

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30162756 BY RANDALL D. SWENSON)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 28, 2023, Randall D. Swenson (Applicant) submitted Application for Beneficial Water Use Permit No. 30162756 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 28.0 gallons per minute (GPM) and 1.45-acre feet (AF) for domestic and lawn and garden use. The Department published receipt of the application on its website on January 16, 2024. The application was transferred to the Missoula Regional Office of the DNRC on January 12, 2024. The application was determined to be correct and complete as of February 23, 2024. An Environmental Assessment for this application was completed on March 13, 2024.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-SW
- Attachments:
 - Appendix A. Flathead County Tract Map 26 27 21 (12/30/2022)
 - Appendix B. Pump Specifications and Pump Curve
 - Technical Brochure B5-25GS R9, Goulds Water Technology
 - Residential Water Systems pages 2-3 and Residential Water Systems Pump Curve Model 25GS, Goulds Water Technology
 - Appendix C. Hydraulic Calculations
 - Appendix D. Water System Specifications
 - AQUAVAR SOLO Technical Brochure BAQSOLO2 R6, Goulds Water Technology
 - Residential Water Systems pages 5-6, Goulds Water Technology
 - WellXTrol WX-250 Stand Model, AMTROL

- Appendix E. Irrigation Plan IR-01, NW Design Studio (12/01/2023)
- Appendix F. Irrigation System Specifications
 - MP Rotator Radius 8' to 35', Hunter Industries
 - MP Rotator Performance Data, Hunter Industries
 - Techline DL 17mm Dripline Features and Benefits, Netafim (01/2018)
- Appendix G. Water Demand Estimate Using Fixture Values, Water & Environmental Technologies
- Maps:
 - Figure 1. Vicinity Map (12/18/2023)
 - Figure 2. Site Map (12/20/2023)
 - Figure 2. (Corrected) Site Map (2/22/2024)

Information within the Department's Possession/Knowledge

- Mean monthly stream flow data for the Flathead River (Flathead Lake) from United States Geological Survey (USGS) Gaging Station #12372000 near Polson, MT (period of record October 1938 – November 2023) used for physical and legal availability analysis.
- List of existing surface water rights on the Flathead River system from the inlet of Flathead Lake to USGS Gaging Station #12372000 near Polson, MT. This list was used to quantify physical and legal availability and to analyze adverse effects.

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

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; PSI means pounds per square inch; HP means horsepower; and TDH means total dynamic head.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Flathead River (Flathead Lake), hereafter Flathead Lake, by means of a 3.0 HP pump, from January 1- December 31 at 28.0 GPM up to 1.45 AF, from a point in the NWNWSE Section 26, T27N, R21W, Flathead County,

Montana, for domestic use from January 1 – December 31 and for lawn and garden irrigation from April 15 – October 15. The place of use is in NWNWSE Sec. 26, T27N, R21W, Flathead County, Montana, more specifically described as Tract 7 of Government Lot 9. The POD is in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

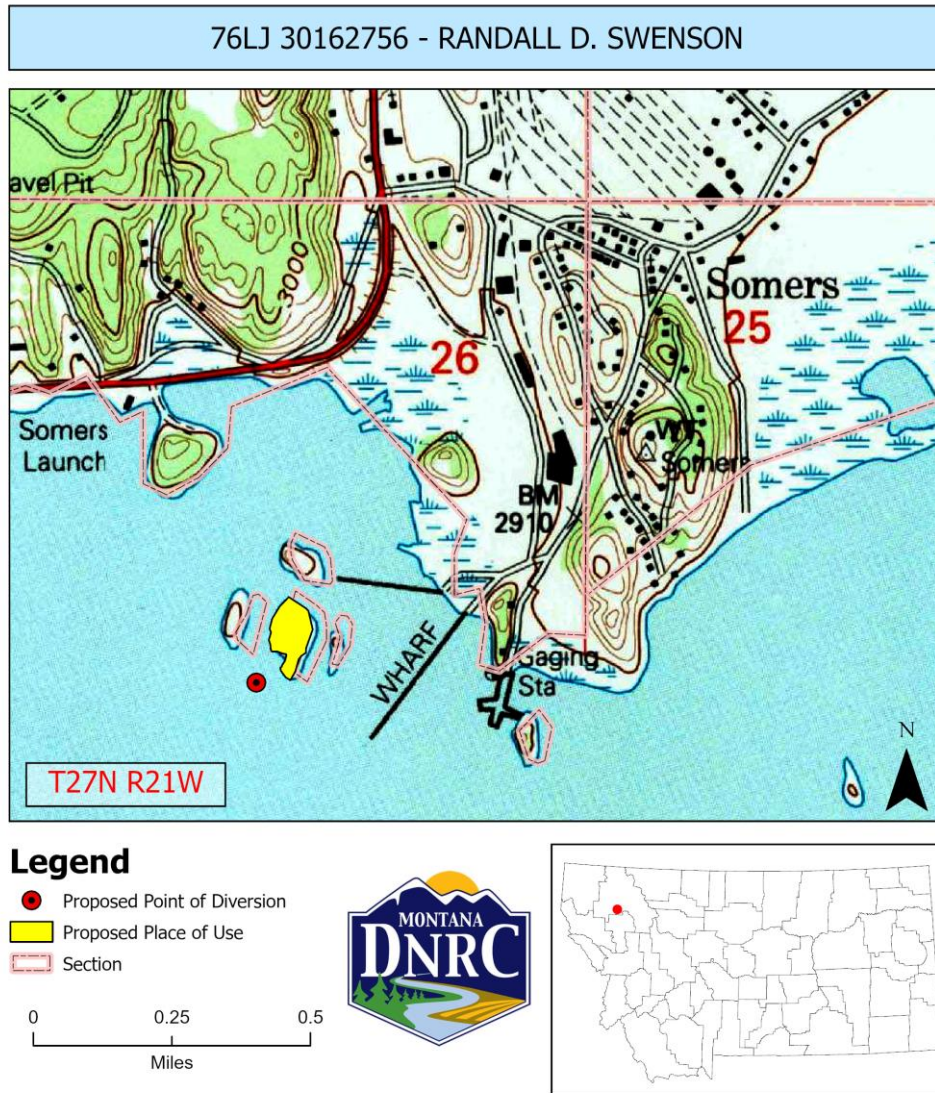


Figure 1. Map of the proposed place of use and point of diversion

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

GENERAL CONCLUSIONS OF LAW

2. 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 . . .

3. 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 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.

4. 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.

5. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier*, 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).

6. 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.

7. 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

8. The Applicant proposes to divert a volume up to 1.45 AF annually at a maximum flow rate of 28.0 GPM from Flathead Lake. Physical availability was determined by considering data from USGS Gaging Station #12372000 on the Flathead River near Polson, MT. This gage is the nearest gage to the proposed POD on Flathead Lake and is approximately 32 miles downstream of the proposed POD on the Flathead River downstream of Séliš Ksanka Qíispé Dam. The date range used to assess physical availability includes the entire period of record for this gage site up to the date the application was filed (October 1938 – November 2023). The DNRC used the method below to quantify physically available monthly flow rates and volumes at the POD during the proposed period of diversion.

9. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for Flathead Lake using USGS Gage #12372000 records for each month of the proposed period of diversion (Table 1, column B). Those flows were converted to monthly volumes in AF (Table 1, column C).

10. The Department calculated the monthly flow appropriated by existing users upstream of the gage on the source (Table 1, column D) by:

- a. Generating a list of existing surface water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);
- b. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
- c. Delegating all other water uses as year-round uses;
- d. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standard; and,

e. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of existing uses from the source; however, the Department finds this an appropriate measure for assessing existing rights as it protects existing water users.

11. Since the gage used is downstream of the POD, the Department added in the flow rates of the existing surface rights between USGS Gage #12372000 and the Flathead Lake inlet (Table 1, column D) to the median of the mean monthly gage values (Table 1, column B) to determine physical availability at the POD (Table 1, column E). Physically available monthly flows were then converted to monthly volumes (Table 1, column F) using the following equation found on DNRC Form 615.

$$\text{median of the mean monthly (CFS)} \times 1.98 ((AF/day)/1 \text{ CFS}) \times \text{days per month} = \text{AF/month}$$

(1)

12. Table 1 below displays the amount of water physically available at the proposed point of diversion:

Table 1: Physical Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage #12372000 near Polson, MT					
A	B	C	D	E	F
Month	Median of Mean Monthly Flow at Gage 12372000 (CFS)	Median of Mean Monthly Volume at Gage 12372000 (AF)	Existing Legal Demands from the Inlet to Gage 12372000 (CFS)	Physically Available Water: Flathead Lake (CFS)	Physically Available Water: Flathead Lake (AF)
January	10,380.0	637,124.4	105.7	10,485.7	643,610.8
February	9,166.0	508,163.0	105.7	9,271.7	514,021.7
March	7,778.0	477,413.6	105.7	7,883.7	483,900.1
April	9,223.0	547,846.2	176.5	9,399.5	558,332.0
May	18,570.0	1,139,826.6	176.5	18,746.5	1,150,661.9
June	25,720.0	1,527,768.0	176.5	25,896.5	1,538,253.8
July	12,730.0	781,367.4	176.5	12,906.5	792,202.7
August	6,136.0	376,627.7	176.5	6,312.5	387,463.0
September	6,006.0	356,756.4	176.5	6,182.5	367,242.2
October	7,230.5	443,808.1	176.5	7,407.0	454,643.4
November	8,556.0	508,226.4	105.7	8,661.7	514,503.6
December	9,883.0	606,618.5	105.7	9,988.7	613,105.0

13. The Department finds the requested flow rate of 28.0 GPM (0.08 CFS) up to an annual volume of 1.45 AF of surface water is physically available during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

14. Séliš Ksanka Qíispé Dam near Polson is the control structure for Flathead Lake. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Séliš Ksanka Qíispé Dam. Statements of Claim 76L 94408-00 and 76L 94409-00 for Séliš Ksanka Qíispé Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity. The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

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

16. The Applicant's proposed diversion from Flathead Lake will reduce the total volume of water leaving the Lake (passing over/through the dam). All water rights on Flathead River downstream of the Séliš Ksanka Qíispé Dam are directly affected by the operation of the dam, rather than being directly affected by upstream diversions. Therefore, the Department determined the potentially impacted reach to be the Flathead River system from the inlet of Flathead Lake downstream to USGS Gage #12372000 near Polson, MT (approximately 0.6 miles downstream

of the dam). There are 1,767 water rights with points of diversion located in the area of potential impact. This list is included in the application file and available upon request.

17. Legal availability of Flathead Lake at the POD was quantified monthly. The Department used the method below to quantify legally available monthly flow rates and volumes at the POD during the proposed period of diversion.

18. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 2, column D) by:

- a. Generating a list of existing surface water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);
- b. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
- c. Designating all other water uses as year-round uses;
- d. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standard; and,
- e. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

19. The Department subtracted out the flow rates of the existing legal demands (Table 2, columns D) within the area of potential impact from the physically available water (Table 2, column B) to determine legal availability at the POD (Table 2, column E). Legally available monthly flows were then converted to monthly volumes (Table 2, column F) using equation (1).

20. The comparison between physically available and legally available water in Flathead Lake is shown in Table 2 below, indicating that water is legally available for the proposed appropriation.

Table 2: Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage #12372000					
A	B	C	D	E	F
Month	Physically Available Water: Flathead Lake (CFS)	Physically Available Water: Flathead Lake (AF)	Existing Legal Demands from the Inlet to Gage 12372000 (CFS)	Legally Available Water (CFS)	Legally Available Water (AF)
January	10,485.7	643,610.8	105.7	10,380.0	637,124.4
February	9,271.7	514,021.7	105.7	9,166.0	508,163.0
March	7,883.7	483,900.1	105.7	7,778.0	477,413.6
April	9,399.5	558,332.0	176.5	9,223.0	547,846.2
May	18,746.5	1,150,661.9	176.5	18,570.0	1,139,826.6
June	25,896.5	1,538,253.8	176.5	25,720.0	1,527,768.0
July	12,906.5	792,202.7	176.5	12,730.0	781,367.4
August	6,312.5	387,463.0	176.5	6,136.0	376,627.7
September	6,182.5	367,242.2	176.5	6,006.0	356,756.4
October	7,407.0	454,643.4	176.5	7,230.5	443,808.1
November	8,661.7	514,503.6	105.7	8,556.0	508,226.4
December	9,988.7	613,105.0	105.7	9,883.0	606,618.5

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

22. The Department finds the proposed appropriation of 28.0 GPM up to 1.45 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

23. Applicant provided a plan showing they can regulate their water use during water shortages to prevent adverse effect to prior appropriators. To satisfy the water rights of senior appropriators during shortages, the Applicant will:

- a. Initially reduce irrigation application by 50 percent;
- b. Irrigate only flowers, shrubs, and trees to ensure survival through drought;

- c. Turn off the pump when a senior appropriator makes a valid call for water; and
 - d. Haul water for potable use from a separate source.
24. The Applicant has shown that they can regulate their water use and that they have an implementation plan to protect senior water users.
25. The Applicant has proven that enough water remains in Flathead Lake to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 28.0 GPM up to 1.45 AF.
26. The Department finds the proposed use of 1.45 AF and 28.0 GPM will not have an adverse effect on other existing water users as a result of the proposed appropriation.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

27. Applicant will divert water from Flathead Lake at a maximum rate of 28.0 GPM using a Goulds 3.0 horsepower (HP) model 25GS30 submersible 4-inch pump (or equivalent) that extends approximately 100-feet out in Flathead Lake. The submersible pump will be located at least 5-feet below the low water elevation (2884 feet) of Flathead Lake and will include a plastic flow sleeve and check valve to prevent backflow. The pump will be controlled by a variable frequency drive (VFD) that is set to maintain a constant pressure of 50 pounds per square inch (PSI). From the shoreline water will be pumped approximately 163-feet to the crawl space of the domestic residence through a 1.25-inch-high density polyethylene (HDPE) pipe. A tee connection will divert to an irrigation line while the remaining water will continue into the residence for domestic use where it will be processed through a filtration and disinfection system prior to distribution. The water system will be equipped with one Well-X-Troll WX-250 vertical pressure tank and a treatment system with two sediment filters and a Pentek Ultraviolet Light.

28. From the tee connection water will be diverted into the irrigation line which will lead to five different irrigation zones through one-inch HDPE water lines. A buried irrigation valve box, Hunter Pro-C controller, and Hunter 1.0-inch PGV valves will regulate water to each sprinkler zone. Two irrigation zones will utilize Hunter MP1000 Rotator Sprinklers and three will utilize TLDL6-1201 Landscaping Driplines. The two sprinkler irrigated zones will each have 5 heads that will not require more than 5 GPM combined with the pressure set at 50 psi. The three dripline irrigated zones will each have 500 ft of dripline with approximately 500 emitters, each spaced 1-foot apart. Each emitter will produce a rate of 0.6 gph, which collectively results in each zone requiring 5 GPM of flow ($0.6 \text{ gph} \times 500 \text{ emitters} = 300 \text{ gph} / 60 \text{ minutes per hour} = 5\text{GPM}$). Only one out of

the five zones will be operated at any given time, therefore, the total lawn and garden flow rate will not exceed 5 GPM.

29. The total dynamic head (TDH) of the system at the residence is 213.75-feet, based on:
- a. The 29-foot elevation gain from Flathead Lake’s surface to the place of use;
 - b. The friction losses (equivalent to 41.03-feet of head) in the transmission and distribution lines at approximately 28.0 GPM.
 - c. The system operating pressure of 116-feet of head at pump vault (50 PSI x 2.31 feet = 116 pressure head);
 - d. The water treatment system losses of 27.72-feet of head (12 PSI x 2.31 feet = 27.72 pressure head); and,
 - e. TDH = elevation head + friction head loss + pressure head
30. Domestic water demand was confirmed using flow calculations based on fixture demands, equating to a flow rate of 23.0 GPM. Since timing of lawn and garden irrigation and residential use may overlap, the total requested flow rate is equal to 28.0, the sum of the maximum residential use (23.0 GPM) and lawn and garden irrigation (5.0 GPM).
31. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

32. Applicant requests to divert 1.0 AF for domestic use January 1 – December 31. Applicant requests the DNRC water use standards for domestic volume and domestic period of diversion and use, as specified in ARM 36.12.115 and ARM 36.12.112(1)(a).

33. Applicant requests to divert 0.45 AF to irrigate 0.18 acres of lawn and garden (equation 2). The volume 0.45 AF is based on DNRC water use standard of 2.5 AF/acre for lawn and garden irrigation, found in ARM 36.12.115(2).

$$2.5 \frac{AF}{acre} \times 0.18 \text{ acres} = 0.45 AF \tag{2}$$

34. Applicant’s property is in USDA Natural Resources Conservation Service climatic area III. Applicant requests the DNRC standard period of diversion and period of use of April 15 – October 15 for USDA Natural Resources Conservation Service climatic area III per ARM 36.12.112(1)(c)(iii).

35. The combined domestic and lawn and garden irrigation volume is 1.45 AF (1 AF domestic + 0.45 AF lawn and garden = 1.45 AF total).

36. The Department finds the proposed water uses are beneficial, and that the requested flow rate of 28.0 GPM and annual volume of 1.45 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

38. 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.”

39. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 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).

40. 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).

41. 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 8-13)

LEGAL AVAILABILITY

42. 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).

43. 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.

44. 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 14-22.)

ADVERSE EFFECT

45. 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.

46. 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).

47. 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).

48. 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).

49. 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.

50. 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).

51. 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 23-26)

ADEQUATE DIVERSION

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

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

54. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 27-31).

BENEFICIAL USE

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

56. 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).

57. 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).

58. 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.*

59. Applicant proposes to use water for domestic and lawn and garden irrigation which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence domestic and lawn and garden irrigation are a beneficial use and that 1.20 AF of diverted volume and 24.0 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 32-36)

POSSESSORY INTEREST

60. 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.

61. 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.

62. 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 37)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30162756 should be GRANTED.

The Department determines the Applicant may divert water from Flathead Lake, by means of a 3.0 HP pump, at 28.0 GPM up to 1.45 AF, from a point in the NWNWSE Section 26, T 27N, R 21W, Flathead County, Montana, for domestic use from January 1 – December 31 and lawn and garden irrigation from April 15 – October 15. The Applicant may irrigate lawn and garden on 0.18 acres. The place of use is located in Tract 7 of Government Lot 9, NWNWSE Section 26, T 27N, R 21W, Flathead County, Montana.

NOTICE

The Department will provide public notice of this application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

Dated this 14th day of March, 2024.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 14th day of March, 2024, by first class United States mail.

RANDALL D. SWENSON
4510 HI LINE DRIVE
BILLINGS, MONTANA 59106 - 4703

WATER AND ENVIRONMENTAL TECHNOLOGIES
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/Original signed by Caitlyn Stevens/

CAITLYN STEVENS
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