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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43B 30163846 BY WESTERN SHAMBALLA INC	**)))**	**DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On April 7, 2025, Western Shamballa Inc (Applicant) submitted Application for Beneficial Water Use Permit No. 43B 30163846 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 103 GPM and 75.84 AF for year-round commercial use. A preapplication meeting was held between the Department and the Applicant on June 11, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on August 28, 2024. The Department delivered the Department-completed Technical Analyses on October 11, 2024. The Department published receipt of the application on its website. The application was determined to be correct and complete as of April 28, 2025. An Environmental Assessment for this application was May 29, 2025.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form No. 600
- Addenda:
    - Controlled Groundwater Area Addendum, Form No. 600-CGWA
    - Yellowstone Controlled Groundwater Area Addendum, Form No. 600Y-over35
- Attachments:
    - Attachment 1 – Form No. 600 Preapplication and Technical Analyses Information
    - Attachment 2 – Form No. 600 Application addenda and review Item 5. Form 600-CGWA, Form 600 YCGA Application Addendum, and Well Log
    - Attachment 3 – Maps
    - Attachment 4 – Form No. 600 Points of Diversion Item 20
    - Attachment 5 – Form No. 600 Supplemental and Overlapping Water Rights, Item 24

  - Attachment 6 – Form No. 600 Narrative Responses to Items 26, 27, 33, 34, 35, 36, and 42.b
- Maps:
  - Map 1 - Proposed PODs/POUs and Overlapping POUs, basemap NAIP 2021 aerial imagery, map produced by WGM Group, dated 4/4/2025
  - Map 2 - Schematic Layout Cold Water Well for YHS, basemap NAIP 2021 aerial imagery, map produced by WGM Group, dated 4/4/2025
- Department-completed technical analyses based on information provided in the Preapplication Checklist, dated October 11, 2024

Information within the Department's Possession/Knowledge

- Groundwater Permit Technical Analyses Report – Part A, dated October 9, 2024
- Groundwater Permit Technical Analyses Report – Part B, dated October 11, 2024
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Bozeman Regional Office at 406-586-3136 to request copies of the following documents.
  - "Technical Memorandum: Physical Availability of Surface Water with Gage Data" (Elison, et al. 2019)
  - "Technical Memorandum: Physical and Legal Availability of Ground Water" (Water Sciences Bureau, 2019)
  - "Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping" (Water Sciences Bureau, 2019)

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

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; gov't lot means government lot.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from groundwater, by means of a 100-foot deep well, from 1/1 to 12/31 at 103 GPM up to 75.84 AF, from a point in government lot 10,

SWSWNWNE Section 30, T8S, R8E, Park County for year-round commercial use. The Applicant proposes to use water from the well, known as “East Gate 3” (EG 3), to provide cooling water for the pools at Yellowstone Hot Springs (YHS). The place of use (POU) is generally located in gov’t lots 1, 10, and 11, all in N2 Section 30, T8S, R8E, Park County.

2. The Appplicant proposes to divert 75.84 AF for non-consumptive commercial use. The consumptive use associated with the proposed use is 0 AF.

3. The proposed diversion is located approximately 700 feet away from the Yellowstone River.

4. The proposed permit will be associated with Statement of Claim No. 43B 194911-00, as the rights will share the same point of diversion (POD). The new permit would appropriate additional flow and volume from the existing well for new commercial use. The total flow rate and volume appropriated by the associated rights would be 135.0 GPM and 101.71 AF. No new consumption is proposed through this permit.

5. The proposed use will provide additional cold water to the pools at the YHS. Claim 43B 194912-00, which appropriates the entire unenhanced flow of LaDuke Springs up to 907.22 AF, provides the hot water to the pools. The Applicant also owns water rights 43B 84099-00, 43B 84100-00, 43B 30063068, 43B 30063069, and 43B 30067543 with overlapping place of use legal land descriptions that are not used in the pools and will not be associated with the proposed use.

CONTROLLED GROUNDWATER AREA

6. This application is to divert groundwater for the purpose of non-consumptive commercial use. This application is within the Yellowstone Controlled Groundwater Area (YCGA). The water from the well measured 49° Fahrenheit at the wellhead. The water had a specific conductance of 375 micromhos when measured. For appropriations over 35 GPM or 10 AF, with a groundwater temperature of less than 60°F, the Applicant shall comply with existing state law for permits to appropriate water and the limits on groundwater appropriations set forth in Articles II and III of the State of Montana/U.S. NPS Compact. The Department shall provide notice of the permit to the United States pursuant to Article II, Section B.2.b.ii.3.(a) and 85-2-207 MCA. The appropriator shall install an adequate metering device to allow the volume of water diverted to be recorded, and measurement shall be submitted to the Montana Bureau of Mines and Geology yearly. As this application is in the YCGA, the permit shall be subject to the following conditions if granted:

GROUNDWATER WASTER & CONTAMINATION

THIS RIGHT IS SUBJECT TO SECTION 85-2-505, MCA, REQUIRING ALL WELLS BE CONSTRUCTED SO THEY WILL NOT ALLOW WATER TO BE WASTED OR CONTAMINATE OTHER WATER SUPPLIES OR SOURCES, AND ALL FLOWING WELLS SHALL BE CAPPED OR EQUIPPED SO THE FLOW OF THE WATER MAY BE STOPPED WHEN NOT BEING PUT TO BENEFICIAL USE.

GROUNDWATER WELL – ACCESS PORT

THE FINAL COMPLETION OF THE WELL(S) MUST INCLUDE AN ACCESS PORT OF AT LEAST .50 INCH SO THE STATIC LEVEL OF THE WELL MAY BE ACCURATELY MEASURED.

U.S. NATIONAL PARK SERVICE COMPACT (YELLOWSTONE)

THIS RIGHT IS ISSUED IN ACCORDANCE WITH THE YELLOWSTONE CONTROLLED GROUNDWATER AREAS PROVISIONS OF THE JANUARY 31, 1994, U.S. NATIONAL PARK SERVICE MONTANA COMPACT. THE DEPARTMENT MAY MODIFY OR REVOKE THIS PERMIT IF THE PROVISIONS OF THE COMPACT ARE NOT MET; THE CHARACTER OF THE GROUNDWATER PRODUCED CHANGES SUCH THAT A RESTRICTION APPLIES PURSUANT TO ARTICLE IV, OR NEW RESTRICTIONS ARE IMPOSED AS A RESULT OF ARTICLE IV, SECTION J. FURTHER MODIFICATION MAY OCCUR TO LIMIT THE TOTAL WITHDRAWAL BY DAY, MONTH OR YEAR; TO REQUIRE A SYSTEM OF ROTATION OF USE WITHIN THE CONTROLLED AREA; OR ADJUST THE TOTAL WITHDRAWAL FROM TWO OR MORE WELLS IN THE AREA USED BY THE SAME APPROPRIATOR. THE APPROPRIATOR SHALL ALLOW ACCESS TO THE WELL BY THE MONTANA BUREAU OF MINES AND GEOLOGY FOR WATER SAMPLING AS PROVIDED IN THE COMPACT. FURTHER, THIS RIGHT IS SUBJECT TO THE CONDITION THAT THE APPROPRIATOR SHALL INSTALL AN ADEQUATE METERING DEVICE TO ALLOW THE VOLUME OF WATER DIVERTED TO BE RECORDED. THE TYPE AND LOCATION OF THE METER SHALL BE DETERMINED BY THE DEPARTMENT. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE VOLUME OF ALL WATERS DIVERTED, INCLUDING THE PERIOD OF TIME, AND SHALL SUBMIT SAID RECORDS BY JANUARY 15TH OF EACH YEAR AND/OR UPON REQUEST TO THE MONTANA BUREAU OF MINES AND GEOLOGY, MONTANA TECH, 1300 W PARK ST, BUTTE, MT 59701-8997.

DEPARTMENT RIGHT OF ACCESS

THIS RIGHT IS SUBJECT TO THE AUTHORITY OF THE DEPARTMENT TO REVOKE THE RIGHT IN ACCORDANCE WITH 85-2-314 OR 85-2-402(9), MCA, AND TO ENTER ONTO THE PREMISES FOR INVESTIGATIVE PURPOSES IN ACCORDANCE WITH 85-2-115, MCA.

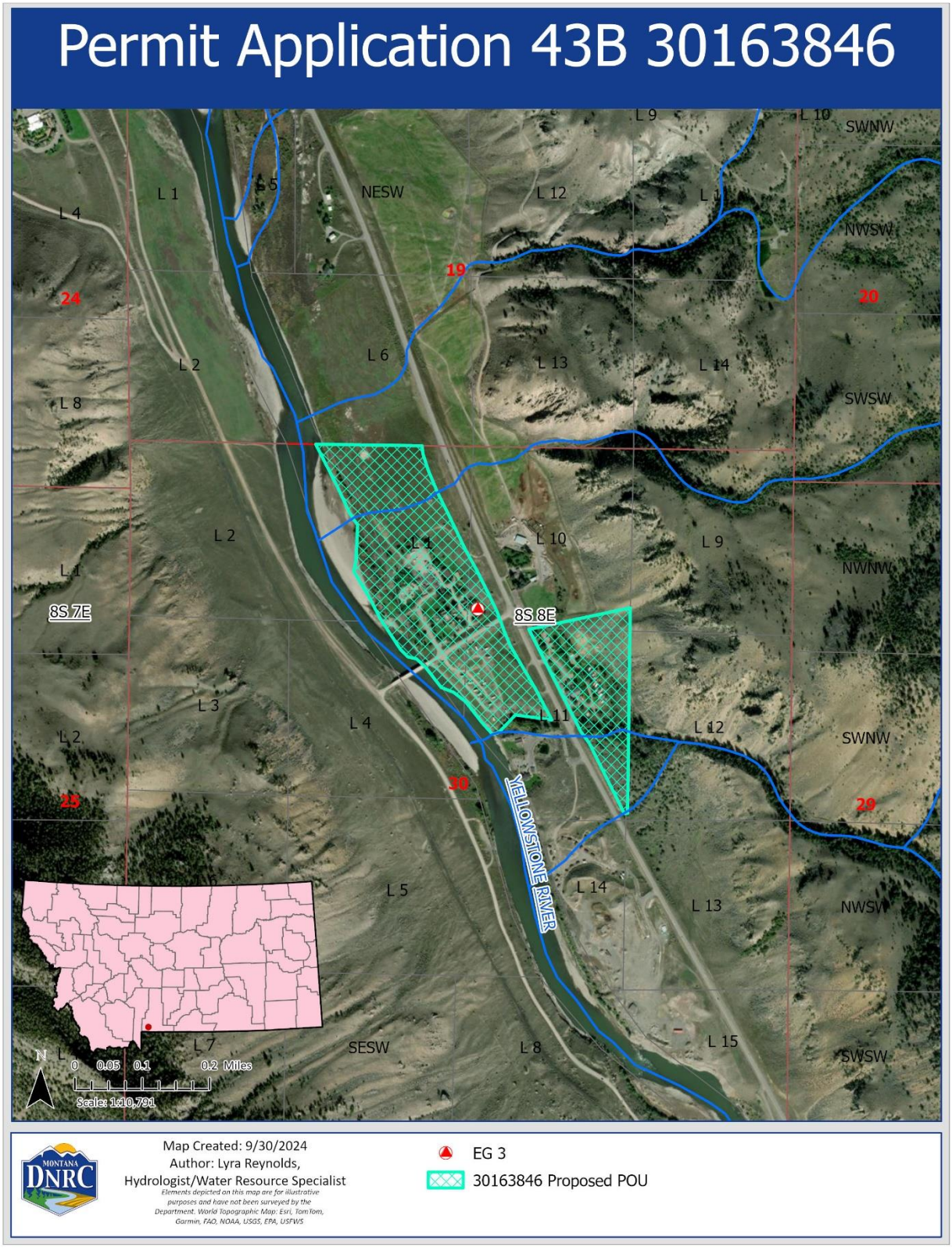

Figure 1. Map of Permit Application 43B 30163846

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

GENERAL CONCLUSIONS OF LAW

7. 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 . . .

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

> … the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
> (a) (I) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
> (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
> (A) identification of physical water availability;
> (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

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

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

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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

9. 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.

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

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

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

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

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

11. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any

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

12. 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

13. The Applicant is requesting to divert water from a groundwater well for commercial use from 1/1 to 12/31 at a rate of 103 GPM up to 75.84 AF per year. The proposed permit will supplement existing Statement of Claim No. 43B 194911-00 for 32 GPM up to 25.87 AF per year. The total combined flow rate and volume for the well is 135 GPM up to 101.71 AF per year.

14. The Applicant provided an Aquifer Testing Addendum (Form 600-ATA) and Aquifer Test Data Form (Form 633) as part of the preapplication meeting. A variance from aquifer testing requirements in ARM 36.12.121(3(f)) and ARM 36.12.121(3(g)) was requested by the Applicant because no observation well was used in the aquifer testing. The variance request was reviewed by Evan Norman, DNRC Groundwater Hydrologist, on the Aquifer Testing Requirements Review dated June 27, 2024, and the Department confirmed aquifer properties could be evaluated based on the information provided in Form 633. The variance was granted by the Bozeman Regional Manager Kerri Strasheim on July 19, 2024.

15. The proposed well is completed 100 feet below ground surface (bgs) in the unconfined sand and gravel aquifers of the Yellowstone River. The well log lists fine sands, gravels, and cobbles from the surface to the bottom of the well which includes fine and coarse sands and pea-sized gravels. The alluvium along the Yellowstone River is well sorted sand, gravel, cobbles, occasionally boulders, with some discontinuous clay layers. This aquifer includes alluvium of the Yellowstone River, glacial outwash and alluvial fan deposits, which all three act as one unit (Clark, 1991). Examining well logs shows an alluvium deposit along the Yellowstone River that is nearly 150-feet thick in the Corwin Springs area.

16. The Department-completed Groundwater Permit Technical Analyses Report – Part A, dated October 9, 2024, evaluated the groundwater physical availability in the source aquifer by

calculating groundwater flux through a zone of influence (ZOI) corresponding to the 0.01-foot drawdown contour. Using the Theis (1935) unconfined solution, a transmissivity (T) value of 11,700 ft^2/day, a storativity (Sy) of 0.1, a constant head boundary representing the Yellowstone River approximately 700 feet from the proposed well, and a constant pumping rate of 47.0 GPM during the year-round period of diversion assigned to the proposed well, the 0.01-foot drawdown contour is modeled to extend approximately 6,300 feet to the northwest and 3,800 feet to the southwest from the proposed well within the source aquifer. The ZOI was truncated to the northeast extent of the Yellowstone River alluvium as mapped by Olson and Reiten (2003) and to the constant head boundary of the Yellowstone River. The direction of groundwater flow within the source aquifer is predominantly parallel to the Yellowstone River from southeast to northwest. The average width of the ZOI that is perpendicular to groundwater flow is 1,340 feet. The average groundwater gradient of 0.003 feet/foot through the ZOI was calculated using well static water level elevations from GWIC and verified using the change in land surface elevation over a measured distance. The calculation of groundwater flux (Q) through the delineated area is given by the following equation:

$$Q = TWi$$

Where, T = Transmissivity = 11,700 ft^2/day

W = Width of Zone of Influence = 1,340 ft

i = Groundwater Gradient (GWIC wells, land surface elevations) = 0.003 ft/ft.

The calculated aquifer flux through the ZOI is 47,034 ft^3/day or 394.1 AF/yr.

17. The Department finds that the amount of groundwater physically available at the proposed point of diversion is 394.1 AF/yr.

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

LEGAL AVAILABILITY

FINDINGS OF FACT

19. The Department-completed Groundwater Permit Technical Analyses Report – Part A, dated October 9, 2024, determined 23 active groundwater rights are completed within the ZOI in the source aquifer, seen in Table 1 below.

Table 1. Water rights in zone of influence

Water Right No.	Water Right Type	Owner	Volume (AF)
43B 18946-00	Groundwater Certificate	WILLIAM C OESTREICH	16.5
43B 194911-00	Statement of Claim	WESTERN SHAMBALLA INC	25.87
43B 20279-00	Groundwater Certificate	SANDRA L DEFFNER	1.5
43B 30050616	Provisional Permit	AMY BARTLETT; GERALD BARTLETT	2.33
43B 30063068	Provisional Permit	WESTERN SHAMBALLA INC	10
43B 30063069	Provisional Permit	WESTERN SHAMBALLA INC	10
43B 30067543	Provisional Permit	WESTERN SHAMBALLA INC	10
43B 30146141	Statement of Claim	BROGAN LP; HUNTER MICHELBRINK	10
43B 30146142	Statement of Claim	BROGAN LP; HUNTER MICHELBRINK	2
43B 30146143	Statement of Claim	BROGAN LP; HUNTER MICHELBRINK	10
43B 30146146	Statement of Claim	BROGAN LP; HUNTER MICHELBRINK	10
43B 30146147	Statement of Claim	BROGAN LP; HUNTER MICHELBRINK	2
43B 30148783	Provisional Permit	BROGAN LP	2.91
43B 30151035	Provisional Permit	BRIAN D ERTEL; HALI K ERTEL	4.5
43B 30152881	Provisional Permit	HARRY D MILLER	1.08
43B 55147-00	Groundwater Certificate	CHURCH UNIVERSAL & TRIUMPHANT INC	10.05
43B 58438-00	Groundwater Certificate	DRAKE, LOIS E LIVING TRUST	4.75
43B 5850-00	Groundwater Certificate	PATRICIA A OESTREICH; WILLIAM C OESTREICH	1.63*
43B 60712-00	Groundwater Certificate	SANDRA L DEFFNER	8.5
43B 84099-00	Groundwater Certificate	WESTERN SHAMBALLA INC	6.77
43B 84100-00	Groundwater Certificate	WESTERN SHAMBALLA INC	6.77
43B 96767-00	Provisional Permit	NOAH BUCKNER; OLGA BUCKNER	1
43B 97867-00	Provisional Permit	HARRY D MILLER; LINDA J MILLER	1.05
*Volume quantified by Department based on information in water right file.			

20. Two water rights, Groundwater Certificates (GWCTs) 43B 84099-00 and 43B 84100-00, are owned by the Applicant and share a volume. The volume of the two Groundwater Certificates was counted once when quantifying groundwater legal demands. GWCT 43B 5850-00 does not have a volume recorded in the Department database. The volume assigned to the water right is based on the New Appropriation's standard at the time of filing for domestic use for one home, which

included ¼ acre of lawn and garden. The legal demands within the ZOI total 152.44 AF per year. Compared to groundwater flux of 394.1 AF per year, 241.66 AF per year remain legally available to appropriate after all existing water rights have been satisfied. Table 2 compares the physical groundwater supply, current legal demands, and the Applicant's requested volume. The calculations demonstrate that groundwater is legally available for the proposed appropriation.

Table 2. Comparison of physical availability, legal availability, and requested volume

Groundwater Flux (AF)	Legal Demands (AF)	Legal Availability (AF)
394.1	152.44	241.66
Legal Availability (AF)	**Requested Volume (AF)**	**Net Effect (AF)**
241.66	75.84	165.82

Depleted Surface Water Analysis

21. Per ARM 36.12.1704, the Department will identify and quantify existing legal demands of water rights for any surface water source that the Department determines will be depleted as a result of the proposed groundwater appropriation. The Department-completed Groundwater Permit Technical Analyses Report – Part A identified the Yellowstone River as hydraulically connected. The proposed use includes commercial purposes. Water from the proposed well would be diverted to pools and discharged to the Yellowstone River. The consumed volume associated with the proposed flow-through pools and discharge via existing pipeline to the Yellowstone River is 0 AF per year. The pools are currently filled with warm water from LaDuke springs with Statement of Claim No. 43B 194212-00, and Claim 43B 194911-00 provides the existing commercial use to the pools. The annual net evaporation from the pools was calculated using the DNRC gridded net evaporation value for the subject application. The annual net evaporation from the pools is 0.1 AF, assuming an imagery measured surface area of approximately 0.06 acres. The subject application proportion of pool volume is 7.5% (Table 3); the annual consumed volume for Application No. 43B 30163846 is 0.0 AF per year, maintaining significant figures.

Table 3. Proportion of total volume for supplemental water rights associated with Application No. 43B 30163846.

Water Right Type	Water Right No.	Annual Volume (AF)	Supplemental Proportion
Statement of Claim	43B 194911-00	25.9	0.026
Statement of Claim	43B 194912-00	907.2	0.899
Application No.	43B 30163846	75.8	0.075
	Total	1,008.9	1.0

22. As net depletions to the surface water source are 0 AF, the Department did not compare physical availability of the surface water source to quantified downstream legal demands.

23. The Department finds water is legally available for the proposed non-consumptive commercial use for the proposed 1/1 to 12/31 period of diversion.

ADVERSE EFFECT

FINDINGS OF FACT

24. The Applicant proposes to divert water from a groundwater well for non-consumptive commercial use from 1/1 to 12/31. Diversions from the well, which is also used by Claim 43B 194911-00, can be decreased or shut off completely in response to call. The Applicant also stated other water rights may be curtailed if call were ever made or during times of shortage to ensure senior water rights are satisfied.

25. Drawdown in nearby wells was modeled using the Applicant's proposed pumping schedule and annual volume. The drawdown in existing wells was modeled using the Theis (1935) solution, T = 11,700 ft^2/day, Sy = 0.1, a constant-head boundary representing the Yellowstone River approximately 700 feet from the proposed well, and a monthly pumping schedule for a period of five years. The one-foot drawdown contour extends a maximum of 11 feet from the proposed well using the monthly pumping schedule. Zero water rights exist within the one-foot drawdown contour.

26. The proposed use is non-consumptive, and a net depletion of 0 AF was identfied for the hydraulically connected surface water. No adverse effect will occur to surface water rights as a result of the proposed use.

27. As the well location is in the YCGA, the Applicant had to provide supplemental information to show that no adverse effect will occur to the Yellowstone National Park hydrothermal system. The Applicant provided sufficient information to show that source water (groundwater) is not connected to the reserved portion of Category 3 or 4 streams, as defined in the U.S. National Park Service-Montana Compact. The Applicant stated the water temperature in the well is 49° Fahrenheit at the wellhead. The water had a specific conductance of 375 micromhos. The information provided shows sufficient information that the proposed appropriation is not connected to the hydrothermal resource being protected in the YCGA. The Applicant will also be required to install a meter and report usage to the MBMG every year. The meter will ensure the volume diverted from the well does not exceed the total amount authorized by the proposed appropriation and associated right, Claim 43B 194911-00.

28. The Department finds that the proposed appropriation of 103 GPM up to 75.84 AF for commercial use will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

29. The Applicant proposes to divert water from a groundwater well, EG 3, to provide cooling water to pools at the Yellowstone Hot Springs. The well will be equipped with a 7.5-horsepower submersible pump. From the well, water will be conveyed to a pressure tank and then the pool complex through a 6-inch water line. The diversion and conveyance system are already in use under existing Claim 43B 194911-00 but were designed to deliver a flow rate up to 135 GPM. The Applicant has an in-line flow meter installed and will be required to maintain a measurement device, as the proposed appropriation is in the YCGA.

30. Total drawdown and the remaining available water column were determined in the Department-completed Groundwater Permit Technical Analyses Report – Part A. Total drawdown is the sum of interference drawdown and predicted drawdown with well loss. Interference drawdown from existing Statement of Claim No. 43B 194911-00 was calculated by adding the maximum theoretical drawdown including wells losses to divert an additional volume of 25.87 AF per year for commercial purposes using the Applicant-provided pumping schedule.

31. Predicted drawdown with well losses is calculated by dividing the predicted theoretical maximum drawdown by a well efficiency value. Well efficiency is calculated by dividing the modeled maximum drawdown for the aquifer test by the maximum observed drawdown of the aquifer test. The aquifer adjacent to the proposed well would experience a predicted maximum drawdown of 19.1 feet during July of the first year of pumping. The remaining available water column for the proposed well is 45.1 feet and is equal to the available drawdown above the bottom of the well minus total drawdown (Table 4).

Table 4. Remaining available water column for the proposed well (GWIC ID 271803).

Drawdown Estimate	GWIC ID 271803
Total Depth at Bottom of Perforated Interval (ft btc)[1]	102.0
Pre-Test Static Water Level (ft btc)	37.85
Available Drawdown Above Bottom of Well (ft)	64.2
Observed Drawdown of Aquifer Test (ft)	25.7
Modeled Drawdown Using Mean Aquifer Test Rate (ft)	4.6
Well Efficiency (%)	18.0
Predicted Theoretical Maximum Drawdown (ft)	2.6
Predicted Drawdown with Well Loss (ft)	14.2
Interference Drawdown w/ Well Loss (Statement of Claim No. 43B 194911-00) (ft)	4.9
Total Drawdown (ft)	19.1
Remaining Available Water Column (ft)	**45.1**

[1]The total well depth measuring point (bgs) was adjusted to the top of well casing based on a 2.0 ft well casing stickup reported on the well log.

32. The Department finds the proposed means of diversion and conveyance are adequate.

BENEFICIAL USE

FINDINGS OF FACT

33. The Applicant proposes to divert 75.84 AF of groundwater, year-round, at a rate of 103 GPM for non-consumptive commercial use to provide additional cool water to the pools at the Yellowstone Hot Springs. The place of use is generally located in N2 Section 30, T8S, R8E, Park County. Commercial use is a recognized beneficial use of water in the state of Montana.

34. The Applicant stated additional cool water is needed as the number of pool users increases. The pools are already in place, but the proposed project will provide additional water to accommodate increased use of the YHS facility as development in the area continues.

35. The Department does not have a standard water use calculation for this commercial use. The proposed volume, 75.84 AF, is the additional volume required to meet future needs for the facility. The Applicant estimated the monthly flow rates and volumes for the commercial use of cold water for the pools, based on existing use, number of residents and projected guest counts. The requested volume was found by subtracting the volume currently authorized under Claim 43B 194911-00 (25.87 AF) from the total volume demand for the well (101.71 AF). No water is proposed to be consumed by the new commercial use.

36. The requested flow rate of 103 GPM was found by subtracting the flow rate currently authorized under Claim 43B 194911-00 (32 GPM) from the peak flow rate needed (135 GPM). The existing pump and pipeline system are capable of diverting and delivering a total 135 GPM to the pool complex. The well was pump-tested at 220 GPM, which is greater than the requested flow rate.

37. The total flow rate and volume that will be diverted from the well under the proposed appropriation and existing supplemental water right, Claim 43B 194911-00, is 135 GPM and 101.71 AF.

38. The Department finds the proposed flow rate of 103 GPM and diverted volume of 75.84 AF for year-round commercial use a beneficial use of water.

POSSESSORY INTEREST

FINDINGS OF FACT

39. 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

CONTROLLED GROUNDWATER AREA

40. Pursuant to the Yellowstone Controlled Groundwater Areas provisions of the January 31, 1994, U.S National Park Service-Montana compact, 85-20-401, MCA, the Department may process and grant a permit for groundwater if the proposed appropriation is determined not to be hydrologically connected to the reserved portion of a Category 3 or 4 stream, or if the limit on consumptive use has not been reached. This application may be processed under the terms of the U.S. National Park Service- Montana Compact, subject to proof of the applicable permit criteria. (FOF No. 6).

PHYSICAL AVAILABILITY

41. 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."

42. 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).

43. 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).

44. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF Nos. 13 – 18).

LEGAL AVAILABILITY

45. 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).

46. 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.

47. 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).

48. Because the Applicant bears the burden of proof as to legal availability, the Applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. Section 85-2-311(a)(ii), MCA. Absent such proof, the Applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim*

Helmer (DNRC Final Order 2009); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

49. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. *Robert and Marlene Takle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007 *)*(permit granted)*, affirmed*, *Montana River Action Network et al. v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; Applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, Applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute

for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. *Royston, supra*.

50. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF Nos. 19 – 23).

ADVERSE EFFECT

51. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. *See Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

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

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

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

55. It is the Applicant's burden to produce the required evidence. *E.g., Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change*

Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Bostwick Properties, Inc.*, ¶ 21.

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

57. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF Nos. 24 – 28).

ADEQUATE DIVERSION

58. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

59. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource*. In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

60. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No.* 41I-105511 *by Flying J Inc.* (DNRC Final Order 1999).

61. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

62. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

63. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF Nos. 29 – 32).

BENEFICIAL USE

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

65. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. *E.g.*, *McDonald*; *Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, *Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, *Dee Deaterly v. DNRC* , Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

66. Amount of water to be diverted must be shown precisely. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3 (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

67. It is the Applicant's burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 ("issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied"); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); *see also Royston; Ciotti*.

68. The Applicant proposes to use water for commercial use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence commercial use is a beneficial use and that 75.84 AF of diverted volume and 103 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF Nos. 33 – 38).

POSSESSORY INTEREST

69. 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.

70. 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.

71. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF No. 39)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 43B 30163846 should be GRANTED.

The Department determines the Applicant may divert water from groundwater, by means of a 100 ft well, located in gov't lot 10, SWSWNWNE Section 30, T8S, R8E, Park County. The Applicant is authorized to divert at a 103 GPM flow rate up to 75.84 AF from 1/1 to 12/31 for year-round, non-consumptive commercial use. The authorized place of use is in gov't lots 1, 10, and

11, N2 Section 30, T8S, R8E, Park County. The maximum flow rate and volume that will be diverted from groundwater under the new appropriation cannot exceed 103 GPM and 75.84 AF.

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

GROUNDWATER WASTER & CONTAMINATION

THIS RIGHT IS SUBJECT TO SECTION 85-2-505, MCA, REQUIRING ALL WELLS BE CONSTRUCTED SO THEY WILL NOT ALLOW WATER TO BE WASTED OR CONTAMINATE OTHER WATER SUPPLIES OR SOURCES, AND ALL FLOWING WELLS SHALL BE CAPPED OR EQUIPPED SO THE FLOW OF THE WATER MAY BE STOPPED WHEN NOT BEING PUT TO BENEFICIAL USE.

GROUNDWATER WELL – ACCESS PORT

THE FINAL COMPLETION OF THE WELL(S) MUST INCLUDE AN ACCESS PORT OF AT LEAST .50 INCH SO THE STATIC LEVEL OF THE WELL MAY BE ACCURATELY MEASURED.

U.S. NATIONAL PARK SERVICE COMPACT (YELLOWSTONE)

THIS RIGHT IS ISSUED IN ACCORDANCE WITH THE YELLOWSTONE CONTROLLED GROUNDWATER AREAS PROVISIONS OF THE JANUARY 31, 1994, U.S. NATIONAL PARK SERVICE MONTANA COMPACT. THE DEPARTMENT MAY MODIFY OR REVOKE THIS PERMIT IF THE PROVISIONS OF THE COMPACT ARE NOT MET; THE CHARACTER OF THE GROUNDWATER PRODUCED CHANGES SUCH THAT A RESTRICTION APPLIES PURSUANT TO ARTICLE IV, OR NEW RESTRICTIONS ARE IMPOSED AS A RESULT OF ARTICLE IV, SECTION J. FURTHER MODIFICATION MAY OCCUR TO LIMIT THE TOTAL WITHDRAWAL BY DAY, MONTH OR YEAR; TO REQUIRE A SYSTEM OF ROTATION OF USE WITHIN THE CONTROLLED AREA; OR ADJUST THE TOTAL WITHDRAWAL FROM TWO OR MORE WELLS IN THE AREA USED BY THE SAME APPROPRIATOR. THE APPROPRIATOR SHALL ALLOW ACCESS TO THE WELL BY THE MONTANA BUREAU OF MINES AND GEOLOGY FOR WATER SAMPLING AS PROVIDED IN THE COMPACT. FURTHER, THIS RIGHT IS SUBJECT TO THE CONDITION THAT THE APPROPRIATOR SHALL INSTALL AN ADEQUATE METERING DEVICE TO ALLOW THE VOLUME OF WATER DIVERTED TO BE RECORDED. THE TYPE AND LOCATION OF THE METER SHALL BE DETERMINED BY THE DEPARTMENT. THE APPROPRIATOR SHALL KEEP A WRITTEN RECORD OF THE VOLUME OF ALL WATERS DIVERTED, INCLUDING THE

PERIOD OF TIME, AND SHALL SUBMIT SAID RECORDS BY JANUARY 15TH OF EACH YEAR AND/OR UPON REQUEST TO THE MONTANA BUREAU OF MINES AND GEOLOGY, MONTANA TECH, 1300 W PARK ST, BUTTE, MT 59701-8997.

DEPARTMENT RIGHT OF ACCESS

THIS RIGHT IS SUBJECT TO THE AUTHORITY OF THE DEPARTMENT TO REVOKE THE RIGHT IN ACCORDANCE WITH 85-2-314 OR 85-2-402(9), MCA, AND TO ENTER ONTO THE PREMISES FOR INVESTIGATIVE PURPOSES IN ACCORDANCE WITH 85-2-115, MCA.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 27 day of June, 2025.

/Original signed by Kerri Strasheim/
Kerri Strasheim, Manager
Bozeman Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 27 day of June, 2025, by first class United States mail.

WESTERN SHAMBALLA INC
63 SUMMIT WAY
GARDINER, MT 59030

JULIE MERRITT, WGM GROUP (CONSULTANT)
VIA EMAIL: JMERRITT@WGMGROUP.COM

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BOZEMAN Regional Office, (406) 586-3136