

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76 LJ - 30071619 BY PRESBYTERY OF GLACIER	}	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 31, 2014, Presbytery of Glacier (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ – 30071619 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 129 gallons per minute (GPM) up to 15.03 acre feet (AF) for commercial use which includes lawn and garden irrigation use. The Department published receipt of the Application on its website. Department Hydrologist, Attila Fohnagy, reviewed the Application for aquifer testing requirements and permit criteria; prepared the Aquifer Test and Depletion Report dated February 5, 2015. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated June 23, 2015. The Applicant responded with information dated August 5, 2015. The Application was determined to be correct and complete as of March 23, 2016. An Environmental Assessment for this Application was completed on July 19, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
 - DEQ approval letter dated 5/18/2015
- Maps:
 - USGS Topographic Site Vicinity Map
 - Aerial Map depicting the place of use

Aerial Map depicting the existing and proposed water system design

- Aquifer Testing Addendum

Information Received after Application Filed

- Department Hydrogeologist Application Review Memorandum, dated February 5, 2015
- Deficiency Response from Applicant to DNRC dated August 4, 2015, and received August 5, 2015

Information within the Department's Possession/Knowledge

- Independent review of USGS gage data for the Flathead River Gage #12372000 Period of record October 1938 – September 2013.
- Independent review of USGS gage data for the Flathead Lake Gage #12363000 Period of record October 1951 – September 2013
- Independent review of senior appropriations on depleted surface sources
- Department memo dated January 10, 2011 entitled “Legal Availability of Groundwater in the Flathead Deep Aquifer” written by Russell Levens and James Heffner; Groundwater Hydrologists for the Water Management Bureau
- Legal demands for the above mentioned streams using the Department water right database

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).

PROPOSED APPROPRIATION

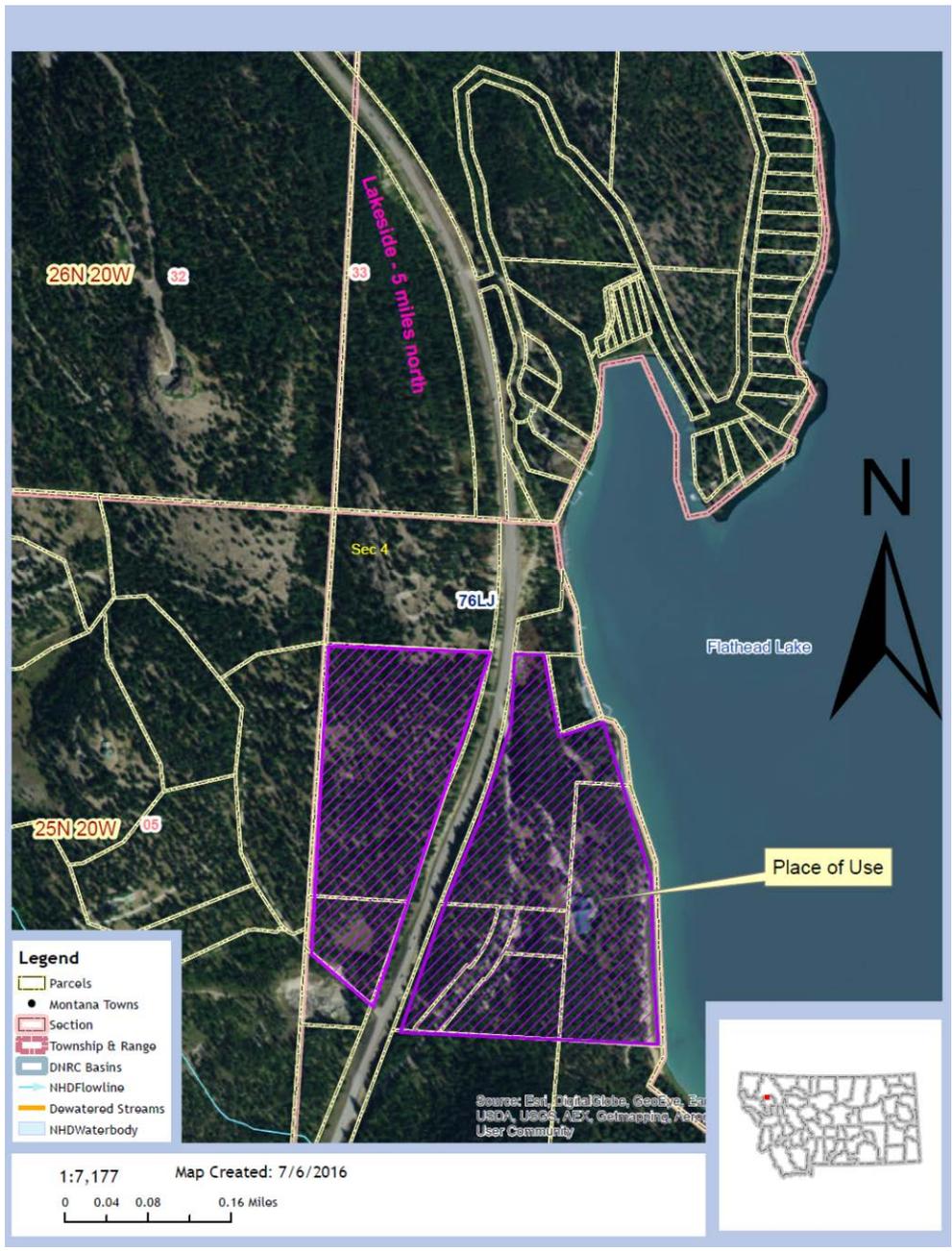
FINDINGS OF FACT

1. The Applicant proposes to divert groundwater from an existing 260 feet deep groundwater well by means of a 20 HP pump. The groundwater well is located in the SWSENW Section 4, T25N, R20W approximately 4.5 miles south of the town Lakeside, Lake County. The proposed appropriation is for the expansion of the Presbytery of Glacier Camp. The expansion consists of Spruce Lodge, a mixed use building also referred to as a Conference Center and lawn and garden irrigation. The Applicant submitted approval letter from the Department of Environmental Quality, permit #EQ#15-1579, PWSID#MT0004632.
2. The proposed period of diversion is January 1 through December 31 at a diversion rate of 129 gallons per minute (GPM) up to 15.03 acre feet (AF), for commercial use and April 17 through October 19 for lawn and garden irrigation on 1.07 acres. The place of use is generally located in SWNW Section 4, T25N, R20W, Lake County.
3. Certificate of Water Right number 76LJ-22607-00 is associated with this Provisional Permit; they have overlapping places of use and will share the conveyance system to serve both the existing and proposed use of the camp facility. The groundwater certificate is for 25 GPM up to 2 AF of volume, the point of diversion being a groundwater well referred to as public water supply well (PWS)#1.
4. The point of diversion is located in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions. The Applicant's well is located approximately 300 feet westerly of Flathead Lake shoreline. The source aquifer is a deep confined aquifer, referred to by Montana Bureau of Mines and Geology as the Deep Aquifer. Depletions to this aquifer will show up in the Flathead River and Flathead Lake.
5. The proposed facility improvements would include new subsurface wastewater drain field sized to meet the building uses and will be approved by the Lake County Environmental Health Department. The Applicant submitted approved permits from the Environmental Health Department for the four (4) existing separate septic systems serving different areas of the camp.

6. The total requested diverted volume is 15.03 AF; of this 2.87AF will be consumed. Consumptive use was calculated using DNRC standards assuming an efficiency value of 10% for drain fields for domestic use ($12.74 \text{ AF domestic diverted volume} \times 0.10 \text{ efficiency value} = 1.274 \text{ AF consumed}$) and 70% for lawn and garden irrigation of 1.07 acres ($2.29\text{AF} \times .70 = 1.60\text{AF}$) for a total consumptive use of 2.87AF ($1.27\text{AF} + 1.60\text{AF} = 2.87\text{AF}$)

7. The Applicant has agreed to measure the flow rate and volume of water diverted and report these figures to DNRC on an annual basis. The following condition applies:

“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. Failure to submit reports may be cause for revocation of a permit or change. The 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.”



Preliminary Determination to Grant
 Application for Beneficial Water Use Permit No.76LJ - 30071619

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

GENERAL CONCLUSIONS OF LAW

8. 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 . . .

9. 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.” § 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.

10. 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.

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

12. 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. § 85-2-311(6), MCA.

13. 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

14. The Applicant conducted a 24-hour constant rate test on the public water supply well (PWS) #2 per ARM 36.12.121 at an average flow rate of 143 GPM, which is approximately 14 GPM more than the requested 129 GPM. Discharge water was measured using a 2 inch Water Specialties TM-01 flow meter and was conveyed through a 4 inch flexible fire hose routed 200 feet away from the test well towards Flathead Lake. PWS well #1 is located 880 feet northerly of the pumped well and was used as an observation well. PWS well #1 exhibited a maximum drawdown of 0.7 feet from a static water level of 152.6 feet below ground surface (bgs). PWS well #2 showed a maximum drawdown in the pumping well of 7.5 feet below the static water level of 119.5 feet below ground surface, leaving 133 feet of water above the well bottom. Drawdown data was used to determine aquifer properties.

15. Physical groundwater availability was evaluated by calculating groundwater flux through a zone of influence determined by the 0.01 foot drawdown contour. A distance of 5000 feet from the pumping well to the 0.01 foot contour was calculated using the Neuman (1974) solution with values of 47 ft²/day and 0.1 for transmissivity and specific yield, respectively, and a constant pumping rate of 9.53 GPM for one year. The calculation for groundwater flux through the delineated zone of influence is 216.6 acre-feet per year. The project requested volume is 15.03 AF.

16. Department Hydrogeologist reviewed aquifer testing and found the aquifer testing meets the requirements under ARM 36.12.121 and is an adequate basis to address criteria under MCA 85-2-311.

17. Based on the production well being completed to a depth of 260 feet in the Flathead Valley's deep alluvial aquifer, the Department understands this groundwater source to be

interconnected with surface water and therefore groundwater levels are effectively controlled by the Flathead River and Flathead Lake. A Department memo dated January 10, 2011 entitled “Legal Availability of Groundwater in the Flathead Deep Aquifer” states groundwater levels in the Deep Aquifer are effectively controlled by Flathead River and Flathead Lake. Physical availability will be evaluated for Flathead River and Flathead Lake. No additional modeling, evaluation of the zone of influence or aquifer flux calculations are needed to prove groundwater’s physical availability.

18. The source aquifer is interpreted to be hydraulically connected to Flathead River and Flathead Lake. Physical availability of surface water was assessed using the USGS’s Flathead River at Columbia Falls gage (station # 12363000), with a period of record of October 1951 thru September 2014 and the Flathead River near Polson USGS gage (station # 12372000) with a period of record of October 1938- September 2013. The following tables represents year-round median of the mean monthly flow rates and volumes associated to these measurements and summarizes physical availability for the Flathead River and Flathead Lake for the proposed year-round period of depletion (Table 1 - 2).

Table 1: Median of the Mean Monthly Flows and Volumes of the Flathead River (#12363000)

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	5,607.0	4,869.0	4,772.0	10,535.0	22,645.0	24,940.0
Volume (AF)	344,157.7	269,937.4	292,905.4	625,779.0	1,389,950.1	1,481,436.0
	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	11,605.0	5,798.0	5,071.0	5,166.5	4,626.5	6,036.0
Volume (AF)	712,314.9	355,881.2	301,217.4	317,119.8	274,814.1	370,489.7

Table 2: Median of the Mean Monthly Flows and Volumes of the Flathead River (#12372000)

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	10,380.0	9,234.0	7,778.0	9,223.0	18,960.0	25,820.0
Volume (AF)	637,124.4	511,933.0	477,413.6	547,846.2	1,163,764.8	1,533,708.0
	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	13,605.0	6,317.0	6,092.5	7,369.0	8,838.0	10,070.0
Volume (AF)	835,074.9	387,737.5	361,894.5	452,309.2	524,977.2	618,096.6

19. The Department finds the requested flow of 129 GPM (approximately 0.29 CFS) up to 15.03 AF of water is physically available.

CONCLUSIONS OF LAW

20. 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.”

21. 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).

22. 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).

23. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Findings Of Fact No. 14-19)

Legal Availability:

FINDINGS OF FACT

24. Based on Department memo dated January 10, 2011, from James Heffner, Water Management Bureau, groundwater levels in the deep alluvial aquifer are effectively controlled by the Flathead River and Flathead Lake. A new groundwater user will not alter the regional gradient, and thus the aquifer flux. A new groundwater user will, however, reduce the discharge from the aquifer to the river and lake, generally in an amount equivalent to their consumptive use. Therefore, evaluation of legal availability was based on depletions to surface water of the Flathead River and Flathead Lake instead of legal demands in the aquifer flux for this application as required by ARM 36.12.1704. Below is a breakdown of monthly depletions to surface waters, depletion from the proposed groundwater appropriation is expected to be generally constant year-round at a rate of 1.8 GPM (0.004 CFS) up to 0.25 AF per month for a total of 2.91 AF a year (Table 3). Commercial consumptive use was calculated based on the Applicant's original request of 13.08 AF diverted for commercial use. The diverted volume requested was amended by the Applicant in their deficiency response to 12.74 AF. The consumptive use figures for the purpose of evaluating legal availability were not recalculated by the department as the figures originally calculated are more conservative and water was found to be legally available for the more conservative figures.

Table #3 - Consumption and net depletion to Flathead Lake

Month	Commercial Consumption (AF)	Irrigation Consumption (AF)	Depletion (AF)	Depletion (gpm)
January	0.11	0.00	0.25	1.8
February	0.11	0.00	0.22	1.8
March	0.11	0.00	0.25	1.8
April	0.11	0.04	0.24	1.8
May	0.11	0.18	0.25	1.8
June	0.11	0.30	0.24	1.8
July	0.11	0.44	0.25	1.8
August	0.11	0.40	0.25	1.8
September	0.11	0.20	0.24	1.8
October	0.11	0.04	0.25	1.8
November	0.11	0.00	0.24	1.8
December	0.11	0.00	0.25	1.8
Total	1.31	1.60	2.91	

25. The Department assessed all surface water legal demands from the Flathead River at Columbia Falls USGS gage (# 12363000) to the Inlet of Flathead Lake and on Flathead Lake to USGS gage # 12372000 Flathead River near Polson. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st; all legal demands exist within climatic region three. Domestic, commercial, multiple domestic, industrial and other uses were analyzed as year round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of depletion, it was assumed the flow rate associated with each month is continuously in use during that month. This assumption leads to an overestimate of legal demands for their respective periods and as a result the Department finds this is an appropriate measure of legal demands. A summary of all legal

demands over the proposed period of depletion for the Flathead River and Flathead Lake are presented in Tables 4-5 below.

Table 4 : Median of the Mean Monthly Flows minus Existing Legal Demands. All legal demands below USGS gage #12363000 to the inlet of Flathead Lake.

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	5,607.0	3,506.6	2,100.4	128,923.8
February	4,869.0	3,506.6	1,362.4	75,532.6
March	4,772.0	3,506.6	1,265.4	77,671.5
April	10,535.0	6,772.3	3,762.7	223,501.4
May	22,645.0	8,247.3	14,397.7	883,727.8
June	24,940.0	8,247.3	16,692.7	991,543.4
July	11,605.0	5,524.3	6,080.7	373,230.3
August	5,798.0	3,622.3	2,175.7	133,541.4
September	5,071.0	3,622.3	1,448.7	86,049.8
October	5,166.5	3,622.3	1,544.2	94,779.9
November	4,626.5	3,506.6	1,119.9	66,523.2
December	6,036.0	3,506.6	2,529.4	155,255.8

Table 5: Median of the Mean Monthly Flows minus Existing Legal Demands. All legal demands from the inlet of Flathead Lake to USGS gage #12372000.

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,380.0	104.7	10,275.3	630,699.9
February	9,234.0	104.7	9,129.3	506,130.2
March	7,778.0	104.7	7,673.3	470,989.1
April	9,223.0	172.1	9,050.9	537,621.3
May	18,960.0	172.1	18,787.9	1,153,199.1
June	25,820.0	172.1	25,647.9	1,523,483.1
July	13,605.0	172.1	13,432.9	824,509.2
August	6,317.0	172.1	6,144.9	377,171.8
September	6,092.5	172.1	5,920.4	351,669.6
October	7,369.0	172.1	7,196.9	441,743.5
November	8,838.0	104.7	8,733.3	518,759.9
December	10,070.0	104.7	9,965.3	611,672.1

26. The above comparison adequately demonstrates that water is legally available in the Flathead River and Flathead Lake in amounts that exceed the requested flow rate of 129 GPM and 15.03 AF.

27. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai 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.

28. Salish-Kootenai 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 Salish-Kootenai Dam require 1,831,306 AF to meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

29. 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 Flathead River, Flathead Lake can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

CONCLUSIONS OF LAW

30. 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).

31. 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.

32. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert

and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

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

plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

34. 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. § 85-2-311(1)(a)(ii), MCA. (Findings Of Fact No. 24 – 29)

Adverse Effect

FINDINGS OF FACT

35. The potential for adverse effect to senior groundwater right appropriators was evaluated using information derived from the aquifer test. The Aquifer Test Report prepared by Department Hydrogeologist Atila Fohnagy, dated 2015, calculated drawdown in nearby wells using the Neuman (1974) solution model using aquifer values of 47 ft²/day and 0.1 for transmissivity and specific yield, respectively, and a constant pumping rate of 9.53 GPM for one year (proportional to the requested total volume of 15.37 AF per year) and generated a radial zone of influence at a distance of 5,000 feet from PWS well#2. After five years of constant pumping, the model predicted drawdown in excess of 1 foot would occur in wells within the 5,000 foot zone of influence. There are 20 water rights in the zone of influence that are predicted to experience drawdown greater than 1 foot. Static water level of the closest well at 2,500 feet away is 280 feet. The well has a total depth of 624 feet and has an available water column of 340.4 feet. A drawdown of 3.6 feet in this well would not result in adverse affect (See Table 6 below). Adequate water columns will exist in all wells to allow appropriators to reasonably exercise their water rights after interference from the proposed wells has manifested.

Water Right No.	Owner Name	Distance (ft)	Well Depth (ft)	Static Water Level (ft) bgs	Drawdown (ft)	Available Water Column (ft)
76LJ 58591 00	M. J. & S. B. WAKEFIELD	4500	103	26	1.2	75.8
76LJ 65007 00	MITCHELL FAMILY TRUST	4800	126	42	1	83.0
76LJ 30017948	ROBERT J LAVIN	4000	460	360	1.6	98.4
76LJ 102622 00	C. S. DIXON; L. J. DIXON	4800	152	26	1	125.0
76LJ 113416 00	D. A. BOWIE; L. A. BOWIE	4000	645	488	1.6	155.4
76LJ 30018221	BRIAN J WALKER	4000	304	141	1.6	161.4
76LJ 81565 00	DEEP BAY CENTER INC	3000	315	148	2.8	164.2
76LJ 108200 00	J. LANDAU; M. L. MILLER	4500	402	235	1.2	165.8
76LJ 30047567	JAMES T HARRISON	4500	220	26	1.2	192.8
76LJ 81490 00	E. M. WEEKS; K. R. WEEKS	3500	284	26	2.1	255.9
76LJ 78129 00	HOMER FAMILY TRUST	4000	304	9	1.6	293.4
76LJ 4089 00	MONTANA FWP	3000	350	30	2.8	317.2
76LJ 114101 00	WILLIAM C WINDERS	3000	769	445	2.8	321.2
76LJ 30066890	BROOKE A THOMAS	2500	624	280	3.6	340.4
76LJ 76461 00	J. R. GREENE; J. L. GREENE	4500	530	5	1.2	523.8
76LJ 40161 00	HOLLANDER FAMILY TRUST	4000	676	108	1.6	566.4
76LJ 30016570	HOLLY JEAN LARSON	4000	728	26	1.6	700.4
76LJ 46796 00	JILL A ADAMS	2500	NA	NA	3.6	NA
76LJ 101320 00	JAY HOKER; SUE HOKER	4000	NA	NA	1.6	NA
76LJ 7506 00	HOLLANDER FAMILY TRUST	4500	NA	NA	1.2	NA

Table 6: Available water column for groundwater rights effected by the monthly pumping schedule for the proposed well. Note: Available Water Column is equal to Static Water Level and Drawdown subtracted from the Well Depth.

36. The calculation for groundwater flux through the delineated zone of influence is 216.6 acre-feet per year while the legal demand calculated within the zone of influence is 150.6 AF per year, leaving 66 AF of unappropriated groundwater. The requested volume is 15.03 AF demonstrating that water is available for appropriation without causing adverse effect.

37. To evaluate if this project will adversely affect existing water rights on the Flathead River and Flathead Lake the Department subtracts monthly net depletions from the flow rate/volume of water legally available on those sources. For every month of the proposed period of diversion, the flow rate/volume of Flathead Lake and the Flathead River exceed all legal demands and the proposed use. The Applicant has shown that water is physically and legally available for these surface depletions see Finding of Facts No. 14-29 in amounts that ensure adverse effect will not occur.

38. The Applicant has a plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of prior appropriators will be satisfied. During times of extreme water shortage or if call should be made, the Applicant proposes the following plan:

1. Stop irrigation at Lake Lodge
2. Ration shower use in upper and lower bathhouse
3. Stop irrigation at Mixed use building
4. Stop irrigation at Spruce Lodge Expansion
5. Facility wide water restrictions to 50% of normal
6. Discontinue all irrigation
7. Turn off the well pumps and haul water on site.

39. A measuring condition will exist for this provisional permit. Diverted flow rates and monthly volumes will be reported to the Department on an annual basis to ensure the appropriator remains under these limitations of the permit. The Department finds that this appropriation will not prevent the existing groundwater appropriators from reasonably exercising their water rights.

40. The total requested diverted volume is 15.03 AF; of this 2.87AF will be consumed. Consumptive use was calculated using DNRC standard assuming an efficiency value of 10% for drain fields for domestic use ($12.74 \text{ AF domestic diverted volume} \times 0.10 \text{ efficiency value} = 1.274 \text{ AF consumed}$) and 70% for lawn and garden irrigation of 1.07 acres ($2.29\text{AF} \times .70 = 1.60\text{AF}$) for a total consumptive use of 2.87AF ($1.27\text{AF} + 1.60\text{AF} = 2.87\text{AF}$)

41. The Department finds that senior ground water appropriators will not be adversely affected and that predicted depletions will not prevent surface water appropriators from reasonably exercising their water rights.

CONCLUSIONS OF LAW

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. (1984), 211 Mont. 91, 685 P.2d 336 (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(8).
44. In regard to senior hydropower water rights, the facts in this application are distinguishable from those In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLIC) concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production. The proposed appropriation in this case is a groundwater appropriation that depletes surface water more than 150 miles upstream of Noxon Reservoir and is located above Flathead Lake and Salish-Kootenai Dam, and below the inflows from the Bureau of Reclamation's Hungry Horse Dam.
45. Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin,

does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista and Confederated Salish and Kootenai Tribes' prior appropriations in this basin, which has not been closed to appropriation by the Legislature, does not include the right to prevent this appropriation where Avista and Confederated Salish and Kootenai Tribes can reasonably exercise their hydropower water rights

46. 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*, (2011) Pg. 4.

47. 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 (1991), 249 Mont. 425, 816 P.2d 1054.

48. 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*, (2011) Pg. 7 (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). (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.

49. 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*, (2011) Pg. 8.

50. 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. § 85-2-311(1)(b) , MCA. (Finding of Facts No. 35-43)

Adequate Diversion

FINDINGS OF FACT

51. The point of diversion is a well referred to as PWS well #2 which is 260 feet deep and has a static water level of 119.5 feet bgs with an 8” casing and a 6” steel liner. PWS well #2 was drilled by a licensed well driller (license#WWC-450) in accordance with MCA Title 37, Chapter 43 and ARM Title 36, Chapter 21. The water system will be controlled by PWS well #2 and supplemented by PWS well #1 located 880 feet away. The two wells will be connected to the conveyance system to serve both the existing and proposed future use at the camp facility.

52. The water distribution system consists of a 20 hp Franklin Electric 6” high capacity pump with associated control box and wiring. The pump is capable of producing 130 GPM at 400 feet of total dynamic head. The Applicant provided copies of the pump curve and schematic diagram of the water distribution system. The proposed total final build out peak instantaneous demand of 154 GPM can be achieved by using the existing PWS well #1 at 25 GPM and the 129 GPM proposed from PWS well #2 (existing 25 GPM + 129 GPM proposed = 154 GPM)

53. Components of the system include several hundred feet of 1.25, 2, 4, and 6 inch water transmission lines, main lines and a 28,694 gallon above ground water storage tank that stores water in case of a fire and provides pressure head to the water system.

54. Per the Aquifer Test Report (Folnagy, A., 2015), the Department’s groundwater hydrologists modeled a straight line extrapolation from the 24-hour aquifer test that showed 8.3 foot drawdown occurring after one year. This would leave 132 feet of water above its bottom. Using a monthly pumping schedule and daily drawdown for PWS well#2 showed there would be 66.2 feet of drawdown. The well is 260 feet deep with a static water level of 119.5 feet bgs. After one year of pumping there will be water remaining above the pump demonstrating short term physical availability and adequate means of diversion.

55. The proposed public water supply system improvements have been approved by the Department of Environmental Quality, permit #EQ#15-1579, PWSID#MT0004632 and Applicant submitted the approval letter.

CONCLUSIONS OF LAW

56. 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.

57. 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.

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

59. 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. § 85-2-311(1)(c), MCA (Finding of Facts No. 51-55).

Beneficial Use

FINDINGS OF FACT

60. The Applicant proposes to divert groundwater at a flow rate of 129 GPM up to 15.03AF for commercial and lawn and garden irrigation uses at Glacier Presbytery Camp. Water will be appropriated and used from January 1 to December 31 for commercial use and from April 17 to October 19 for lawn and garden irrigation annually.

61. The appropriation is for commercial use at the camp, which consists of lodges, bath houses, cabins and conference centers. The annual flow rate of 154 GPM was determined based on the water demands of the Glacier Presbytery Camp at full build-out as designed by Hafferman Engineering Inc., and supported by submitted technical calculations based on American Water Works Association (AWWA) Method from the M22 manual at the request of DEQ. The AWWA M22 fixture count analysis for the water system shows a total build out of 1199.8 equivalent fixture units which results in a peak flow rate demand of 122.2 GPM for the facilities, not

including irrigation. Based on previously issued groundwater certificate number 76LJ-22607-00 with a flow rate of 25 GPM, an additional flow rate of 129 GPM is needed to meet the full build-out design of 154 GPM (25 GPM + 129 GPM = 154 GPM).

62. The commercial volume is based on the camp's annual population at full build out for the water system. The DEQ Circular 3 and 4 were used as the basis for commercial water volume based on each building's fixture count and population. The Applicant provided a water use calculation spreadsheet showing 14.74 AF as the peak annual volume needed. Existing water right 76LJ -22607 has a claimed volume of 2 AF therefore the requested diverted volume for commercial use is 12.74 AF.

63. The volume of water necessary to irrigate 1.07 acres of lawn and garden was calculated using the USDA Irrigation Water Requirement (IWR) Program for pasture grass set to turf grass parameters per the DNRC Consumptive Use Methodology – Turf Grass (New Projects) memorandum dated March 23, 2010, and the 70% efficiency factor for sprinklers. The total volume for lawn and garden irrigation equals 2.29 AF.

64. Lawn and garden irrigation at the camp utilizes an underground irrigation system with pop-up sprinklers and above ground sprinklers and hoses connected to outdoor spigots. The underground irrigation system runs from an automated Hunter Irrigation controller for 6 zones with five zones utilizing sprinklers and one zone utilizing drip irrigation for planters. Irrigation run times will be scheduled around peak facility use times in the morning and evening to prevent exceeding the peak diversion rate.

CONCLUSIONS OF LAW

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

66. 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, supra; 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 et al, 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).

67. 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*, (2011) Pg. 3 (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).

68. Applicant proposes to use water for commercial and lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that commercial and lawn and garden irrigation are beneficial use and that 129 GPM of water up to 15.03 AF of diverted volume requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (Findings of Fact No. 60-62)

Possessory Interest

FINDINGS OF FACT

69. The Applicant signed and had the affidavit on the application form notarized 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

70. 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.

71. 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.

72. 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. § 85-2-311(1)(e), MCA. (Findings of Fact No. 69)

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 – 30071619 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of a pump, from a well 260 feet deep, from January 1 thru December 31 at a maximum diversion rate of 129 GPM up to 15.03 AF. The well is located in the SWSENW of Section 4, Township 25N, Range 20W, Lake County, and water will be appropriated year round for commercial use at Glacier Presbytery Camp and from April 17 to October 19 for lawn and garden irrigation of 1.07 acres. The place of use is located at Glacier Presbytery Camp which is generally located in the SWNW of Section 4, Township 25N, Range 20W, Lake County approximately 4.5 miles south of the town of Lakeside.

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

1. **WATER MEASUREMENT RECORDS REQUIRED**

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. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE 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.

NOTICE

This 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 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, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 20TH day of July 2016.

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