0	372.2
May	50.0	50.0	372.2
June	50.0	50.0	372.2
July	50.0	50.0	372.2
August	50.0	50.0	372.2
September	50.0	50.0	372.2
October	50.0	50.0	372.2
November	50.0	50.0	372.2
December	50.0	50.0	372.2
TOTAL	**600.3**	**600.3**	

38. The Applicant will be subject to the following conditions, limitations, or restrictions on its permit:

> The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form

provided by the Department, the appropriator shall keep a written *monthly* record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by January 31st of each year and upon request at other times during the year until certification. 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 shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

39. The Department finds that there will be no adverse effect to existing water users due to the proposed appropriation. There are no water rights which have wells with known depths completed in the Deep Aquifer which will experience drawdown below the bottom of their perforations due to the Applicant's proposed pumping, and water is both physically and legally available in the Flathead River and Flathead Lake in the amount which will be depleted.

CONCLUSIONS OF LAW

40. 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. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

41. 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(8).

42. In regard to senior hydropower water rights, the facts in this application are distinguishable from those In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLC) concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of 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 a groundwater appropriation that depletes surface water more than 150 miles upstream of Noxon Reservoir and is located above Flathead Lake and Salish-Kootenai Dam, and below the inflows from the Bureau of Reclamation's Hungry Horse Dam.

43. 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 and Confederated Salish & Kootenai Tribe's prior appropriations in this basin, which has not been closed to appropriation by the Legislature, does not include the right to prevent this appropriation where Avista and Confederated Salish & Kootenai Tribes can reasonably exercise their hydropower water rights.

44. 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,* (2011) Pg. 4.

45. 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 (1991), 249 Mont. 425, 816 P.2d 1054.

46. 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*, (2011) Pg. 7 (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). (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.

47. 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*, (2011) Pg. 8.

48. The Applicants have 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. § 85-2-311(1)(b) , MCA. (FOF 35-39)

Adequate Diversion

FINDINGS OF FACT

49. The Applicant proposes to pump 1 CFS up to 710.53 AF per year from a well located in the SENWSE Section 20, Township 28N, Range 20W, Flathead County. The well (MAWC #1) was drilled by O'Keefe Drilling, a licensed well driller in the State of Montana (Lic. No. WWD-126). MAWC #1 is completed to a depth of 222 feet and has an inner casing diameter of 10 inches. The well is a flowing artesian well with a shut-in pressure of 12.5 pounds per square inch (psi) or -28.8 feet below ground surface. The well is completed in a confined aquifer referred to by MBMG as the Deep Aquifer.

50. A Goulds model 7TLC submersible pump will be used to pump water from the well. The well pump will be controlled by a variable frequency drive (VFD) which will allow the pump to maintain constant system pressure with various plant operations occurring. The system pressure

will be set at 45 psi and the pump will ramp up/down to maintain this pressure. Water is conveyed from the wellhead via a 6" pipe welded to the side of the well casing. Water to be bottled is conveyed from the well to a series of paper filters and a ultra-violet disinfection system (UV Pro50). After filtration/disinfection, water is conveyed to the Monobloc model RFC 18-18-6 rotary rinser-filler-capper machines. These machines are capable of rinsing and filling 20 ounce water bottles at a rate of 7,000 per hour. Ultimately, Montana Artesian Water Company intends to use up to 20 of these machines to produce 140,000 water bottles per hour, 24 hours a day, 365 days a year (1.2 Billion water bottles; 588.08 AF bottled per year). Additionally, the rinser-filler-capper machine will use 224.25 gallons of rinse water per 1,093.75 gallons of water bottled, for a total annual use of 120.57 AF rinse water at full build out. Facility water (wash water, employee use) in the water bottling plant will be conveyed via a 1" pipe that tees off of the 6" supply line.

51. The Applicant is planning full build-out of the water bottling plant in stages. It will begin plant operation only using the natural artesian flow of the well (Approximately 175 GPM) until production requirements exceed the natural flow of the well, at which point they will install and divert water via the submersible pump. During staged build-out, water will be used for geothermal heating of the facility. Two ten-ton water source heat pumps will be used to operate the geothermal system. The heat pumps require a maximum flow of 3 GPM/ton; the peak flow demand of the geothermal system will be 60 GPM and the maximum annual volume used will be 12.28 AF. Once heat is taken from the groundwater, the water is discharged to an unnamed tributary to the Flathead River located approximately 160 feet east of the well. The proposed geothermal use will be temporary and the volume appropriated for geothermal use will count against the volume bottled; the maximum combined appropriation of these two uses will be 588.08 AF per annum. Upon full buildout, the Applicant plans to bottle the entire volume of 588.08 AF, however as the water bottling plant develops, up to 12.28 AF per annum will be used for the geothermal purpose. The Applicant estimates that the geothermal system can be utilized until the bottling plant reaches a production rate of 120,000 water bottles per hour, at which point the geothermal use will be replaced with a different heat source in favor of maximizing water

bottle production. Flow rate for all uses will be managed to not exceed the maximum requested flow rate of 1 CFS.

CONCLUSIONS OF LAW

52. 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.

53. 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.

54. 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. § 85-2-311(1)(c), MCA. (FOF 49-51)

Beneficial Use

FINDINGS OF FACT

55. The Applicant is proposing to divert 1 CFS flow up to 710.53 AF per year for year-round commercial and geothermal use associated with a water bottling plant. The commercial use is further broken down as shown below:

Bottled water:	588.08 AF per year
Bottle rinsing:	120.57 AF per year
Facilities wash water:	1.12 AF per year
On-site employee use:	0.76 AF per year

56. Annual volume of water bottled is based on the facility's maximum planned production of 140,000-20 ounce water bottles per hour (20 machines producing 7,000 bottles per hour based on manufacturer's specifications). Under full build-out the Applicant intends to bottle water 24

hours a day, 365 days per year, totaling 588.08 AF of water bottled on an annual basis. The annual bottle rinsing requirement was calculated based on the maximum annual water bottle production and manufacturer's specifications for rinsing requirements of the bottling machines (224.25 gallons of rinse water per 1,093.75 gallons bottled).

57. Per DNRC Form 615, a total of 15 gallons per employee per shift was calculated for employee use. At full build-out, it is anticipated that there will be three daily shifts of 15 employees each for a daily use of 675 gallons and annual use of 0.76 AF.

58. Facilities wash water use is estimated to be 1000 gallons per day (1.12 AF per year) for washing and rinsing equipment on-site.

59. The water bottling machines will require 440 GPM for rinsing and bottling purposes at the maximum anticipated production of 140,000 water bottles per hour. The Applicant is requesting 10 GPM to sufficiently provide the on-site employee uses and facility wash water. The total flow rate requested is 1 CFS (450 GPM).

60. The proposed geothermal use will be temporary and the volume appropriated for geothermal use will count against the volume bottled; the maximum combined appropriation of these two uses will be 588.08 AF per annum. Upon full buildout, the Applicant plans to bottle the entire volume of 588.08 AF, however as the water bottling plant develops, up to 12.28 AF per annum will be used for the geothermal purpose. The total combined flow rate of the commercial and geothermal uses will be 1CFS; during buildout the water delivery system will be managed to not exceed this flow rate when satisfying all uses. The Applicant estimates that the geothermal system can be utilized until the bottling plant reaches a production rate of 120,000 water bottles per hour, at which point the geothermal use will be replaced with a different heat source in favor of maximizing water bottle production.

61. The Applicant has proven the proposed commercial and geothermal uses are beneficial uses. The requested period of diversion and period of use is January 1-December 31. The requested flow rate of 1 CFS and requested annual volume of 710.53 AF have been proven to be necessary in order to sustain the beneficial uses.

CONCLUSIONS OF LAW

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

63. 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, supra; 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 *et al*, 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).

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,* (2011) Pg. 3 (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. Applicant proposes to use water for commercial use. Applicant has proven by preponderance of the evidence commercial use is a beneficial use and that 710.53 AF of diverted volume and 1 CFS flow of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 55-61)

Possessory Interest

FINDINGS OF FACT

65. 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

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 Applicants have proven by a preponderance of the evidence that they have 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. § 85-2-311(1)(e), MCA. (FOF 65)

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. 76LJ 30102978 should be GRANTED.

The Department determines the Applicant may divert water from a groundwater aquifer, by means of a well (222 feet deep), from January 1-December 31 at 450 GPM up to 710.53 AF per year, from a point in the SENWSE Section 20, Township 28N, Range 20W, Flathead County, for commercial and geothermal uses in a water bottling plant from January 1-December 31. The place of use is located in the SENWSE Section 20, Township 28N, Range 20W, Flathead County.

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

The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written *monthly* record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by January 31st of each year and upon request at other times during the year until certification. 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 shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 14th day of January, 2016

/Original signed by Kathy Olsen/
Kathy Olsen, Deputy Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 14th day of January, 2016, by first class United States mail.

MONTANA ARTESIAN WATER COMPANY
405 PEDERSON RD
KALISPELL, MT 59901

APPLIED WATER CONSULTING
% BRAD BENNETT
PO BOX 7667
KALISPELL, MT 59904

/Original signed by Nathaniel T. Ward/ *1/14/2016*
NAME DATE