

**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 30160453 BY BOGDAN & MARINA SHKURINSKIY)))	PRELIMINARY DETERMINATION TO GRANT BENEFICIAL WATER USE PERMIT
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On April 17, 2023, Bogdan & Marina Shkurinskiy (Applicants) submitted Application for Beneficial Water Use Permit No. 76LJ 30160453 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 75 gallons per minute (GPM) and 13.76 acre-feet (AF) for stock watering and irrigation. The Department published receipt of the application on its website. The Department sent the Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), sent September 27, 2023. The Applicants responded with information dated January 18, 2024, along with an Amendment to Application requesting an increase in flow rate and volume to 76 GPM and 17.25 AF, respectively. The Application was determined to be correct and complete as of March 4, 2024. The Department amended the Application based on the findings in the Legal Availability Section of the Technical Report on March 25, 2024, reducing the proposed volume to 10.89 AF. This amendment has been accepted by the Applicant. An Environmental Assessment for this Application was completed on April 23, 2024.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600- SW, dated April 17, 2023
- Attachments:
 - Supplemental narrative to application
 - USDA NRCS Irrigation Water Requirements (IWR) Crop Data Summary (performed on April 17, 2023)
- Maps:
 - Flathead County Interactive Web Mapping Application parcel maps
 - Aerial imagery demonstrating Point of Diversion (POD) and Place of Use (POU)

Information Received after Application Filed

- Amendment to Application for Beneficial Water Use Permit, dated January 18, 2024
- Deficiency Response, dated January 18, 2024
- Attachments:
 - Appendix A: Certificate of Survey (COS) 19868, dated October 7, 2014, Flathead County
 - Appendix B: Hydraulic calculations table and pump curve
 - Appendix C: Water system specifications for pump and water reel
 - Appendix D: NRCS Irrigation Water Requirements (IWR) Crop Data Summary (performed on April 17, 2023)
 - Appendix E: IWR calculations table
- Maps:
 - Vicinity map showing property location with respect to Section corners.
 - Site map showing irrigation line placement, irrigated acreage, and stock pen.

Information within the Department's Possession/Knowledge

- The Montana Department of Natural Resources and Conservation (DNRC) Stream and Gage Explorer (StAGE) stream discharge measurements dataset.
- List of existing surface water rights on Mooring Creek. This data was used to quantify legal availability and is included in the Technical Report- Legal Availability section.
- The Department 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 Kalispell Regional Office at 406-752-2288 to request copies of the following documents.
 - Technical Memorandum: DNRC's Use of the Irrigation Water Requirements (IWR) Program, dated February 4, 2013
 - Technical Memorandum: Physical Availability of Surface water with Gage Data, dated November 1, 2019

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

For the purposes of this document, Department of DNRC means the Department of Natural Resources & Conservation; USDA means United States Department of Agriculture, NRCS means the National Resource Conservation Service, StAGE means the DNRC Stream and Gage Explorer dataset; 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; AU means animal unit; HP means horsepower; TDH means Total Dynamic Head; and IWR means The United States Department of Agriculture's National Resource Conservation Service Irrigation Water Requirements Program.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicants propose to divert water from Mooring Creek (historically known as Morning Creek), by means of a pump, from January 1st – July 31st and October 1st – December 31st at 76 GPM up to 10.89 AF, from a point in the SE ¼ of the NE ¼ of the NE ¼ of Section 22, Township 29 N, Range 20 W, Flathead County, for irrigation from April 20th – July 31st and October 1st – October 10th and stock watering use from January 1st – July 31st and October 1st to December 31st . The Applicant proposes to irrigate 7.5 acres of alfalfa hay grass totaling 10.68 AF annually and water 10 beef cows and 3 horses (14.5 AU) totaling 0.21 AF annually. The place of use is generally described as 6 acres in the SE ¼ of the NE ¼ of the NE ¼ of Section 22, Township 29N, Range 20W, and 1.5 acres in the SW ¼ of the NE ¼ of the NE ¼ of Section 22, Township 29N, Range 20W, Flathead County, Montana.
2. This permit will not be supplemental and does not share a place of use with any existing water rights.
3. The provisional beneficial water use permit will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING

PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

4. Water may not be appropriated during the months of August and September.

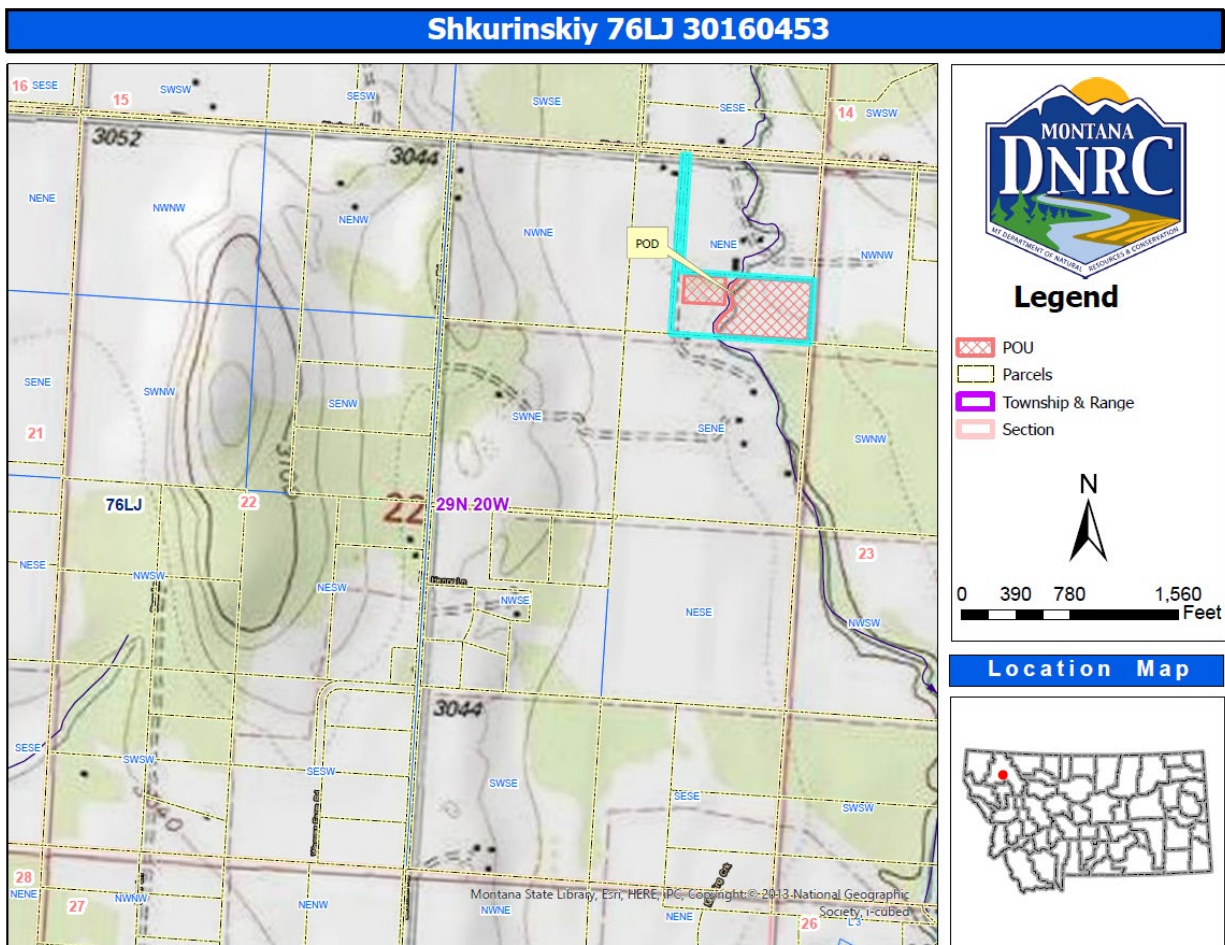


Figure 1- Map of Proposed Place of Use and Point of Diversion

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

GENERAL CONCLUSIONS OF LAW

5. 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 . . .

6. 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.

7. 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.

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

9. 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.

10. 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

11. The Applicants propose to irrigate 7.5 acres of alfalfa hay totaling 10.68 AF annually April 20th – July 31st and October 1st – October 10th and water 10 beef cows and 3 horses (14.5 AU) totaling 0.21 AF annually from January 1st – July 31st and October 1st – December 31st. This equates to a total volume demand of 10.89 AF, to be diverted at a rate of 76 GPM (0.17 CFS).

12. The Department used data from the Mooring Creek at Blackmer Road DNRC gage number 76LJ 004 (shown in figure 2). This gage is located approximately 400 feet upstream of the POD for the proposed appropriation. The date range used: May 11, 2017- March 7, 2022, includes the entire period of record for this gage.

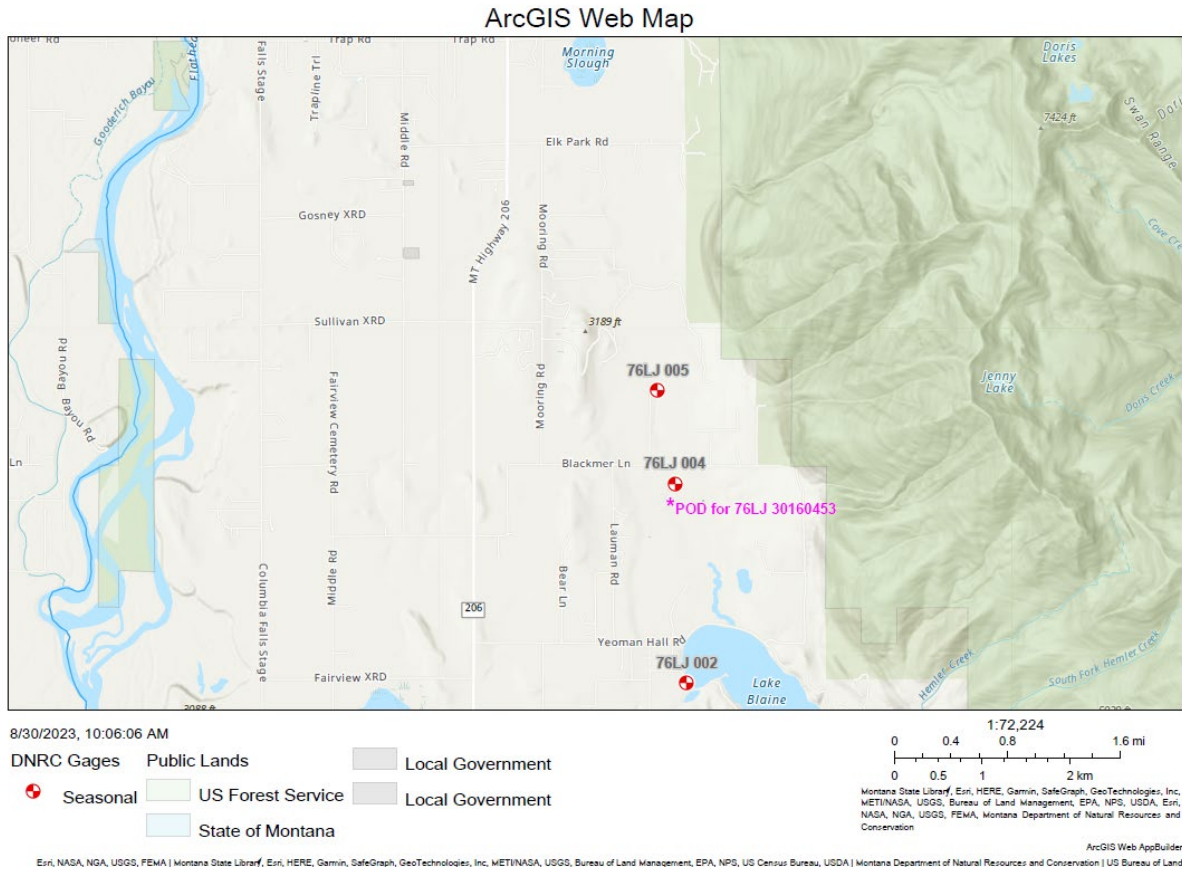


Figure 1- Map of gage locations near the POD for 76LJ 30160453 sourced from the DNRC StAGE- Stream and Gage Explorer

13. Physical availability of Mooring Creek water at the POD was quantified monthly. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the water rights between the gage and the POD from the monthly median of the mean gage values. The DNRC used the method below to quantify physically available monthly flows and volumes at the POD during the proposed period of diversion:

- a. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for Mooring Creek using DNRC gage #76LJ 004 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).
- b. The Department found a single water right to be located between the POD and the upstream 76LJ 004 gage. The flow rate required for this water right was added to Table 1, column D during its respective period of diversion.

c. Since the gage used is upstream of the POD, the physically available water is calculated by subtracting the flow obligation of water rights below the gage from the flow at the gage (Table 1, column E). Physically available monthly flows were then converted to monthly volumes (Table 1, column F.)

i. $Median\ of\ the\ mean\ monthly\ flow\ (CFS) \times 1.98\ (AF/day/1\ CFS) \times\ days\ per\ month = AF/month.$

Table 1. Physical Availability at the Point of Diversion on Mooring Creek					
A	B	C	D	E	F
Month	Median of the Mean Monthly Flow at Gage 76LJ 004 (CFS)	Mean Monthly Volume at Gage 76LJ 004 (AF)	Existing Rights from Gage 76LJ 004 to POD (CFS)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
January	2.01	123.20	0	2.01	123.20
February	1.58	87.35	0	1.58	87.35
March	1.69	103.73	0	1.69	100.38
April	2.55	151.74	0.89	1.66	98.87
May	9.39	576.51	0.89	8.50	521.89
June	18.00	1068.92	0.89	17.11	1016.05
July	7.84	481.36	0.89	6.95	426.73
August	2.06	126.36	0.89	1.17	71.73
September	1.01	60.18	0.89	0.12	7.31
October	2.90	178.01	0.89	2.01	123.38
November	3.78	224.78	0	3.78	224.78
December	2.40	147.53	0	2.40	147.53

14. The Department finds that surface water is physically available during the proposed period of diversion, from January 1st - July 31st and October 1st - December 31st annually.

LEGAL AVAILABILITY

FINDINGS OF FACT

15. The area of potential impact is Mooring Creek, below the POD and above the mouth of Mooring Creek at Lake Blaine. There are six surface water rights with points of diversion located within the area of potential impact, listed in Table 2 below. Diverting water from Mooring Creek will reduce the total volume of water in the creek from the POD to the creek mouth, which the Department considers an appropriate hydrologic boundary for the area of potential impact.

16. The following existing legal demands (surface water rights) may be affected by the proposed appropriation:

Table 2. Water Rights Below POD and Above Mooring Creek Mouth at Lake Blaine		
Water Right Number	Period of Use	Flow Rate
76LJ 30122750	Jan-1 to Dec-31	0.08 CFS**
76LJ 147094	Jan-1 to Dec-31	0.08 CFS**
76LJ 147092	Jun-1 to Sep-1*	2 CFS
76LJ 124154	Jan-1 to Dec-31	0.08 CFS**
76LJ 124152	May-1 to Sep-30	0.06 CFS
76LJ 103279	Jan-1 to Dec-31	0.07 CFS
<p><i>* Water Right 76LJ 147092 flows were not subtracted from the month of September in Table 3 below as the period of use only involves the one day (the first day) of the month.</i></p> <p><i>**In order to account for livestock direct from source rights that do not have a defined flow rate, Department practices is to assign one combined total flow rate of 35 GPM (0.08 CFS).</i></p>		

17. The Department generated a comparison of the physical water supply at the POD to the existing legal demands in the area of potential impact over the requested period of diversion. Legal availability of Mooring Creek water was quantified monthly. The DNRC used the method below to quantify legally available monthly flows and volumes at the POD during the proposed period of diversion:

- a. The Department quantified physically available monthly flows (Table 3, column B) and volumes for Mooring Creek at the POD.
- b. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 3, column C-D) by;
 - i. Generating a list of existing water rights from the POD to the Mooring Creek mouth (Table 2);
 - ii. Delegating all uses as occurring during their respective periods of diversion;
 - iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate; and
 - iv. 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 as an appropriate measure of assessing existing rights as it protects existing water users.

c. The Department subtracted out of the flow rates of the existing legal demands (Table 3, columns C-D) within the area of potential impact from the physically available water (Table 3, column B) to determine legal availability at the POD (Table 3, column E). Legally available monthly flows were then converted to monthly volumes (Table 3, column F).

d. Monthly flows were converted to monthly volumes using the following equation found on DNRC Water Calculation Guide (formerly Form 615):

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

18. The comparison between physically available and legally available water in Mooring Creek is shown in Table 3 below, indicating that water is legally available for the proposed appropriation from January 1st - July 31st and October 1st - December 31st.

Table 3. Legal Availability at the Point of Diversion on Mooring Creek					
A	B	C	D	E	F
Month	Physically Available Water at POD (CFS)	Existing Legal Demands from Gage 76LJ 004 to POD (CFS)	Existing Legal Demands from POD to Mooring Creek Mouth (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	2.01	0	0.15	1.86	113.99
February	1.58	0	0.15	1.43	79.04
March	1.69	0	0.15	1.54	94.52
April	2.55	0.89	0.15	1.51	89.96
May	9.39	0.89	0.21	8.29	509.00
June	18.00	0.89	2.21	14.90	884.78
July	7.84	0.89	2.21	4.74	291.08
August	2.06	0.89	2.21	-1.04	-63.92
September	1.01	0.89	0.21	-0.09	-5.16
October	2.90	0.89	0.15	1.86	114.17
November	3.78	0	0.15	3.63	215.87
December	2.40	0	0.15	2.25	138.32

19. The Department finds the proposed appropriation of 76 GPM (0.17 CFS) and up to 10.89 AF to be legally available during the proposed period of use, January 1st - July 31st and October 1st - December 31st.

ADVERSE EFFECT

FINDINGS OF FACT

20. The Applicants have provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during water shortages, the Applicants will turn off their pump when a senior appropriator makes a valid call for water. With respect to the existing senior water rights downstream of the proposed POD, the Applicants will not divert water from Mooring Creek during the months of August and September.

21. The Applicants have proven physical availability of Mooring Creek water throughout the proposed period of use from January 1st through July 31st and October 1st through December 31st. The Applicants have proven that the proposed appropriation up to an annual volume of 10.68 AF is legally available for irrigation from April 20th through July 31st and October 1st through October 10th annually. The Applicants have proven that the proposed appropriation of 76 GPM (0.17 CFS) up to an annual volume of 0.21 AF is legally available for stock watering from January 1st through July 31st and October 1st through December 31st annually. The Applicants have shown that they can regulate their water use and that they have an implementation plan to protect senior water users.

22. The Department finds the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

23. The Applicants will divert water from Mooring Creek at a maximum rate of 76 GPM. The diversion will use an AY McDonald 24500T 5 horsepower (HP) submersible pump. Water will be conveyed via 2-inch PVC to a series of irrigation headers producing water 1.5 acres on the west side of Mooring Creek and 6.0 acres on the east side of Mooring Creek. A Kifco Model T210 Water-Reel with a timed retractable sprinkler will be used to irrigate Alfalfa Hay on the property.

24. The total dynamic head (TDH) of the system at the farthest reach of the irrigation system is 187.6-feet, based on:

- a. The maximum operating pressure of 62 pounds per square inch (psi) (equivalent to 143.1-feet of head);
- b. The 5-foot elevation gain from Mooring Creek to the far end of the irrigation system; and,
- c. The friction losses in the 434-foot long 2-inch diameter PVC supply line at 76 GPM (equivalent to 39.5-feet of head).

25. The Kifco T210 is capable of irrigating an area of 171x486 feet in a four hour period at a design flow of 76 GPM and 62 psi, therefore, the irrigated area will be divided into five zones to be operated one at a

time. The Applicant intends to irrigate an average of 46 hours per week and record total irrigation hours on a weekly basis.

26. The AY McDonald 25400T 5 HP pump is capable of producing 76 GPM at 187.6-feet of TDH based on the Applicant-provided system specifications. This flow rate will allow the Applicants to supply the irrigation system at adequate operating pressures.

27. A 250-gallon stock tank will be manually filled by connecting a 1-inch hose to the irrigation connection on the west side of Mooring Creek. The stock tank will only be refilled when the irrigation system is off to ensure the Applicant does not exceed the requested flow of 76 GPM.

28. The Department finds the system capable of producing and distributing the requested flow rate of 76 GPM and annual volume of 10.89 AF.

BENEFICIAL USE

FINDINGS OF FACT

29. The Applicant proposes to divert up to 10.89 AF annually at a flow rate of 76 GPM to supply irrigation and stock watering demands.

30. The Applicant considered data from the Kalispell WSO Airport Weather Station in Flathead County and IWR to identify a net irrigation requirement of 19.03 inches per acre (1.59 AF/acre) per year, which is within DNRC standards found in ARM 36.12.115 for Climatic Area 4 (moderately low consumptive use).

31. A Technical Report was sent to the Applicant on March 4, 2024, with the Correct and Complete determination letter demonstrating lack of legal availability in the months of August and September. An Amended Technical Report was sent to the Applicant on April 10, 2024 with minor edits but no change in lack of legal availability in the months of August and September. The Applicant did not respond within the required 15 days from the date of the letter; therefore, the Department has proceeded with the following volume reductions as an amended application proposal:

- a. Irrigation demands were determined from the USDA NRCS annual Irrigation Water Requirements 80 % dry year chance, excluding the months of August and September.

$$\frac{11.96 \text{ in}}{0.7 \text{ (sprinkler efficiency)}} * \frac{1 \text{ ft}}{12 \text{ in}} * 7.5 \text{ acres} = 10.68 \text{ AF}$$

- b. Stock watering demands were determined using the DNRC standard of 15 gallons per day per animal unit, excluding the months of August and September.

$$14.5 \text{ animal units} * \frac{15 \text{ gallons}}{\text{day}} * 304 \text{ days} * \frac{1 \text{ AF}}{325,851 \text{ gallons}} = 0.21 \text{ AF}$$

32. The Department finds that the water use is beneficial, and the requested flow rate of 76 GPM and volume of 10.89 AF is reasonably justified per ARM 36.12.1801(3).

33. The provisional beneficial water use permit will be subject to the following conditions:
- THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
34. Water may not be appropriated during the months of August and September.

POSSESSORY INTEREST

FINDINGS OF FACT

35. The Applicant signed the application form affirming the Applicant has possessory interest, in the property where the water is to be put to beneficial use.
36. The Department finds that the Applicant has possessory interest in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

37. 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.”

38. 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).

39. 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). (FOF 11-14.)

LEGAL AVAILABILITY

40. 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.

41. *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). 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.

42. 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 15-19.)

ADVERSE EFFECT

43. 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.

44. 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).

45. 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).

46. 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).

47. 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.

48. 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).

49. 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 20-22)

ADEQUATE DIVERSION

50. 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.

51. 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.

52. 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 23-28).

BENEFICIAL USE

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

54. 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).

55. 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).

56. 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*.

57. Applicant proposes to use water for irrigation and stock watering which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation and stock watering are beneficial uses and that 10.93 AF of diverted volume and 76 GPM is the amount needed to sustain these beneficial uses. Section 85-2-311(1)(d), MCA. (FOF 29-34)

POSSESSORY INTEREST

58. 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.

59. 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.

60. 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 35-36)

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 30160453 should be GRANTED.

The Department determines the Applicant may divert water from Mooring Creek, by means of a pump, at 76 GPM up to 10.89 AF, from a point in the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 22, Township 29 N, Range 20 W, Flathead County, for irrigation from April 20th to October 31st, excluding August 1st to September 30th and stock watering use from January 1st to December 31st, excluding August 1st to September 30th. The Applicant may irrigate Alfalfa Hay on 7.5 acres and water up to 14.5 AU. The place of use is located on 6 acres in the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 22, Township 29 N, Range 20 W, AND 1.5 acres in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 22, Township 29 N, Range 20 W, Flathead County.

The provisional beneficial water use permit will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

Dated this 26th day of April, 2024.

/Original signed by Jim Ferch/

Jim Ferch, Manager
Kalispell 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 26th day of April, 2024, by first class United States mail.

BOGDAN & MARINA SHKURINSKIY
834 BLACKMER LANE
COLUMBIA FALLS, MT 59912

and

BRAD BENNETT
WATER ENVIRONMENTAL TECHNOLOGIES
102 COOPERATIVE WAY, SUITE 100
KALISPELL, MT 59901

KALISPELL Regional Office, (406) 752-2288