

**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 30148853 BY DON GOODSPEED AND LINDA GOODSPEED))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On May 28, 2020, Don and Linda Goodspeed (Applicants) submitted Application for Beneficial Water Use Permit No. 76LJ 30148853 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 15.0 gallons per minute (GPM) up to 1.63 acre-feet (AF) annually for domestic use and lawn & garden irrigation use from the Flathead River (Flathead Lake). The Department published receipt of the Application on its website. The Department held a pre-application meeting with the Applicants' consultant, Water Rights, Inc., on May 7, 2020. The Department sent the Applicants a deficiency letter on July 9, 2020. The Applicants' consultant responded with a letter received by the Department on July 17, 2020. The Applicants submitted an amendment to application form which was received by the Department on August 13, 2020. The amendment increased the requested total diverted volume from 1.63 AF to 1.95 AF due to the addition of 0.13 acres of irrigated area. The application was determined to be correct and complete as of August 13, 2020. An Environmental Assessment for this Application was completed on August 13, 2020.

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
- Attachments/Appendices:

- Application narrative
- Subdivision map and certificate of dedication
- Certificate of Survey No. 2229
- Flathead Lake water level information
- Pump specifications
- Maps

Information Received after Application Filed

- Letter of response, with attachments, from the Applicants’ consultant to the DNRC received July 17, 2020, re: DNRC’s July 9, 2020 deficiency letter.
- Amendment to Application form received August 13, 2020.

Information within the Department’s Possession/Knowledge

- Mean monthly stream flow data for the Flathead River (Flathead Lake) from USGS Gaging Station #12372000 near Polson, MT (period of record October 1938 – January 2020) used for physical and legal availability analysis.
- List of existing surface water rights on Flathead Lake from the inlet of Flathead Lake to USGS Gaging Station #12372000 near Polson, MT used to quantify physical and legal availability.

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 Applicants propose to divert water from Flathead Lake, by means of a pump, at a rate of 15.0 GPM up to 1.95 AF annually for domestic use (1.0 AF) from January 1 – December 31 and for irrigation of 0.38 acres of lawn & garden (0.95 AF) from April 15 – October 15. The point of diversion (POD) and place of use are located in the Flathead Lakeshore Tracts

Subdivision Portion of Lots 7 & 8, Government Lot 3, SWNESE Section 8, Township 25N, Range 19W, Lake County, Montana (Figure 1). The POD is in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

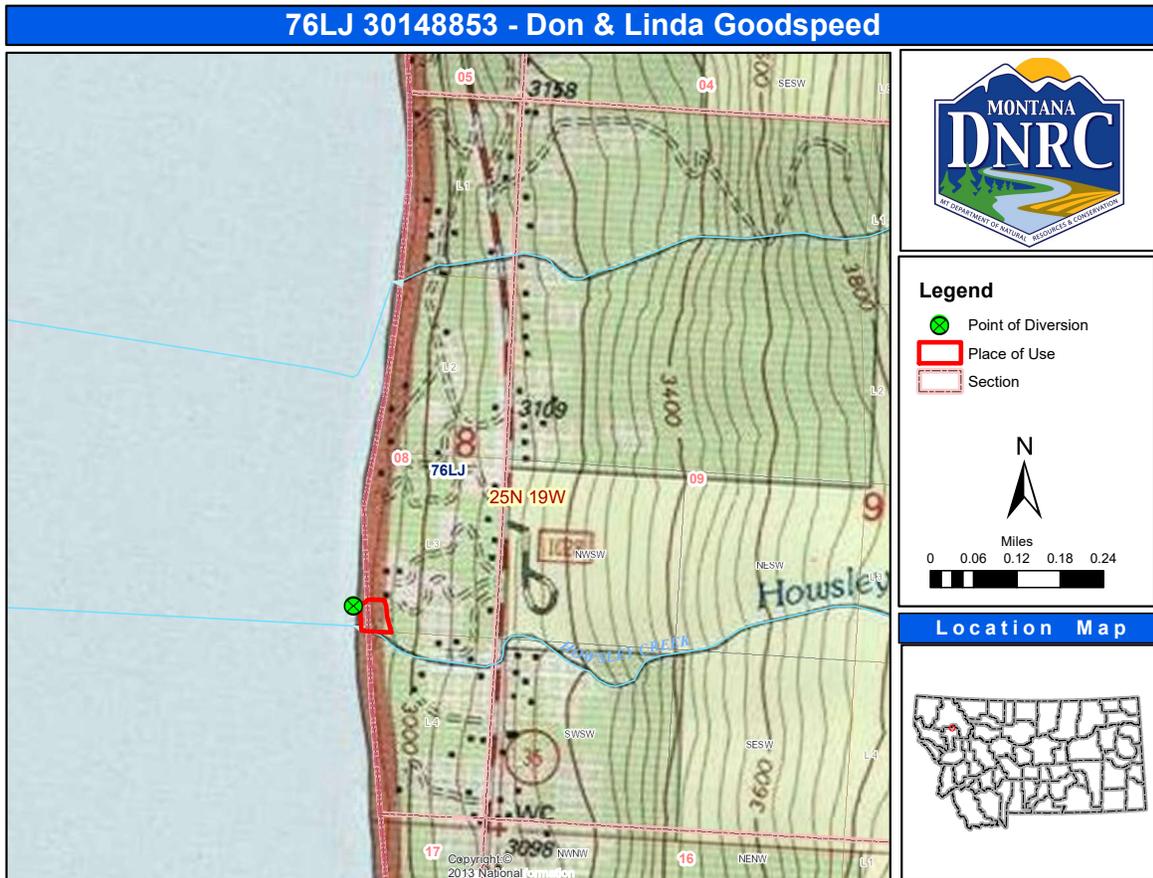


Figure 1: Map of the proposed place of use and point of diversion.

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

GENERAL CONCLUSIONS OF LAW

2. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

- (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

3. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

- (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
- (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
 - (A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 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.

4. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

6. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

7. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

8. The Applicants are requesting to divert up to 1.95 AF annually at a maximum flow rate of 15.0 GPM from Flathead Lake. USGS Gaging Station #12372000 (Flathead River near Polson, MT; period of record October 1938 – January 2020) records were used to quantify the median of the mean flow rates in cubic feet per second (CFS) (Table 1, column B) and volumes in acre-feet (AF) (Table 1, column C) for each month during the proposed period of diversion of water from Flathead Lake. This gage is the nearest gage downstream of Flathead Lake and the Applicants' POD.

9. For analysis of reaches where the gaging station used is below the POD or depleted reach (in this instance, the entirety of Flathead Lake), Department practice is to add in the flow rates and volumes of existing rights within the reach (Table 1, column D) to the gage values to determine physical availability (Table 1, columns E-F). This is done to account for existing users' withdrawals on the source. For this analysis, the Department added in all rights from the USGS gage near Polson up to the inlet of Flathead Lake to determine physical availability for the reach from which the Applicants propose to divert.

10. When calculating the flow and volume appropriated by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1 through October 31. All other water uses were calculated as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

11. Volumes were calculated by converting monthly flows using the following equation found on Department Form 615: $\text{monthly flow (CFS)} \times 1.98 \times \text{days per month} = \text{AF/month}$.

Table 1: Physical Availability Analysis of Flathead Lake from the Flathead Lake Inlet (FLI) to USGS Gage #12372000 near Polson, MT

A	B	C	D	E	F
Month	Median of Mean Monthly Flow at Gage 12372000 (CFS)	Median of Mean Monthly Volume at Gage 12372000 (AF)	Existing Legal Demands from FLI to Gage 12372000 (CFS)	Physically Available Water: Flathead Lake (CFS)	Physically Available Water: Flathead Lake (AF)
January	10,405.0	638,658.9	104.7	10,509.7	645,085.4
February	9,181.0	508,994.6	104.7	9,285.7	514,799.2
March	7,865.0	482,753.7	104.7	7,969.7	489,180.2
April	9,450.0	561,330.0	172.7	9,622.7	571,588.4
May	19,350.0	1,187,703.0	172.7	19,522.7	1,198,303.3
June	25,720.0	1,527,768.0	172.7	25,892.7	1,538,026.4
July	12,730.0	781,367.4	172.7	12,902.7	791,967.7
August	6,224.0	382,029.1	172.7	6,396.7	392,629.4
September	6,038.0	358,657.2	172.7	6,210.7	368,915.6
October	7,308.5	448,595.7	172.7	7,481.2	459,196.1
November	8,675.0	515,295.0	104.7	8,779.7	521,514.2
December	9,976.5	612,357.6	104.7	10,081.2	618,784.1

12. The Department finds the requested flow rate of 15.0 GPM (0.03 CFS), up to a volume of 1.95 AF annually, is physically available in Flathead Lake during the proposed period of diversion.

CONCLUSIONS OF LAW

13. 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.”

14. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

15. 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).

16. The Applicants have proven that water is physically available at the proposed point of diversion in the amount Applicants seek to appropriate. § 85-2-311(1)(a)(i), MCA. (Finding of Fact (FOF) Nos. 8-12)

Legal Availability:

FINDINGS OF FACT

17. The Department assessed all legal demands on Flathead Lake from the inlet downstream to USGS Gaging Station #12372000 on the Flathead River near Polson, MT. This area of potential impact (the affected reach) has been identified because the Selis Ksanka Qlispe Dam near Polson is the control structure for Flathead Lake, and diversions from Flathead Lake will reduce the total volume of water leaving the Lake (passing over/through the dam). The USGS gage is approximately 0.6 miles downstream of the dam.

18. To evaluate criteria for legal availability, existing rights (legal demands) are subtracted from physically available water. For this analysis, the Department subtracted out all legal demands (Table 2, column D) from the Flathead Lake inlet down to the USGS gage near Polson in order to determine legal availability for this reach (Table 2, columns E-F). A list of existing water users on Flathead Lake from the Flathead Lake inlet down to the Polson USGS gage was compiled, a copy of which can be found in the water right file or provided upon request.

19. When calculating legal demand flows and volumes, irrigation and lawn/garden uses were delegated as occurring from April 1 to October 31. All other water uses were analyzed as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion,

it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users.

20. Volumes were calculated by converting monthly flows using the following equation found on Department Form 615: monthly flow (CFS) \times 1.98 \times days per month = AF/month.

Table 2: Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet (FLI) to USGS Gage # 12372000 near Polson, MT					
A	B	C	D	E	F
Month	Physically Available Water: Flathead Lake (CFS)	Physically Available Water: Flathead Lake (AF)	Existing Legal Demands from FLI to Gage 12372000 (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,509.7	645,085.4	104.7	10,405.0	638,658.9
February	9,285.7	514,799.2	104.7	9,181.0	508,994.6
March	7,969.7	489,180.2	104.7	7,865.0	482,753.7
April	9,622.7	571,588.4	172.7	9,450.0	561,330.0
May	19,522.7	1,198,303.3	172.7	19,350.0	1,187,703.0
June	25,892.7	1,538,026.4	172.7	25,720.0	1,527,768.0
July	12,902.7	791,967.7	172.7	12,730.0	781,367.4
August	6,396.7	392,629.4	172.7	6,224.0	382,029.1
September	6,210.7	368,915.6	172.7	6,038.0	358,657.2
October	7,481.2	459,196.1	172.7	7,308.5	448,595.7
November	8,779.7	521,514.2	104.7	8,675.0	515,295.0
December	10,081.2	618,784.1	104.7	9,976.5	612,357.6

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

CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

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

23. 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 and the Stillwater River can reasonably be considered legally available during the period in which the Applicants seek to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

24. The Department finds that the proposed diverted flow of 15.0 GPM (0.03 CFS) and annual diverted volume of 1.95 AF that the Applicants seek to appropriate is legally available in Flathead Lake.

CONCLUSIONS OF LAW

25. 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).

26. 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.

27. The Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicants seek 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. (FOF 17-24)

Adverse Effect

FINDINGS OF FACT

28. The Applicants have a plan for the exercise of the permit that demonstrates that the Applicants' use of water can be controlled so the water rights of prior appropriators will be satisfied in times of water shortage. The Applicants will cease pumping when a valid call for water occurs.

29. Physical availability has been demonstrated using USGS gaging station data and existing water rights between the lake inlet and the gage, showing that there is sufficient water available in the source throughout the proposed period of diversion exceeding the amount requested. Legal availability has been demonstrated by comparing what is physically available in the source and what is legally appropriated by existing users. The Department finds that there is sufficient water available to meet all existing legal demands in addition to the Applicants' requested flow rate of 15.0 GPM (0.03 CFS) and volume of up to 1.95 AF. As such, there will be no adverse effect to senior water appropriators on the source.

CONCLUSIONS OF LAW

30. 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) (TRLCo) 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.

31. 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.

32. 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.

33. 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).

34. 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.

35. 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.

36. 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.

37. 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.

38. The Applicants have 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. (FOF 28-29)

Adequate Diversion

FINDINGS OF FACT

39. The Applicants propose to divert water from Flathead Lake at a maximum rate of 15.0 GPM while maintaining a minimum operating pressure of 40 pounds per square inch (psi) via a 4-inch Franklin Pump Systems ¾-hp submersible pump and an HP20 20-gallon capacity pressure tank with a 40/60 psi pressure switch. The submersible pump is set in Flathead Lake approximately 13-feet below the low-pool water elevation. This pump has been in place since 2002 and the Applicants could not obtain the exact model number. The Applicants provided pump specification data of equivalent pumps for comparison.

40. The diversion is controlled by the pressure tank/water system pressure. Water is transmitted from the pump to the pressure tank in the residence via approximately 150-feet of 1.25-inch poly pipe. From the pressure tank, water will be delivered to household fixtures for domestic use and to two (2) outside hose spigots. The spigots supply maneuverable tripod sprinkler towers with ½-inch adjustable sprinklers capable of supplying 3.9 GPM at 35 psi.

41. The requested flow rate is based on the system capacity as designed, which will allow the Applicants to supply domestic uses and lawn and garden irrigation uses as needed at pressures adequate enough to operate the sprinkler heads.

42. Based on the total dynamic head (155-feet), system design, and pump performance specifications, the Department finds that the system is adequate to produce and distribute the requested flow rate and volume.

CONCLUSIONS OF LAW

43. 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.

44. 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.

45. The Applicants have 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 (FOF 39-42)

Beneficial Use

FINDINGS OF FACT

46. Using the general water requirement standards found on DNRC Form 615, the Applicants requested 1.0 AF for domestic use and 0.95 AF for irrigation of 0.38 acres of lawn and garden (2.5 AF/acre x 0.38 acres = 0.95 AF). The certificate of dedication of the Flathead Lakeshore Tracts was recorded in 1915. At the time of approval, there were no limitations on the use of surface water for in-home domestic uses.

47. Water will be diverted from Flathead Lake at a flow rate of 15.0 GPM. The 15.0 GPM can be applied to various combinations of household and irrigation system fixtures to simultaneously

meet domestic and lawn and garden irrigation demands, and the pump and associated diversion works can adequately deliver the required flow rate to satisfy both purposes.

48. The Department finds the water use to be beneficial, and that the requested flow rate and volume are reasonably justified.

CONCLUSIONS OF LAW

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

50. 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).

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).

51. It is the applicant's burden to produce the required evidence. 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.

52. The Applicants propose to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as ‘lawn and garden irrigation’) which is a recognized beneficial use. § 85-2-102(4), MCA. “Domestic use” by DNRC rule means those water uses common to a household including: ... (g) garden and landscaping irrigation up to five acres.” ARM 36.12.101(23). The Applicants have proven by a preponderance of the evidence that domestic and lawn and garden irrigation are beneficial uses and that 1.95 AF of diverted volume and 15.0 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 46-48)

Possessory Interest

FINDINGS OF FACT

53. The Applicants signed the affidavit on the application form affirming the Applicants have 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

54. 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.

55. 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.

56. The Applicants have proven by a preponderance of the evidence that they have 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. (FOF 53)

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 30148853 should be GRANTED.

The Department determines the Applicants may divert water from the Flathead River (Flathead Lake), by means of a pump, at a rate of 15.0 GPM up to 1.95 AF annually for domestic use from January 1 – December 31 and for irrigation of 0.38 acres of lawn & garden from April 15 – October 15. The point of diversion (POD) and place of use are located in the Flathead Lakeshore Tracts Subdivision Portion of Lots 7 & 8, Government Lot 3, SWNESE Section 8, Township 25N, Range 19W, Lake County, Montana.

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 25th day of August 2020.

/Original signed by Kathy Olsen/
Kathy Olsen, Regional Manager
Kalispell Regional Office
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 25th day of August 2020, by first class United States mail.

DON AND LINDA GOODSPEED
15 LOCUST LN
RYE, NY 10580

WATER RIGHTS, INC.
ATTN: LEE YELIN
PO BOX 9285
MISSOULA, MT 59807

NAME
Kalispell Regional Office, (406) 752-2288

DATE