

**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 30162788 BY CAROL B. AND ROBERT O. SENOUR)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 29, 2023, Carol B. and Robert O. Senour (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30162788 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 22.0 gallons per minute and 1.6 acre-feet of water annually for domestic and lawn and garden purposes. The Department published receipt of the application on its website. The application was transferred to the Missoula Regional Office of the DNRC on January 16, 2024. The application was determined to be correct and complete as of February 20, 2024. An Environmental Assessment for this application was completed on March 15, 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: Certificate of Survey, Phipps Tracts (8/8/1957)
 - Appendix B: Water System Specifications
 - *Aquavar Solo 2* Xylem Technical Brochure BAQSOLO2 R6 (7/2023)
 - AMTROL WELLXTROL Information Sheet (1/19)
 - Pentek Big Blue Housings Spec Sheet (2014)
 - Pura Ultraviolet Water Treatment Systems Installation Manual & Owners Guide (10/2012)
 - Appendix C: Pump Specifications and Pump Curve
 - Xylem Technical Brochure B5-25GS R8 (9/2017)
 - Appendix D: Hydraulic Calculations
 - Pump curves from Xylem Technical Brochure B5-25GS R8 (9/2017)
 - Appendix E: Fixture Count Analysis

- Maps:
 - Site Vicinity Map: location of the proposed water right with reference to state, county, and PLSS section on a 1994 USGS topographic map.
 - Site Map: Location of POU and POD at the parcel scale on March 2021 aerial imagery.

Information Received after Application Filed

- Email from Brad Bennett, Consultant, to DNRC dated February 20, 2024, clarifying details on application form.

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 effect.
- 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 Missoula Regional Office at 406-721-4284 to request copies of the following documents.
 - Technical Memorandum: DNRC Consumptive Use Methodology – Turf Grass, dated March 23, 2010

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; and AF/YR means acre-feet per year.

PROPOSED APPROPRIATION

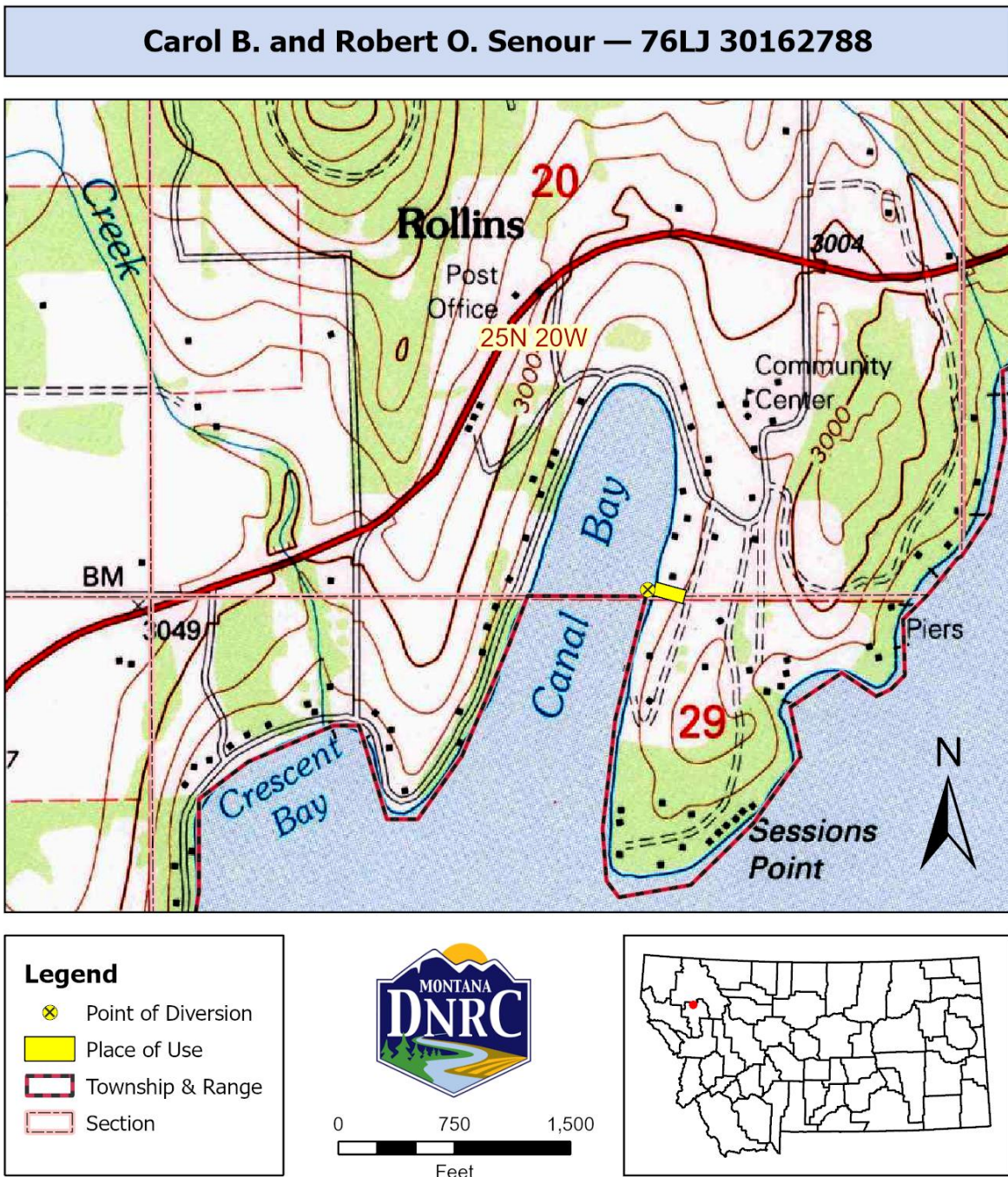


Figure 1. Location of Proposed Appropriation.

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Flathead River (Flathead Lake), hereafter Flathead Lake, by means of a submersible pump, from January 1 to December 31 at 22.0 GPM up to 1.6 AF, from a point in the SWSWSE, Section 20, Township 25N, Range 20W,

Lake County, Montana, for domestic use from January 1 to December 31, and for lawn and garden use from April 15 to October 15. The Applicant proposes to supply a residential dwelling with water for domestic use and to irrigate 0.24 acres of lawn and garden. The place of use is generally located in the SESWSE Section 20 and NENWNE Section 29, Township 25N, Range 20W, Lake County, Montana.

§ 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 up to 1.6 AF/YR at a flow rate of 22.0 GPM from Flathead Lake. USGS Gaging Station #12372000 on the Flathead River near Polson, MT is the nearest gage to the proposed POD on Flathead Lake and is approximately 22 miles downstream of the proposed POD on the Flathead River downstream of the Séliš Ksanka Qlispé Dam. The entire period of record for this gage at the time the application was filed, (October 1938 – November 2023) was used to calculate the monthly physical availability of water. The gaging station is downstream of the point of diversion for this application. Department practice for physical availability analyses where the gage used is downstream of the POD is to add the monthly flow rates of existing water rights between the gage and the POD to the median of the mean monthly flows at the gage. The DNRC used the method below to quantify physically available monthly flows and volumes at the POD during the proposed period of diversion.

9. The Department calculated the median of the mean monthly flow rates in cubic feet per second for the Flathead River (Flathead Lake) using USGS Gage #12372000 records for each month of the proposed period of diversion (Table 1, column B). These flow rates were then converted into monthly volumes in acre-feet (Table 1, column C).

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

- i. Generating a list of existing water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);

- ii. Considering irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Considering all other water uses as occurring year-round;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct-from-source rights without a designated flow rate; and,
- v. 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. The Department finds this an appropriate measure of 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 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 3). Physically available monthly flows were then converted to monthly volumes (Table 1, column F) using the following equation found on DNRC Water Calculation Guide (formerly Form 615): median of the mean monthly flow (CFS) × 1.98 (AF/day/CFS) × days per month = AF/month.

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 the Mean Monthly Flow Rate at Gage #12372000 (CFS)	Median of the Mean Monthly Volume at Gage #12372000 (AF)	Existing Rights from Flathead Lake Inlet to Gage #12372000	Physically Available Water at Flathead Lake (CFS)	Physically Available Water at 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
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13. The Department finds the requested surface water of 1.6 AF/YR at a flow rate up to 22.0 GPM (0.05 CFS) is physically available in Flathead Lake during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

14. Seli's Ksanka Qlispe' Dam near Polson is the control structure for Flathead Lake. The Applicant's diversion from Flathead Lake will reduce the total volume of water leaving the lake (passing over/through the dam). The area of potential impact for this application is 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).

15. The Department quantified physically available monthly flows (Table 2, column B) and volumes for Flathead Lake at the POD.

16. 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:

- i. 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);
- ii. Considering irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Considering all other water uses as occurring year-round;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct-from-source rights without a designated flow rate; and,
- v. 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 from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

17. The Department subtracted out the flow rates of the existing legal demands (Table 2, column 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 the aforementioned equation found on DNRC Water Calculation Guide (formerly Form 615).

18. 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 (CFS)	Physically Available Water (AF)	Existing Legal Demands between Flathead Lake Inlet and USGS Gage #12372000 (CFS)	Legally Available Water (CFS)	Legally Available Water (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

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

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

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 22.0 GPM and up to 1.6 AF (0.05 CFS) to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

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

- i. Initially reduce irrigation application by 50 percent;
- ii. Irrigate only flowers, shrubs, and trees to ensure survival through drought;
- iii. Turn off the pump when a senior appropriator makes a valid call for water; and
- iv. Haul water for potable use.

24. The Applicant has proven both physical and legal availability of Flathead Lake water. Enough water remains in Flathead Lake to meet existing legal demands and the requested 22.0 GPM up to 1.6 AF. The Applicants have shown that they can regulate their water use and that they have an implementation plan to protect senior water users. The Department finds the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

25. The Applicant will divert water from Flathead Lake at a maximum rate of 22.0 GPM. The diversion uses a Goulds 18GS15, 1.5 horsepower 4-inch submersible pump that extends approximately 150 feet from the shoreline into Flathead Lake. The submersible pump will be located at a depth greater than 5 feet below the annual low water elevation and will include a plastic flow sleeve and a check-valve. The pump will be controlled by an AQUAVAR SOLO variable frequency drive (VFD) set to maintain a constant pressure of 50 psi. The water will be conveyed from the pump approximately 200 feet to the basement of the dwelling through a 1.25-inch high-density polyethylene (HDPE) pipe. The water system will be equipped with one Well-X-Trol WX-250 44-gallon pressure tank, which will pump water through two sediment filters and a Pura UVBB-2 Ultraviolet Light. Based on the pump curve for the Goulds 18GS15 and anticipated operating conditions, the pump can supply a maximum rate of 23 GPM while maintaining a pressure of 50 psi. Maximum flow will be limited to 22 GPM by the VFD controller.
26. The total dynamic head (TDH) of the system at the residence is 201.3 feet, based on:
- i. The system operating pressure of 50 psi (equivalent to 115.4 feet of head) at pump vault and water treatment system losses of 12 psi (equivalent to 27.7 feet of head);
 - ii. The 38-foot elevation gain from Flathead Lake's surface into the pump vault; and,
 - iii. The friction losses (equivalent to 20.20 feet of head) in the transmission and distribution lines at approximately 22.0 GPM.
27. The 0.24 acres of lawn and garden area will be irrigated with a manually operated system consisting of standard garden hoses and impact sprinkler heads.
28. Domestic water demand was confirmed using flow calculations based on fixture demands, equating to a flow rate of 22.0 GPM.
29. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate of 22.0 GPM and annual volume of 1.6 AF.

BENEFICIAL USE

FINDINGS OF FACT

30. The Applicant is requesting 1.0 AF of water for domestic use per DNRC standard. Additionally, the Applicant is requesting 0.6 AF to irrigate 0.24 acres of lawn and garden. Using the United States Department of Agriculture – Natural Resources and Conservation Service (USDA-NRCS) Irrigation Water Requirements (IWR) software, the Department's guidelines outlined in the memo titled "DNRC Consumptive Use Methodology – Turf Grass," The Polson

Weather Station climate data (Net Requirement: 20.68 inches/acre for turf grass), and assuming 70% sprinkler irrigation efficiency (ARM 36.12.155(2)(3)) the Applicant identified a net irrigation requirement of 29.54 inches per acre (2.46 AF) for turf grass ($20.68 \text{ inches/acre} \div 0.70 = 29.54 \text{ inches/acre}$, $29.54 \text{ inches/acre} \div 12 \text{ inches/ft} = 2.46 \text{ AF}$). For 0.24 acres of lawn and garden irrigation demand is therefore 0.59 AF ($2.46 \text{ AF} \times 0.24 \text{ acres} = 0.6 \text{ AF}$). The combined domestic and lawn & garden irrigation diverted volume for this application is 1.6 AF.

31. The Applicant will divert water from Flathead Lake at a maximum flow rate of 22.0 GPM to fill the 44-gallon pressure tank for uses inside the residence. This flow rate is reasonable and adequate to provide the requested volume for the purpose throughout the requested period of use.

32. The Applicant proposes a period of use of April 15th through October 15th for the Lawn and Garden purpose, and a year-round period of use for the domestic purpose. These dates align with DRNC standards for period of use set forth in ARM 36.12.112(a) and ARM 36.12.112(c).

33. The Department finds the proposed water uses are beneficial, and that the requested flow rate of 22.0 GPM and annual volume of 1.6 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

34. 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

35. 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.”

36. 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).

37. 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).

38. 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. 8-13)

LEGAL AVAILABILITY

39. 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).

40. 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.

41. 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 No2. 14-22.)

ADVERSE EFFECT

42. 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.

43. 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).

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

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

46. It is the Applicant's burden to produce the required evidence. *E.g.*, *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 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.

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

48. 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. 23-24)

ADEQUATE DIVERSION

49. 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.

50. 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.

51. 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. 25-29).

BENEFICIAL USE

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

53. 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).

54. 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).

55. 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*.

56. Applicant proposes to use water for domestic use 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 use and lawn and garden irrigation are beneficial uses and that 1.6 AF of diverted volume and 22.0 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF Nos. 30-33)

POSSESSORY INTEREST

57. 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.

58. 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.

59. 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. 34)

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 30162788 should be GRANTED.

The Department determines the Applicant may divert water from Flathead Lake, by means of a submersible pump, from January 1 through December 31 at 22.0 GPM up to 1.6 AF, from a point in the SWSWSE Section 20, Township 25N, Range 20W, Lake County, Montana, for domestic use from January 1 through December 31 and for lawn and garden use from April 15 through October 15. The Applicant may irrigate lawn and garden on 0.24 acres. The place of use is located in the SESWSE Section 20 and NENWNE Section 29, Township 25N, Range 20W, Lake 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 15th 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 15th day of March, 2024, by first class United States mail.

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