Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6615
DNRCOAH@mt.gov

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

* * * * * * * * *

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41K-30150582 BY POWER-TETON COUNTY WATER & SEWER DISTRICT	))))	**FINAL ORDER**

* * * * * * * * *

On June 17, 2025, I conducted a hearing on the objection filed against the Department of Natural Resources and Conservation's ("DNRC" or "Department") Preliminary Determination to Grant ("PDG") in the above-captioned application. For the reasons set forth below, I hereby find that, notwithstanding the objections filed by Objectors William O. Speck, Jr. and Clayton and Terri Perry ("Objectors"), Power-Teton County Water & Sewer District's ("Applicant") has established by a preponderance of the evidence that the application satisfies the statutory criteria to be granted a permit.

BACKGROUND AND PROCEDURAL HISTORY

On October 4, 2023, DNRC issued the PDG regarding Application for Beneficial Water Use Permit No. 41K 30150582 ("Application") filed by Applicant. The Application seeks a new water use permit to supply water to the Power-Teton County Water and Sewer District for anticipated population growth in the future. On October 26, 2023, DNRC publicly noticed the PDG pursuant to § 85-2-307, MCA, and objections were timely filed to the Application contesting various criteria set forth in § 85-2-311, MCA, that Applicant must satisfy to be entitled to its permit. After reviewing the objections, DNRC determined that three Objectors[1] filed valid objections

1. VM Land Cattle Development Inc. submitted an objection on 12/12/2023, which the Department validated on 1/11/2024. I dismissed this objection on January 3, 2025, due to default as specified in my Order dated August 29, 2024.

contesting the criteria of adequate diversion, adverse effect, legal availability, and physical availability.

On January 19, 2024, DNRC assigned me to be the Hearing Examiner presiding over this contested case. I conducted a pre-hearing conference on January 30, 2024, after which I set a series of discovery and pre-hearings motions deadlines. Consistent with this schedule (as subsequently modified by request of the parties), the parties filed and fully briefed cross-motions for summary judgment, which I decided on May 9, 2025. In my Order of that date, I denied both Parties' motions for summary judgment. The matter eventually proceeded to a hearing in Great Falls, Montana on June 17, 2025. Upon the close of the hearing, I set a deadline of July 3, 2025, for the Parties to file closing briefs. Applicant and Objectors both timely filed closing briefs in this matter. I deemed the record closed on July 3, 2025.

APPEARANCES AND WITNESSES

At the hearing on June 17, 2025, Applicant was represented by counsel Betsy R. Story, and Objectors were represented by counsel Amber Henning. The following witnesses were called to testify at the hearing: Objector Clayton Perry; Objector William Speck, Jr.; Matt Miles, DNRC Havre Regional Manager; Evan Norman, DNRC Hydrologist and assigned Staff Expert; Nicole Rediske, Consultant; and Peter Klevberg, Consultant.

EXHIBITS

This Order cites the administrative record (AR) as it is scanned and filed by DNRC with a date of January 18, 2024. The initial citations of any document in the AR cite the name of the document then the pdf page number of the AR. Subsequent references refer to the document by name and internal page numbering only. Thus "Document title, AR at page #" followed by subsequent refences as "Document title at page #". The audio recording of the hearing is referred to as "HR" to signify "hearing recording" and noting the minute and second of the track at which the relevant evidence is presented.

In addition to the AR, and the audio recordings of the hearing, the record in this case includes the following exhibits offered by Applicant and Objectors that I admitted at the hearing:

Applicant:

1) P-025: Objectors' Responses to Discovery, September 20, 2024.

2) P-031: 41K-30127993 Post Decree Abstract (Perry Surface Right).

3) P-035: Nicole Rediske Pre-Filed Direct Expert Testimony.

4) P-036: Peter Klevberg Pre-Filed Direct Expert Testimony.

5) P-043: Matt Miles Deposition Transcript (Mini).

6) P-050: Fall 2023 Test – October 22, 2023 TD&H Memo re: Pump Tests (Excerpts).

Objectors:

1) O-E: M. Miles Exhibit 5_Email Correspondence Re: Town of Power Variances (05-26-2022).

2) O-L: Points of Diversion Map.

The pre-filed expert testimony consists of numbered questions and answers similar to an interrogatory. The pre-filed testimony is cited as [Witness name] pre-filed testimony [answer #].

MOTION TO STRIKE THE PREFILED TESTIMONY OF ALAN FROHBERG

Objectors pre-filed the expert testimony of Alan T. Frohberg on November 8, 2024. Mr. Frohberg was unable to attend the scheduled June 17, 2025 hearing and thus Applicant could not cross-examine him at the hearing. At the conclusion of the hearing Applicant moved to strike Mr. Frohberg's testimony based on Applicant's inability to cross-examine him.

I held a final pre-hearing conference with both Applicant and Objectors on May 21, 2025. The Objectors agreed to the hearing date. Applicant did not learn of Mr. Frohberg's planned absence from the hearing until June 9, 2025, eight days before the hearing. (Applicant's Post-Trial Brief at 3). Objectors did not seek to continue the hearing or propose to hold the record open for the purpose of permitting Mr. Frohberg to be cross-examined. The Applicant did not introduce Mr. Froberg's pre-filed testimony, and no other witness referenced Mr. Frohberg's pre-filed testimony.

ARM 36.12.220 requires that witnesses who submit pre-filed direct expert testimony be available for cross-examination at the hearing. (ARM. 36.12.220). I find that consideration of Mr. Frohberg's pre-filed testimony would violate the plain language of ARM 36.12.220, and accordingly I GRANT Applicant's motion to strike.

LEGAL STANDARD

Under Montana law, an applicant for a new beneficial water use permit always retains the burden of proof to demonstrate by a preponderance of evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the permit. *Bostwick Properties v. DNRC*, 2013 MT 48, ¶ 18, 369 Mont. 150, 296 P.3d 1154 (2013). The Montana Supreme Court has defined the preponderance of the evidence standard as one that "requires proof sufficient to support a conclusion that the asserted existence, non-existence, occurrence, or non-occurrence of the subject fact or factual occurrence was, is, or will be more probable than not, i.e., more likely than not." *Breuer v. State*, 2023 MT 242, ¶ 19 at n. 14, 414 Mont. 256, 274, 539 P.3d 1147, 1160 (2023). This a "relatively modest standard" that requires a showing only that it is "more probable than not" that the statutory criteria have been met. *Hohenlohe v. DNRC*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

In this case under the criteria from Section 85-2-311(1)(a)-(e), MCA, Applicant must prove that:

1) water is physically available at the proposed point of diversion in the amount that Applicant seeks to appropriate;
2) water can reasonably be considered legally available during the period in which Applicant seeks to appropriate, in the amount requested;
3) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
4) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
5) the proposed use of water is a beneficial use; and
6) 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.

Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's PDG reflects DNRC's preliminary determination that Applicant has proven these six criteria by the requisite standard in connection with the Application[2]. This hearing provides an opportunity for the Objectors to provide argument and evidence that Applicant did not meet this standard and for Applicant to counter that argument and evidence.

2. A permit applicant need only prove that the criteria of § 85-2-311(1)(f)-(h), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-311(2), MCA. No valid objection was received contesting the water quality criteria; therefore, it is not at issue in this proceeding.

UNCONTESTED CRITERIA

Because no valid objections were filed challenging beneficial use or Applicant's possessory interest, and because there is no evidence in the record that would cause me to revisit DNRC's findings and conclusions in the PDG as to those two criteria, I find that Applicant has met its burden of proof in regard to those two criteria for the reasons set forth in the PDG. (PDG, ¶¶ 88-95).

THE CONTESTED CRITERIA

The remaining criteria that Applicant must satisfy under § 85-2-311(1), MCA, are contested. The criteria of legal availability, physical availability, and adequacy of diversion are all dependent on the information from the pump tests conducted by the Applicant. The criterion of adverse effect is not.

The method and duration of pump tests is dictated by the requirements in ARM 36.12.121(2018). There are two types of pump tests that the Applicant performs to satisfy the rule and the statutory criteria. Legal and physical availability and adverse effect are predicated in part on the results of the 28-hour well tests performed in accordance with ARM 36.12.121 (2018). In this case the 28-hour well tests were performed on small vertical wells drilled for this purpose. (Power Water System Improvements - Phase 4 Water Rights Application Part 1 of 2 AR at 51). The data from these well tests are analyzed in conjunction with published information on the area's hydrography and geology to produce the Aquifer Test Report (Aquifer Test Report, AR at 273). The Aquifer Test Report describes the area and makes predictions about the aquifer's ability to produce the amount of water physically requested. It also identifies a "zone of influence" and identifies other groundwater rights in that area which may be affected by the proposed appropriation. The Department also produced a Revised Groundwater Depletion and Mitigation Report (Revised Groundwater Depletion and Mitigation Report AR at 285) which identifies potentially affected surface waters and predicts the effect of the proposed appropriation.

The adequacy of diversion criterion is dependent on the second type of well test, the drawdown and yield test required by ARM 36.12.1703 (2012). This test determines whether the proposed diversion works can actually divert the requested amount of water. This test is completed on the actual production well, in this case a 500-foot-long horizontal buried perforated pipe. The results of this test are not analyzed but are a simple pass/ fail determination. The two tests may be completed at the same time using the same data or may be completed separately.

An applicant may also request a variance from the aquifer testing requirements as described in ARM 36.12.121 (2018).

The remaining criteria, adverse effect, is proven by the applicant by evaluating the predicted drawdown to other water rights within the zone of influence as identified in the Aquifer Test Report, and evaluating the impact to other surface water rights identified as affected in the Mitigation and Depletion Report.

SUMMARY OF OBJECTORS' ARGUMENTS

For the sake of clarity, this Order will summarize issues presented in this matter before presenting findings of fact and conclusions of law.

Objectors Clayton and Terri Perry and William O. Speck, Jr. had one attorney and combined their cases and arguments. Their position is referred to as Objectors' case in the remainder of this Order.

Objectors argue that the aquifer testing data Applicant provided, and the manner in which it was collected, does not satisfy the requirements described in ARM 36.12.121. The Objectors further argue that the Applicant cannot prove satisfaction of the physical availability and adverse effect criteria by a preponderance of evidence. Because these arguments are mixed questions of law and fact and not distinct to any specific water permit criteria this Order is organized by the § 85-2-311, MCA, criteria.

Timetable of Application and Testing

Applicant filed an application for a permit for the proposed appropriation on December 23, 2020. (AR at 40). Based on the permit application, the Applicant had identified how and where it sought to appropriate water but had done only a preliminary investigation to determine the feasibility of the proposed appropriation. (AR at 53). Applicant drilled four smaller wells for testing and monitoring and began preliminary testing (AR at 172). The Applicant shared this data from the initial test wells and initial pump test with the DNRC. (AR at 113). Using this information combined with other published groundwater information, hydrologist Evan Norman prepared an Aquifer Test Report, identifying the physical and hydrogeologic characteristics of the aquifer and predicting the impact of the proposed appropriation on nearby groundwater rights, and the Depletion and Mitigation Report which predicted the impact of the proposed appropriation on nearby surface water sources. (AR at 273, 285).

The Applicant then constructed a horizontal well (essentially a 500' long perforated pipe buried horizontally) and conducted drawdown and yield tests to satisfy ARM 36.12.1703 (2012) in a final test in July 2024. The Applicant's materials refer to this as the "test well" while DNRC rules would refer to it as a "production well" because it is the specific well structure which will eventually be used in the proposed appropriation. This Order refers to it as the "production well".

Applicant's consultant TD&H performed the actual pump tests and Consultant Klevberg described the testing at the hearing. (HR #09 at 13:00). The three pump tests of the production well are described in detail in the TD&H Memorandum, dated 10/22/23. (Exhibit P-050).

Ms. Rediske and Mr. Klevberg's pre-filed testimony further described the pumping of the test wells. (Rediske pre-filed testimony#4, Klevberg pre-filed testimony #5).

Testimony of Clayton Perry

Objector Clayton Perry, a retired engineer, lives adjacent to the wellsite and worked for Boland Construction who constructed the production well in 2023. Perry testified that the construction crew expected to dig 26' deep but "hit hardpan at half that". (HR #03 at 4:45). Perry testified that the test well only produced 20 gallons per minute, but the Applicant had requested 170 gallons per minute. (HR #03 at 6:17). Perry also testified that he felt the discharge pipe from the well test went back into the unnamed tributary of Muddy Creek. Perry testified that he felt this improperly affected water levels in the unnamed tributary and improperly affected the well test results. (HR #03 at 8:33).

Testimony of Matt Miles

Matt Miles, Regional Manager at the DNRC Havre Regional Office, oversaw the Applicant's application and wrote the Preliminary Determination to Grant (PDG). (HR #5 at 1:20). Miles testified that he could not find any written correspondence requesting a variance from the aquifer testing requirements, but he did remember receiving a verbal request. (HR #5 at 2:10). Miles explained that he does not generally grant variances without consulting the Water Sciences Bureau or groundwater hydrologist, and that in this case after consulting with them "they had sufficient information to complete their assessment." (HR #5 at 4:48). Miles testified that he was the individual responsible for receiving a request for a variance and issuing the variance and that the fact that there wasn't a formal written request or grant did not change the issuance of the PDG. (HR #5 at 13:36, 16:33).

In addition, Miles explained that the DNRC doesn't specifically note or differentiate between proposed appropriations that occur within or outside of an irrigation district. However, it is "pretty well known that there are considerable flows that do come off the district notably during irrigation season into the Muddy Creek drainage." (HR #05 at 10:22).

Testimony of Evan Norman

Evan Norman is a groundwater hydrologist for DNRC who prepared the Aquifer Test Report and the Mitigation and Depletion Report for the technical analysis that DNRC used in formulating the PDG. Norman also authored a Staff Expert Report dated January 24, 2025. Norman testified that though he now (at the time of the hearing) had information that the production well was 15 feet below the ground surface, "the analysis of the report was based off the design of the well and the operation and construction of the proposed well, and at the time of this report 21 feet was what I was receiving with the permit and that's how I analyzed my aquifer test report." (HR #06 at 3:21).

Norman testified that he did not issue the variance but evaluated the adequacy of the information provided and recommended that the variance be issued. (HR #06 at 12:41). Norman recommended the variance be issued because the information submitted was adequate for his technical analysis. (HR #06 at 9:16). Norman reviewed the data already collected and believed that it was adequate to analyze the DNRC criteria and to create those aquifer properties for the technical analysis. (HR #06 at 13:41).

Under questioning and cross-examination, Norman explained the aquifer boundaries. (HR #06 at 15:52). Norman noted that he had chosen to extend the zone of potential influence beyond the aquifer boundaries as a conservative measure, including in his analysis of influence a greater area (and thus more potentially affected water rights). (HR #06 at 15:52, 20:12, 21:45). Norman used the aquifer test data to model the aquifer using the Cooper-Jacobs model. (HR #06 at 29:30, 30:19; AR at 276). Among the assumptions of the Cooper-Jacobs solution are that the aquifer is unconfined, has an infinite extent, and is homogeneous and of uniform thickness. (Aquifer Test Report at 5). Norman explained that when looking at the test well data there was no information that informed him that these conditions did not exist. (HR #06 at 31:07, 31:52). Norman testified that he did know that the test wells had hit bedrock which would counter the assumptions of the model. (HR #06 at 33:13). He explained that in nature aquifers are never going to fit every assumption and that the model are "textbook examples". (HR #06 at 33:45).

Upon cross-examination Norman clarified that his modelling of aquifer properties was based on the data derived from the 28-hour test (the first pump test) and also published scientific references and data as noted in his Aquifer Test Report. (HR #06 at 39:44).

Applicant's Attorney asked Norman: "And is the purpose of the initial pump test and the form 633 to determine, generally, the aquifer properties of where that well has been drilled?"

Norman: "Yes"

Applicant's Attorney: "And is that why you establish as a condition that the Applicant do multiple other pump tests once the horizontal wells are built?"

Norman: "The recommendation to condition the permit on additional tests was to establish the adequacy of diversion and like you had said the 28-hour test fulfilled those other needs that we would use at water sciences to do those other technical analyses." (HR #06 at 40:04).

Norman also explained that a variance to the constant discharge rate is commonly granted by DNRC because it can be hard to keep a constant rate, particularly at the beginning of the test but that this variance is granted after looking at the data as a whole. (HR #06 at 41:20). In addition, although the proposed appropriation has a maximum flow rate of 172 gallons per minute the Applicant's initial pump tests never produced that flow rate because the test walls would have been incapable of producing that flow rate, as they were more similar in size to regular domestic wells that produce flow rates of 15-25 gallons per minute. (HR #06 at 41:50).

Testimony of Nicole Rediske

Nicole Rediske is a civil engineer and project manager for TD&H engineering. (HR #07 at 00:37). Rediske did not design the horizontal wells for the project, but she testified that the horizontal wells were designed to be constructed 21 feet below ground level. (HR #07 at 4:03). When the bedrock was discovered at a shallower depth the wells were installed at approximately 15 feet below ground level. (HR #07 at 4:40). Rediske testified that TD&H conducted a vertical well test in May 2019 that produced only 17 gallons per minute. (HR #07 at 5:17). In May of 2023 the first horizontal test, lasting approximately 72 hours, produced an initial flow rate of 170 gallons per minute but the flow rate had dropped to 20 gallons per minute by the end of the test. (HR #07 at 5:50). In October/November of 2023 the well test produced a continuous flow rate of 54 gallons per minute. The test was conducted specifically at that time of year so that it wouldn't be affected by the Greenfields Irrigation District. (HR #07 at 6:10). In July of 2024, Applicant conducted

another test at a time selected to coincide with peak water demands of the proposed appropriation. (HR #07 at 6:55). This test maintained an average flow rate of 151 gallons per minute over a 72-hour period. (HR #07 at 7:17). Rediske explained that the discharge from the test site was discharged into the unknown tributary approximately 200 feet away. (HR #07 at 8:09). The discharge location was the same for all the pump tests. (HR #07 at 9:33). In her Pre-filed Testimony, Ms. Rediske explained exactly why she was sure the proposed appropriation would not adversely affect the Objectors' wells. (Rediske pre-filed testimony #15). Rediske noted:

- Objector Speck's well went dry during a period (February 2024) when no water was being pumped from the test well.
- The test well did not show water level fluctuations at this same time, suggesting the wells are not hydraulically connected.
- Applicant's test wells in the vicinity of Objector Speck's well did not respond to the pump tests but seemed to respond to seasonal groundwater level fluctuations which correspond with Objector Speck's observations.
- Objector's observations did not correspond with pump test timing or the well measurements generally. (Rediske pre-filed testimony #15).

Peter Klevberg Testimony

Peter Klevberg is a geotechnical engineer with TD&H. (Klevberg pre-filed testimony #1). Klevberg explained that "the aquifer on the Greenfields bench has significant artificial recharge and the entire area was probably a sagebrush plain before the Greenfields Irrigation District." (HR #08 at 3:28). Klevberg acknowledged that groundwater wells drilled in the vicinity of the wellsite are influenced by applied irrigation water because it is a shallow aquifer, it is quite transmissive, and most of the water applied as irrigation water enters the aquifer relatively quickly. (HR #08 at 9:53).

Klevberg explained the differences between the two wells used in the pump tests. The first well used in the pump test is a vertical well less than twenty feet deep whereas the second well, referred to as the test well (labelled as "test well" on Exhibit P-050), is a horizontal well 500 feet long that mimics the eventual well to be used in the proposed appropriation. (HR #09 at 3:00). (Other testimony clarified that the "test well" Klevberg refers to is the production well, i.e. the actual well that will be used in the proposed appropriation. (*See* Aquifer Test Report and Exhibit

P-050). During the first pump test the flow rates did not remain constant because the amount of water available to the pump decreased. Klevberg explained that this was not due to the availability of water but rather the increased resistance of the water getting to the pump. (HR #09 at 6:16).

Klevberg testified that he watched the water levels in the test wells during the pump tests and had noted that wells #2 and #3 were not actually connected to the test wells and there was no evident change in the water levels of those wells. (HR #09 at 16:12). Klevberg opined that Objector Speck's well was not affected by the pump tests based on the effect of pumping on these wells and the fact that there is a hydraulic divide between the test wells and Objector Specks well. The same reasoning applies to Objector Perry's well. (HR #09 at 17:40, 18:50, 19:55). Klevberg testified that in his professional opinion monitoring well 5 is the best indicator of the effects to the unnamed tributary. (HR # 09 at 23:04). Monitoring well 5 was unaffected by the discharge. (HR #09 at 23:40). Klevberg testified that the unnamed tributary is likely to be impacted by only one one-hundredth of a foot. (HR # 09 at 25:25).

On cross-examination Klevberg agreed that he had authorized a hydrogeologic report in May of 2019, but this report was based only on the pump test data from the May 2019 test, the vertical well pump test. (HR #09 at 29:49). Klevberg agreed that the Applicant had provided Evan Norman of the DNRC only the data from the May 2019 pump test at the time of his two aquifer test reports in the summer of 2022. (HR #09 at 30:10).

Based on the aquifer properties and well locations Klevberg determined that there would be no impact to any wells in the area, including Objector Perry and Objector Speck's. (Klevberg pre-filed testimony #13 and #14). Klevberg testified that he had relied on the 2018 Preliminary Engineering Report in order to determine the rates and quantities that the well will need to produce for the proposed appropriation. (Klevberg pre-filed testimony #16). Klevberg testified that he believes that the horizontal well (production well) and diversion are adequate for the proposed appropriation but that the Montana Department of Environmental Quality regulations will require a second well (a replacement or substitute well) which will need to be tested to ensure that it can meet the proposed flow rate and volume. (Klevberg pre-filed testimony #17).

CONCLUSIONS OF LAW

Objector Perry timely filed a valid objection to the Application on the basis that the Applicant did not prove the physical availability, legal availability, adverse effect, and adequate means of diversion criteria in MCA § 85-2-311(1). (Clayton and Terri Perry Objection Validity Form

dated 1/11/2024). Objector Speck timely filed a valid objection to the Application on the basis that the Applicant did not prove the physical availability, legal availability, adverse effect, and adequate means of diversion criteria in § 85-2-311(1), MCA. (William O. Speck Validity Form dated 1/11/2024). Because Objectors have satisfied their burden of production through their arguments, testimony, and witness examination, the remaining issue to be answered is whether Applicant has proven their application satisfies the physical availability, legal availability, adverse effect, and adequate means of diversion criteria in § 85-2-311, MCA.

An applicant for a beneficial water use permit possesses the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the applicant a new beneficial use permit. *Bostwick Properties v, DNRC*, 2013 MT 48, ¶ 18, 369 Mont., 150, 296 P.3d 1154 (2013). Consequently, at this hearing Applicant must show that:

1) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;
2) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested;
3) the water rights of a prior appropriator will not be adversely affected by the proposed new use; and
4) the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(§ 85-2-311(1)(a)-(e), MCA).

Has Applicant proved there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate by a preponderance of evidence?

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."

The DNRC has promulgated a rule describing how it determines whether physical ground water is available during the permit application process:

(1) Applicants for groundwater must follow aquifer testing requirements and provide to the department, at minimum, information and data in conformance with ARM 36.12.121.

(4) The requirements of ARM 36.12.121 must be followed, unless a variance has been granted by the department.

(ARM 36.12.1703 (2012)).

Aquifer Testing

ARM 36.12.121(2018) lists the requirements for the manner and scope of aquifer testing. In specific pertinent part the rule provides:

> Minimum testing procedures are as follows. (a) Pumping must be maintained at a constant discharge rate. (b) The discharge rate must be equal to or greater than the proposed rate for the entire duration of the test if the application is for one well or if the total proposed rate for multiple wells can be obtained from a single well. The discharge rate may be less than the proposed rate if the application is for multiple wells and the total proposed rate cannot be obtained from a single well, so long as the remainder can be demonstrated from the remaining wells under (f). (c) Discharge rate must be measured with a reliable measuring device and recorded with clock time according to the schedule on Form 633. (d) Minimum duration of pumping during an aquifer test must be 24 hours for a proposed use or discharge of 150 gpm or less and a proposed volume of 50 acre-feet or less. (e) Minimum duration of pumping during an aquifer test must be 72 hours for a proposed use or discharge of greater than 150 gpm and proposed volume greater than 50 acre-feet. (f) Eight-hour duration drawdown and yield tests must be conducted on additional production wells. (g) Discharged water must be conveyed a sufficient distance from the production and observation wells to prevent recharge to the aquifer during the test. Adequate water conveyance devices include pipe, large-diameter hose (e.g., fire hose), lined ditch or canal, or an existing irrigation system. (h) One or more observation wells must be completed in the same water-bearing zone(s) or aquifer as the proposed production well and close enough to the production well so that drawdown is measurable and far enough that well hydraulics do not affect the observation well. If existing wells are monitored they must not be pumped, or if pumped should be monitored at a frequency necessary

to separate the effects of the pumping. (i) Electronic pressure transducer/data logger instrumentation, electric well probes, pressure gauges on turbine pumped wells, or graduated steel tapes are acceptable methods of measuring groundwater levels. (j) Groundwater levels in the production well and observation well(s) must be monitored at frequent intervals for at least two days prior to beginning the aquifer test to evaluate background water-level trends. An applicant must evaluate and correct for background water-level trends. (k) Water levels in the production well and observation well(s) must be measured with 0.01- foot precision according to the schedule specified on Form No. 633.

(ARM 36.12.121 (2018)).

Variance to Aquifer Testing Requirements

An applicant may request a variance and be excused from the testing requirements of ARM 36.12.121 (2018). At the time of this application ARM 36.12.121 addressed variances, "Requests for variance from testing requirements must be submitted to the appropriate regional office manager." (ARM 36.12.121(1)(b) (2018)).

Matt Miles testified that he remembered discussing an aquifer testing variance with the Applicant and sharing that request with the Water Sciences Bureau. (Exhibit P-043 p. 17 line 10). An email from Evan Norman to Matt Miles recommends the following variances for the "Town of Power Application." (AR 4/10/24 Supplement at 68).

These included waiving the following requirements:

(a) Pumping must be maintained at a constant discharge rate.

(b) The discharge rate must be equal to or greater than the proposed rate for the entire duration of the test if the application is for one well or if the total proposed rate for multiple wells can be obtained from a single well. The discharge rate may be less than the proposed rate if the application is for multiple wells and the total proposed rate cannot be obtained from a single well, so long as the remainder can be demonstrated from the remaining wells under (f)

(e) Minimum duration of pumping during an aquifer test must be 72 hours for a proposed use or discharge of greater than 150 gpm and proposed volume greater than 50 acre-feet.

(j) Groundwater levels in the production well and observation well(s) must be monitored at frequent intervals for at least two days prior to beginning the aquifer test to evaluate background water-level trends. An applicant must evaluate and correct for background water-level trends.

(k) Water levels in the production well and observation well(s) must be measured with 0.01- foot precision according to the schedule specified on Form No. 633.

(Id.)

The Aquifer Test Report authored by Evan Norman also notes the Applicant had been granted variances. (Aquifer Test Report p. 1). The PDG notes that "a variance request was granted for ARM 36.12.121(3)(a), (3)(b), (3e), and (3(j) and 3(k)". (PDG FOF #22).

Matt Miles testified Applicant requested a variance and that he had issued a variance. Evan Norman testified that he approved the variance because he felt he had enough information to determine the aquifer properties. (HR #06 at 9:15). Email exchanges document the need for a variance, the Aquifer Test Report notes that Applicant received a variance, and the PD states that the Applicant received a variance.

Based on the testimony and evidence I find that the Applicant requested a variance, and the department issued a variance, in accordance with the law.

The PDG outlined the basis for its conclusion that the Applicant had fulfilled the physical availability criteria of § 85-2-311(1)(a)(i), MCA. (PDG ¶¶ 22-37). Objector did not provide any evidence on the issue of physical availability. I therefore find the Applicant has proven that water is physically available in the amount they want to appropriate.

Has Applicant proved there is water legally available at the proposed point of diversion in the amount that the Applicant seeks to appropriate by a preponderance of evidence?

Pursuant to § 85-2-311(1)(a)(ii), MCA, an applicant must prove by a preponderance of 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". Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands of water rights 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 of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.

This statutory language is reinforced and expanded upon by rule:

> 36.12.1704 PERMIT APPLICATION - EXISTING LEGAL DEMANDS (1) Legal demands usually exist on the source of supply or its downstream tributaries and may be affected by a proposed water right application, including prior appropriations and water reservations. These existing legal demands will be senior to a new application and the senior rights must not be adversely affected: (a) an applicant may use a plan for mitigation or aquifer recharge, as generally defined in 85-2- 102, MCA, as a means of showing water is legally available. (2) The department will identify the existing legal demands on the source of supply and those waters to which it is tributary and which the department determines may be affected by the proposed appropriation. (a) For groundwater appropriations, this shall include identification of existing legal demands for any surface water source that could be depleted as a result of the groundwater appropriation. ARM 36.12.1704 (eff. 10/12/2012)

Applicant relied on aquifer and drawdown modelling presented in the Aquifer Test Report. (AR at 273). DNRC Hydrogeologist Evan Norman identified surface water subject to depletion in his Revised Groundwater Mitigation and Depletion Report, satisfying 36.12.1704(2)(a). (Revised Groundwater Mitigation and Depletion Report at 3). Objectors did not offer any alternative evidence or evidence to indicate that the Applicant's information was incorrect.

The PDG made findings relative to legal availability. (PDG ¶¶41-59). Objectors did not offer any alternative evidence or evidence to indicate that the Applicant's information was incorrect.

I find that Applicant proved there is water legally available at the proposed point of diversion in the amount that the Applicant seeks to appropriate by a preponderance of evidence.

Has Applicant proved by a preponderance of the evidence that the proposed new use will not adversely affect a prior appropriator's water right?

An applicant for a beneficial water use permit must prove by a preponderance of evidence that the proposed new use will not adversely affect a prior appropriator's water right. § 85-2-

311(1)(b), MCA. “[A]dverse 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.” (*Id.)*

For groundwater applications, the department will evaluate how water levels in wells of prior water rights could be lowered and the rate, timing, and location where water flow could be reduced by any amount from hydraulically connected surface waters. (ARM 36.12.1706 (2012)).

The Department produced a list of the effects it anticipates on water rights in the area of the proposed appropriation. Both Objector Speck’s and Objector Perry’s water rights are on the list:

WR Number	Owners	Distance (ft)	Well Depth (Ft)	Static Water Level (ft)	Predicted Drawdown (ft)	Available Drawdown (ft)
41K 62706 00	PERRY	1470	26	20	3.8	2.2
41K 30127990	PERRY	1470	NA	NA	3.8	NA
41K 93585 00	SPECK	1720	27	6	3.3	17.7

(Aquifer Test Report at 10).

Objector Perry alleges that his water rights, Nos. 41K 62706 00, 41K 30127990, and 41K 30127993 were adversely affected by the test wells. (Perry Objection dated 12/07/2023). Based on the abstracts available on the DNRC Water Rights Query system (dnrc.mt.gov/water-resources/comprehensive-water-review/Water-Rights-Query-System) 41K 30127990 is a groundwater well but the abstract lists no depth presumably resulting in the “NA” fields on the list. Water right no. 41K 30127993 is for “livestock direct from source” from the unnamed tributary of Muddy Creek, which accounts for its absence from the list in the Aquifer Test Report.

Objector Speck alleges that his water right No. 41K 93585, a groundwater right from a well, will be adversely affected. (Speck Objection dated 11/22/2023).

Objector Perry alleged the predicted depletion to the unnamed tributary will dry up his well. Objector Perry presented no evidence to counter the expected change in his well water level presented in the Aquifer Test Report and instead argues that the depletion caused by the pumping tests was not measurable in his well because the pump tests discharged excess water directly

into the unnamed tributary, masking the effect of the depletion. (HR #03 at 5:58). The predicted depletion is based upon aquifer characteristics described in the Aquifer Test Report and calculated in Table 2 of the Revised Groundwater Depletion and Mitigation Report, dated August 31, 2022. (Aquifer Test Report at 10, Revised Groundwater Depletion and Mitigation Report at 5). The depletions are not dependent on Objector Perry's observations and thus discharging the pumped water into the unknown tributary is not relevant.

Objector Speck alleges that the water in his culvert well dropped about a foot during a previous well test but did not specify when this drop occurred. (HR #03 at 3:12- 7:05). Objector Speck did not provide evidence that the proposed appropriation will cause a further drop in his well water level or that this will negatively impact his use of the well.

Klevberg explained that his observation of the test wells during the pump test left him confident that the proposed appropriation would not significantly impact either the Objectors' wells or the surface water in the unnamed tributary. (Klevberg pre-filed testimony Answer 14B).

A new appropriator adversely affects a prior appropriator when the prior appropriator can no longer reasonably exercise their right as a result of the new appropriator's actions. "Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as …the lowering of a water table…, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions." (§ 85-2-401(1), MCA). Reasonable exercise might include lowering one's pump or even digging a deeper well if the original well doesn't fully penetrate the aquifer. See *In the Matter of the Application for Beneficial Water Use Permit No. 42M-30064191 by Arnold Thiel (DNRC Nov 15, 2013)* and *In the Matter of the Application for Beneficial Water Use Permit No. 41H 11716500 by Lisa and Gary Perry (DNRC May 12, 2004).*

Neither Objector Speck nor Objector Perry provided evidence or testimony that contradicted the Department's calculations in the Aquifer Test Report and aquifer testing observations, nor did either Objector provide evidence or testimony that they would not be able to reasonably exercise their existing water rights.

The PDG outlined the basis for its conclusion that the Applicant had fulfilled the adverse effect criteria of § 85-2-311(1)(b), MCA. (PDG ¶¶ 65-73). I find that the Applicant has proved the water rights of a prior appropriator will not be adversely affected by the proposed new use by a preponderance of evidence.

Has Applicant proved there is an adequate means of diversion for the amount of water that the Applicant seeks to appropriate by a preponderance of evidence?

An applicant for a beneficial water use permit must prove by a preponderance of evidence that "the proposed means of diversion, construction, and operation of the appropriation works are adequate." (§85-2-311(1)(c), MCA). Rule further provides:

> 36.12.1707 PERMIT APPLICATION CRITERIA - ADEQUATE DIVERSION MEANS AND OPERATION (1) The diversion works must be capable of diverting the amount of water requested to accomplish the proposed use without unreasonable loss through design or operation. (2) The diversion works must conform to current industry design, construction, and operation standards. (3) Wells must be constructed according to ARM Title 36, chapter 21, subchapter 6. (4) The applicant shall describe how the proposed system will be operated, from point of diversion through the place of use and on through the discharge of water, if any. (5) Preliminary design plans and specifications for the diversion and conveyance facilities and the equipment used to put the water to beneficial use must be submitted including the following: (a) the proposed flow rate and volume design capacity; (b) the expected overall efficiency, including diversion, conveyance, and system efficiencies; (c) the proposed diversion schedule, such as number and timing of irrigation sets; (d) system design, construction, or operation features which are intended to reduce or eliminate adverse effects on other water rights; and (e) the flow rate and operation of diversions must be described. (6) For developed springs, an explanation of how the spring will be developed must be included.

(ARM 36.12.1707 (2005)).

In addition, the yield and drawdown test ensures that the proposed appropriation can produce the requested maximum flow rate. In pertinent part:

> (2) The department will complete an evaluation of drawdown in the applicant's production well for the maximum pumping rate and total volume requested in the permit application using the information provided from the aquifer test.
>
> (3) The department will compare the drawdown projected for the proposed period

of diversion to the height of the water column above the pump in the proposed production well to determine if the requested appropriation can be sustained.

(ARM 36.12.1703 (2012)).

Objectors' complaints relating to adequacy of diversion are two-fold, first that the PDG and the DNRC analysis cite and rely on proposed well construction that differs from the actual constructed wells, and second that the well testing as submitted and analyzed does not show that the horizontal wells described in the PDG can actually produce the requested amount of water. The actual construction of the proposed wells is a mixed question of physical availability and adequacy of diversion. At the time of this application ARM 36.12.1703 (2012) was titled "Permit Application Criteria - Physical Groundwater Availability". This Order reviews the requirements of 36.12.1703 (2012) under the adequacy of diversion section.

The Comparison of Drawdown to the Height of the Water Column

The evaluation in ARM 36.12.1703(3) could be impacted by the Objector's assertion that the Applicant incorrectly identified the depth of the Applicant's proposed well. Objectors are correct that the PDG and the Aquifer Test Report all incorrectly describe the Applicant's production well as "21 feet bgs (below ground surface)" (Aquifer Test Report at 1, Revised Groundwater Depletion and Mitigation Report at 1). The PDG described the proposed point of diversion (well) as a horizontal well approximately 21 feet below ground surface. (PDG ¶¶18, 84). In reality the production well is approximately 15 feet below ground surface.

The Department performed the evaluation and comparison required by ARM 36.12.1703 (2012) in the Aquifer Test Report, dated June 27, 2022. The Aquifer Test Report was based on the original information that the production well was 21 feet below ground surface.

> "For the adequacy of diversion, the production wells could experience 10.0 feet of drawdown, leaving approximately 3.1 feet of available water column above the installation depth assuming the wells are installed 21 feet below ground surface."

(Aquifer Test Report at 11).

Evan Norman testified that he did not recompute the aquifer properties established in the Aquifer Test Report when construction altered the production well depth. (*See* Evan Norman Testimony). Norman testified that he "stands by" his calculations and the new

information would not alter his conclusions regarding the aquifer properties that were presented in the Aquifer Test Report. Norman revisited the drawdown calculation using information provided by the Applicant regarding the actual production well construction, which indicated that the horizontal well pipe was installed at a depth of 14.86 feet below ground surface (bgs).

(Staff Expert Report p. 5).

Norman first summarized the initial information:

> As part of the application, a 28-hour aquifer test was submitted pursuant to ARM 36.12.121 to provide a basis for modeling, including the adequacy of diversion criteria. In the Aquifer Test Report, dated June 27, 2022, a Cooper-Jacob (1946) solution was fit to the Observation Well, GWIC ID 301853 drawdown data to generate an estimate of aquifer properties for forward modeling. The adequacy of diversion forward modeling showed that a maximum drawdown of 7.1 ft would occur in each of the production wells with interference drawdown of an additional 2.9 ft for a total of 10 ft of drawdown. Based on the data available regarding assumed well completions, the available water column minus the total modeled drawdown equaled 3.1 ft of remaining available water column.

Next Norman adds more recent information:

> The depth to water measurements collected in the 36-inch vertical manhole between July 3, 2023, and July 30, 2024, show waters levels between 2.61 ft and 6.54 ft, below the top of casing, with an average of 5.41 ft. This data shows there would be an average of 12.45 ft of available drawdown in the vertical manhole. The available drawdown above the bottom of the modeled horizontal wells of 13.1 ft in the Aquifer Test Report, dated June 27, 2022, is comparable to actual conditions.
>
> In addition to the two tests dated May 2023 and November 2023, the Applicant performed a pump test July 17, 2024. The field notes from the pump test performed July 17, 2024, indicate that the proposed well maintained a flow rate of 170 gpm between the beginning of the pump test on July 17, 2024, at 1:27 p.m. to July 19, 2024, at 11:00 a.m. The duration of pumping at 170 gpm was 45.5 hrs. At the end of the 71.5-hour pump test on July 17, 2024, the pumping rate was reduced to 95 gpm and the total drawdown in the pumping well was 11.61 ft leaving 2.73 ft of water above the transducer.

(Staff Expert Report at 5,6).

The rule requires that DNRC evaluate the drawdown to determine if the proposed appropriation can be sustained. Norman performed that evaluation and specifically addressed it in the Staff Expert Report.

Maximum Pumping Rate and Volume

The second section of the ARM 36.12.1703(2) (2012) requires that the DNRC evaluate the drawdown to determine if the proposed appropriation can be sustained from the production well. (ARM 36.12.1703(2) (2012)).

The yield and drawdown test described in ARM 36.12.1703 (2012) is specifically disputed by Objectors who assert that the production well has never produced the requisite flow rate or volume. The pump test described in ARM 36.12.121 provides data that DNRC and Applicant use to determine aquifer characteristics and in turn describe expected depletions. In this case the tests analyzed to produce Evan Norman's Aquifer Test Report and Revised Depletion and Mitigation Report were performed on test wells. However, ARM 36.12.1703 (2012) provides that the department will analyze the drawdown in the production well for the maximum drawdown and requested volume.

At the time of the Aquifer Test Report, dated June 27, 2022, and the Revised Depletion and Mitigation Report, dated August 31, 2022, the production well had not been tested.

Evan Norman emailed Matt Miles on May 26, 2022 with the following statement:

> "I have information to evaluate adequacy of diversion for the well(s) that are currently installed but not the two proposed horizontal wells with a storage component. I recommend a condition that once the wells are drilled, to perform an 8-hour drawdown and yield tests on the wells to prove the requested flow rate. Have you put this condition (or something similar) on permits in the past? ***The provided Form 633 does give adequate information to evaluate physical availability and adverse affect for the proposed groundwater diversion***." (emphasis added). Exhibit O-E.

DNRC issued the Draft Preliminary Determination to Deny on September 15, 2022. FOF #85 stated:

"The average flow rate of 20 gpm for the 28-hour aquifer test did not exceed the requested maximum flow rate, however, an 8-hour drawdown and yield test are a condition to establish proof of adequacy of diversion once the horizontal wells are installed."

By July of 2024, Applicant completed three well tests on the production well and provided DNRC this test data. This includes the folder of raw data titled "2024-12-18 Staff Expert Production".

The following table describes the tests as related in the TD&H Memorandum, dated 10/22/23. (Exhibit P-050).

PRODUCTION WELL PUMP TESTS				
Date	**Well**	**Duration**	**Flow rate**	**Notes**
May 2023	Horizontal "Test Well"	3 hours	170 gpm	After 3 hours flow rate was unsustainable and test ended.
November 2023	Horizontal "Test Well"	73.5 hours	54 gpm	N/A
July 2024	Horizontal "Test Well"	47.5 hours 72 hours	170 gpm 151 gpm average	Flow meter seems to have read low. Bucket measurement indicated 200 gpm and 171 gpm respectively.

Evan Norman summarized this data in the Staff Expert Report with the following statements:

> In addition to the two tests dated May 2023 and November 2023, the Applicant performed a pump test July 17, 2024. The field notes from the pump test performed July 17, 2024, indicate that the proposed well maintained a flow rate of 170 gpm between the beginning of the pump test on July 17, 2024, at 1:27 p.m. to July 19, 2024, at 11:00 a.m. The duration of pumping at 170 gpm was 45.5 hrs. At the end of the 71.5-hour pump test on July 17, 2024, the pumping rate was reduced to 95 gpm and the total drawdown in the pumping well was 11.61 ft leaving 2.73 ft of water above the transducer.
>
> The multiple tests performed on the installed horizontal well *meet the requirements in ARM 36.12.12* for an eight-hour duration drawdown and yield test and the variance recommendation. (emphasis added).

(Staff Expert Report p.6).

By the time the final PD to Grant was issued in October 2024, Applicant had performed all required pump tests and rendered the proposed condition moot. However, the proposed language remained in the PDG:

> GWTC ID 301863 was evaluated by the Department's groundwater hydrologist with a 28- hour aquifer test at an average pumping rate of 20.0 GPM and a maximum drawdown of 5.36 feet below the static water level (swl) of 7.89 feet below top of the well casing (btc). This measured maximum drawdown leaves 0.8 feet above the well bottom. The average flow rate of 20.0 GPM for the 28-hour aquifer test did not exceed the requested maximum flow rate, however, ***an 8-hour drawdown and yield test are a condition to establish proof of adequacy of diversion once the horizontal wells are installed***. (emphasis added).

(PDG FOF #85).

I find that based on the evidence and testimony the Applicant has proven that there is an adequate means of diversion for the amount that the Applicant seeks to appropriate by a preponderance of evidence. Further, I find that the drawdown and yield test condition found in the PDG at Finding of Fact #85 is meant for the production well and the PDG should be corrected to reflect this change***.***

OBJECTORS' CLOSING BRIEF

Objector's closing brief draws parallels between the fact and legal patterns in this case and *Flathead Lakers Inc. v. DNRC*. 2023 MT 85, 412 Mont. 225, 530 P.3d 769.

In *Flathead Lakers,* Objectors took issue with DNRC's grant of a groundwater permit on the basis that the Applicant had significant omissions in the aquifer testing procedure and that the Department had failed to analyze hydraulically connected surface waters as rule required. The Court found that DNRC had erred in analyzing incomplete aquifer testing data without a variance and in relying on an internal memo to justify limiting the scope of surface water analysis for adverse effect.

In this case both DNRC and the Applicant agree that they did receive a variance and the DNRC hydrogeologist testified that he performed his analyses with the understanding that the Applicant had been excused from certain aquifer testing provisions. He also credibly testified that he was able to perform adequate and reliable calculations despite the missing information. The Objectors in this case did not provide any contrary evidence or point to specific conclusions which were tainted by the lack of aquifer testing data. Conversely, the Court in *Flathead Lakers* noted

that DNRC proceeded improperly without a request or grant of a variance from aquifer testing requirements and the Objectors produced evidence that the resultant analysis itself was faulty.

Here the Objectors argue that Objectors' water rights will be adversely affected by the proposed appropriation, but they produced no evidence to refute the Department's analysis of depletions. Conversely, in *Flathead Lakers* the Objectors produced evidence that the Department had not performed legally required analysis of all hydraulically connected surface waters and therefore could not have performed an adequate analysis of adverse effect. *Flathead Lakers* stands in part with the proposition that the Department must follow its own statutes and rules in analyzing a water permit application. In this case the Objectors presented no evidence that the Department did not do so.

CONCLUSION

Objectors have failed to bear their burden of production regarding the criteria of adequate diversion, adverse effect, legal availability, and physical availability put at issue by the valid objections they filed to the PDG. Applicants have met its burden of proof to show by a preponderance of evidence that it has satisfied all the applicable criteria necessary to warrant a grant of the Application.

FINAL ORDER

Beneficial Water Use Permit No. 41K-30150582 is hereby GRANTED for the reasons set forth in this Final Order and for the reasons set forth in the PDG as to the other applicable criteria of § 85-2-311(1), MCA, with the modifications listed below.

PDG FOF #18, #22, #43, and #85 are corrected to read as follows, new matter underlined, and stricken matter interlined:

> 18. The Application materials and information incorporated in the Department's Technical Report including Groundwater Depletion and Aquifer Testing Report describe the proposed wells that will be completed horizontally in a shallow sand and gravel aquifer at approximately ~~21~~ 15 feet below the ground surface; and an Unnamed Tributary of Muddy Creek is the hydraulically connected surface water source that will experience net depletion.
>
> 22. A 28-hour aquifer test was conducted by Boland Drilling and TD&H Engineering for the Town of Power located in Teton County. The applicant requests two points of diversion (wells), a total maximum flow rate of 170 gallons

per minute (GPM) and 91 acre-ft (AF) for year-round municipal use. The proposed wells will be completed horizontally in a shallow sand and gravel aquifer at approximately ~~21~~ 15 feet below the ground surface and will convey water to an existing distribution system. A variance request was granted by the Havre Regional Office for the following variances related to ARM 36.12.121(3)(a), 3(b), 3(e) and 3(j) and 3(k).

43. The physical amount of groundwater available within the zone of influence is the estimated groundwater flux of 3,653 AF/year. The existing legal demand for groundwater within the zone of influence is 513.6 AF. The amount of water legally available is the difference between physical water availability (3,653 AF/year) and existing legal demand (513.6 AF/year) equal to ~~73,39.4~~ 3,139.4 AF/year. The Applicant requested a maximum flow rate of 170 GPM and diverted volume of 91.0 AF. Groundwater is legally available in the amount requested.

85. GWIC ID 301863 was evaluated by the Department's groundwater hydrologist with a 28-hour aquifer test at an average pumping rate of 20.0 GPM and a maximum drawdown of 5.36 feet below the static water level (swl) of 7.89 feet below top of the well casing (btc). This measured maximum drawdown leaves 0.8 feet above the well bottom. ~~The average flow rate of 20.0 GPM for the 28-hour aquifer test did not exceed the requested maximum flow rate, however, an 8-hour drawdown and yield test are a condition to establish proof of adequacy of diversion once the horizontal wells are installed.~~

NOTICE

This Final Order is the Department's final decision in this matter. A final order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the reviewing court.

Dated this 21st day of October 2025.

/s/ Martin Balukas
Martin Balukas, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing was served upon all parties listed below on this 21st day of October 2025 by first class United States mail and/or by electronic mail (e-mail).

JOHN E. BLOOMQUIST - ATTORNEY
BETSY R. STORY - ATTORNEY
PARSONS BEHLE & LATIMER
P.O. BOX 104
HELENA, MT 59624
jbloomquist@parsonsbehle.com
bstory@parsonsbehle.com
ecf@parsonsbehle.com
Attorneys for Power-Teton County Water & Sewer District

AMBER HENNING – ATTORNEY
KIRK D. EVENSON - ATTORNEY
MARRA, EVENSON & LEVINE PC
2 RAILROAD SQUARE STE C
PO BOX 1525
GREAT FALLS, MT 59403 1525
ahenning@marralawfirm.com
kevenson@marralawfirm.com
dosterman@marralawfirm.com
Attorneys for Clayton &Terri Perry; and William O Speck Jr.

Staff Expert:
EVAN NORMAN
DNRC, WATER SCIENCES BUREAU
Evan.Norman@mt.gov

/s/ Jamie Price
Jamie Price, OAH Hearings Assistant
(406) 444-6615; jsprice@mt.gov