



DECISION NOTICE

CONSENT TO APPROVE BENEFICIAL WATER USE APPLICATION BY PEAK HEALTH MANAGEMENT COMPANY LLC

September 8, 2023

ACTION

Decision Notice (DN). Montana Fish, Wildlife & Parks (FWP) shall prepare a DN for the proposed action. The DN must identify the agency decision, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

With this action, FWP hereby adopts the Draft Environmental Assessment or Draft EA as final, without modification, and approves Alternative 3.

AUTHORITY: MONTANA ENVIRONMENTAL POLICY ACT

According to the applicable requirements of the Montana Environmental Policy Act or MEPA and its implementing rules and regulations, before a proposed action may be approved, environmental review must be conducted to identify, consider, and disclose any potential impacts of the proposed action on the affected human environment. The level of environmental review will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors. *Title 75, Chapter 1, Parts 1 through 3, Montana Code Annotated (MCA)*.

Based on these factors, FWP determined a Checklist EA (Draft EA) constitutes the appropriate level of review for the proposed action. Therefore, to assess and disclose potential impacts of the proposed action, FWP prepared a Draft EA for public review and comment. See *Public Participation Process* below.

Further, FWP must consider any substantive comments received in response to an EA and proceed in accordance with one of the following steps: determine the EA did not adequately reflect the issues raised by the proposed action and issue an Environmental Impact Statement or EIS; determine the EA did not adequately reflect the issues raised by the proposed action and issue a supplemental EA; or determine the Draft EA adequately addressed the issues raised by the proposed action and make a final decision, with appropriate modification resulting from the analysis provided in the Draft EA and the analysis of any substantive public comments received. See *Public Comment and FWP Response* below.

PUBLIC PARTICIPATION PROCESS

The Draft EA was made available for public review and comment from August 7 through August 21, 2023. A legal Notice was published in the Missoulian and the Helena Independent Record and the Draft EA was posted on FWP's Public Notice webpage: <https://fwp.mt.gov/news/public-notice>. The Draft EA was also made available for public review on the Environmental Quality Council or EQC website:

<https://leg.mt.gov/mepa/search/>, by individual request, and through notice to identified interested parties.

FWP received one comment during the public comment period.

DESCRIPTION OF PROPOSED ACTION

Peak Health Management Company LLC (PEAK) has expanded the use of water from groundwater wells to supply additional developments around its facility located at the intersection of Blue Mountain Road and HWY 93 southwest of Missoula near the Bitterroot River. With this expanded water use PEAK is exceeding its existing water rights and needs to acquire a new water right permit (pending application 76H 30150412). The new use of groundwater results in a depletion of flow in the lower Bitterroot River where Montana Fish, Wildlife & Parks (FWP) jointly holds with the Confederated Salish and Kootenai Tribes (CSKT) instream flow water rights that are not always met. Because of this, PEAK must mitigate the Bitterroot River flow depletions.

The following table compares the CSKT/FWP monthly instream flow right for the lower Bitterroot River with monthly percentile flow data for the Bitterroot River near Missoula (USGS Gage 12352500) for the 1989-2021 period of record. A percentile is a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it. For example, a flow at the 80th percentile is equal to or greater than 80 percent of the mean monthly values recorded for that month of the year during all years that measurements have been made.

The values in red show monthly percentile values less than the instream right reflecting the occurrences when the instream right is not met. More red values in a column means the instream right is met less often in that month.

Percentile	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
80th	1009	1233	1601	3818	8464	10476	3571	1066	911	1098	1442	1062
50th	779	816	1151	2612	6487	7251	1980	814	766	890	1018	872
25th	693	717	880	1991	5152	4714	1134	623	620	730	874	749
20th	649	697	858	1614	5079	4553	1087	606	611	715	836	708
10th	613	639	815	1427	4451	3879	1003	546	595	665	786	645
5th	587	543	803	1342	4220	3575	903	501	539	636	770	632
CSKT/FWP Instream Right	900	900	900	900	7707	7707	600	600	600	900	900	900
% years CSKT/FWP Right Not Met	66%	66%	30%		70%	55%		16%	12%	53%	31%	58%

Comparison of instream right to monthly flow values in cubic feet per second.

While in April and July the mean monthly flow did not drop below the instream right level in any year from 1989-2021, a review of daily flow records finds that in the first part of April and the last part of July flow dropped below the instream right in some years showing that it is not met in all months for all years. When this occurs, the instream right of CSKT/FWP would be adversely affected and therefore PEAK must mitigate the Bitterroot River flow depletions.

PEAK has purchased part of an irrigation water right (Statement of Claim 76H 30122609) across the Bitterroot River from its facility to mitigate the impacts to the Bitterroot River. The acquired portion of the water right was previously used to irrigate the area now occupied by the Jennette Rankin Elementary School. The following table lists the water rights held by PEAK:

NUMBER	TYPE	PRIORITY DATE	SOURCE	FLOW	VOLUME	ACRES
76H 30122609	STATEMENT OF CLAIM	6/30/1958	BITTERROOT RIVER	2.5 CFS		8
76H 30151828	GROUND WATER CERTIFICATE	3/26/2021	GROUNDWATER	35 GPM	1.63	0.65
76H 62593 00	PROVISIONAL PERMIT	5/5/1986	GROUNDWATER	120 GPM	3.5	3
76H 65902 00	GROUND WATER CERTIFICATE	8/3/1987	GROUNDWATER	96.6 GPM	14	2

Existing water rights held by PEAK.

The retirement of the surface water irrigation from the Bitterroot River along with a change in purpose to mitigation would offset depletions during the irrigation season but would provide no mitigation during the non-irrigation season (October – April). The other water rights owned by Peak include existing groundwater rights that are junior in priority to the instream water right with a priority date of 7-1-1970 and are currently causing depletions to the Bitterroot River. Because PEAK is unable to fully mitigate the flow depletions to the Bitterroot River in the non-irrigation period caused by its newly requested water right permit, it has requested that FWP consent to the issuance of the groundwater permit under the provisions of §85-2-402(19), MCA. If FWP and CSKT consent, DNRC would not include the CSKT/FWP right in its analysis of adverse effects on other water rights.

The consent would very likely have the practical effect of allowing DNRC to issue PEAK's water right permit and change applications.

PURPOSE AND NEED

PEAK requests that FWP consent to the issuance of the pending groundwater Permit 76H 30150412 under the provisions of §85-2-402(19), MCA, requiring DNRC to not conduct an adverse effects analysis of the FWP co-owned instream right for the Bitterroot River. The requested consent would allow for the development of the State's water resources as provided for by the Water Use Act while potentially protecting and benefiting the fishery resource of the Bitterroot River.

ALTERNATIVES ANALYZED

Alternative 1: No Action

In addition to the proposed action, and as required by MEPA, FWP analyzes the "No-Action" alternative in the EA. Under the No-Action alternative, the proposed action would not occur. Therefore, no additional impacts to the human environment would occur. The No Action alternative forms the baseline from which the potential impacts of the proposed action may be measured.

Under the No Action alternative PEAK would not be able to obtain a new water right permit. Slight benefits to the Bitterroot River during summer low-flow periods would not be realized.

Alternative 2: Consent to Issuance with Mitigation as Proposed by PEAK

Under Alternative 2, PEAK through applications submitted to the Department of Natural Resources and Conservation (DNRC) has proposed to mitigate the net depletions to the Bitterroot River resulting from pending water right permit application 76H 30150412 by changing Claim 76H 30122609 (irrigation from the

Bitterroot River) to a mitigation purpose and leaving that water in the river. Only a portion of the changed Bitterroot irrigation right would mitigate the net depletion caused by the pending permit, with the remainder being set aside for future mitigation. Additional mitigation is proposed by the retirement of 0.46 acres from irrigation under existing groundwater Permit 76H 62593-00 with a change to mitigation. The retirement of irrigation under this permit would provide 0.001 cfs of mitigation during the irrigation season (May - September) but this leaves 0.002 cfs of net depletion outside the irrigation season.

Permit 76H 62593-00 with a 5-5-1986 priority date, is junior to FWP's and CSKT's instream right with a 7-1-1970 priority date that needs to be mitigated. In addition, the 1987 and 2021 groundwater certificates also used at the same facility are un-mitigated junior rights. The proposed mitigation by the groundwater permit does not provide effective mitigation to the senior instream flow water right while the existing un-mitigated groundwater use further negatively impacts streamflow.

Note that DNRC would only require the mitigation for the pending permit. The following table shows the change in flow in the Bitterroot River with the net depletion associated with the pending permit and the proposed amount of consumptive use from Claim 76H 30122609 changed to mitigation. It excludes the mitigation proposed from Permit 76H 62593-00 because it is junior to the instream water right being mitigated. Positive values indicate a loss in river flow while negative values indicate a gain.

Bitterroot River	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ave
Net Depletion (cfs)	0.003	0.003	0.003	0.003	-0.001	-0.001	-0.001	-0.001	-0.001	0.003	0.003	0.003	0.001

The following table shows the change in flow in the Bitterroot River with the net depletion of all PEAK groundwater rights with the proposed amount of consumptive use for Claim 76H 30122609 changed to mitigation.

Bitterroot River	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ave
Net Depletion (cfs)	0.011	0.011	0.011	0.011	0.007	0.007	0.007	0.007	0.007	0.011	0.011	0.011	0.010

Under this alternative FWP would consent to the issuance of the Permit 76H 30150412 with the mitigation scenario proposed by PEAK through its pending applications.

Alternative 3: Consent to Issuance with Full Mitigation

Under Alternative 3, All of Claim 76H 30122609 for irrigation from the Bitterroot River would be changed to mitigate the net depletion caused by the pending Permit as well as those net depletions to the Bitterroot River caused by the current use of Permit 76H 62593-00 and Groundwater Certificates 76H 30151282 & 76H 65902-00. No water would be left for future mitigation. The following table shows the change in flow in the Bitterroot River with the net depletion of all PEAK groundwater rights with the full amount of consumptive use for Claim 76H 30122609 changed to mitigation.

Bitterroot River	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ave
Net Depletion (cfs)	0.011	0.011	0.011	0.011	0.003	-0.028	-0.042	-0.034	-0.001	0.011	0.011	0.011	-0.002

The following terms would be required for FWP to consent to the issuance of Permit 76H 30150412:

- The currently unused portion of Permit 76H 62593-00 will not be used for mitigation and this unused portion will be terminated by PEAK.
- All of Claim 76H 30122609 will be changed to mitigation of net depletions to the Bitterroot River caused by pending Permit 76H 30150412, Permit 76H 62593-00 and Groundwater Certificates 76H 30151282 & 76H 65902-00.
- Any portion of Claim 76H 30122609 not approved by DNRC for mitigation of pending Permit 76H 30150412, Permit 76H 62593-00 and Groundwater Certificates 76H 30151282 & 76H 65902-00 will be terminated by PEAK.

The termination of a portion of Claim 76H 30122609 would result in the same effect as changing it to mitigation as the Bitterroot River does not run dry and making a call on other water rights to cease diversion based on this water right would not be necessary to effectuate the mitigation benefits.

PUBLIC COMMENT AND FWP RESPONSE

FWP received one substantive public comment on the Draft EA. A substantive public comment is defined as the identification of a specific issue or impact. The following provides the public comment received and FWP response(s).

COMMENT PART 1: Please enter my comments in strong OPPOSITION to FWP approving the change in water rights for Peak Health Management as proposed in the EA.

No need to get too complex here. Peak is proposing to trade a continuous groundwater withdrawal for a very minimal and part-time irrigation water right that may not even be met in the coming years of hotter, longer summers and shorter, warmer winters.

The reasons for my strong opposition are simple. The water right does not have a senior appropriation date to start with. Moreover, given the increasing problems with maintaining even minimal instream flows in Montana's major rivers -- like the Bitterroot -- which are now closed entirely to fishing or with hoot owl restrictions basically every summer, there's no guarantee that irrigation water right will even be available -- not for irrigation and not for instream flows as proposed. In fact, given the priority date, it's much more likely to find senior users putting a call on their water rights than having enough water in the river to fulfill the much more junior irrigation water right.

FWP RESPONSE: The surface water right to be used for mitigation is relatively junior in priority (6-30-1958), but it is senior to the FWP/CSKT instream flow water rights and can provide effective mitigation in that respect. Whether or not water would be physically available for this 1958 appropriation was considered. While the Bitterroot River does drop below the instream flow water rights, it is far from going dry with the 5th percentile monthly flow above 500 cfs in all months. Water would be physically available for use of the 1958 water right for mitigation.

COMMENT PART 2: Secondly, the proposal is for continuous withdrawal of ground water -- that's a year round withdrawal that even your charts show means the instream rights currently held by CSKT and FWP are not met 10 out of 12 months a year! Those months, by the way, just happen to be when the brown trout spawn in fall and the rainbows spawn in spring. Consequently, the extremely minimum amount of instream flows offered by Peak as "mitigation" for the groundwater withdrawals fall outside of those two spawning seasons, which are critical to maintaining naturally-reproducing wild trout fisheries for which Montana -- and the Bitterroot River -- are nationally and internationally renowned.

FWP RESPONSE: Under selected Alternative 3 the annual amount of flow available from the mitigation right will be greater than the depletion caused by the proposed groundwater appropriation creating a net positive change in the annual water balance. Small increases in flow during the irrigation season will benefit the fishery during late summer period of low flow and high water-temperature. This benefit will more than offset small decreases in flow and associated impacts to the fishery during the non-irrigation season when flow is higher than in late summer. In addition, presently unmitigated groundwater use will be mitigated. PEAK is not responsible to mitigate low flow impacts created by other water users or environmental conditions.

COMMENT PART 3: Third - there's no such thing as a "no impact" groundwater withdrawal. The more groundwater you withdraw, the lower the water table goes -- and that's pretty much across the board unless they're planning on drilling some 1,000 ft deep wells into some completely isolated ancient aquifer. But to put it mildly, that's not really what happens for the "housing developments" these days. Speaking from experience here in the Helena Valley, the domestic wells are so shallow they're all showing significant pollution by a host of substances ranging from herbicides and pesticides (normally "surface" applications) to pharmaceuticals from septic systems and municipal water treatment plants...again, with very shallow or surface discharge.

FWP RESPONSE: The PEAK groundwater appropriation is expected to lower the water table some, but with the proximity to the Bitterroot River the impacts to the water table will be limited as they reach the Bitterroot River causing a depletion in flow that will be mitigated.

COMMENT PART 4: In conclusion, FWP's mandate is to protect the public trust, not to accommodate the endless requests for ever more resources by the development sector. That simply cannot happen with this proposal - no matter how you cut it, the river gets the short end of the stick, as do the fisheries with this "deal" that provides such minimal instream flows to the river and its fisheries and the public, which own and count on FWP to conserve these precious public resources.

Hence, there's no realistic option but to request FWP DENY the water right change for all the above reasons -- especially in light of our ever-more frequent droughts and low winter snowpack in Montana.

FWP RESPONSE: FWP's mandate is to protect the public trust but this can be done in situations such as this where the selected alternative overall benefits the fishery, the trust resource that is being protected.

DECISION

Based on the environmental review provided in the Draft EA, and in accordance with all applicable laws, rules, regulations, and policies, FWP determined Alternative 3, will not have significant adverse impacts on the human environment associated with the proposed action and constitutes a reasonable and appropriate strategy to achieve identified objectives. Therefore, preparation of an EIS is unnecessary. FWP hereby adopts the Draft EA as final, selecting Alternative 3 and recommending to Montana Fish, Wildlife and Parks Director Temple to consent to the issuance of pending application 76H 30150412 contingent on PEAK agreeing to the stipulations found in Alternative 3.

Sincerely,



Randy Arnold
Region 2 Supervisor
Montana Fish, Wildlife & Parks