

**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 30152091) PRELIMINARY DETERMINATION TO
BY GLACIER LODGE HOSPITALITY, LP.) GRANT PERMIT**

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Glacier Lodge Hospitality, LP (Applicant) submitted a Groundwater Application for Beneficial Water Use Permit No. 76LJ 30152091 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on June 18, 2021. The Department published receipt of the Application on its website on June 21, 2021. The applicant proposes diverting 195.0 gallons per minute (GPM) from two wells up to a volume of 15.77 acre-foot (AF) annually for commercial use. The DNRC deemed the application correct and complete on October 10, 2021. An Environmental Assessment was completed on December 30, 2021.

INFORMATION

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

Application as filed:

- Groundwater Application for Beneficial Water Use Permit Form 600-GW
- Aquifer Testing Addendum Form 600-ATA
- Application Criteria and Aquifer Testing Addenda narratives
- Attachments:
 - Attachment A. Lease Agreement and Certificate of Survey
 - Attachment B. Well log Reports and Lithologic Logs
 - Attachment C. Water Right Abstract
 - Attachment D. DNRC Form 633s
 - Attachment E. APEC Engineering Design Specifications

- Attachment F. DEQ Sanitary Survey
- Attachment G. Submersible Pump Specifications
- Attachment H. Water Demand Estimate
- Attachment I. Observation Well Log Reports
- Maps:
 - Figure 1. Site Vicinity
 - Figure 2. Place of Use
 - Figure 3. Aquifer Testing Map
- Tables:
 - Table 1. Well Head Elevation and Estimated Potentiometric Surface

Information within the Department’s Possession/Knowledge

- Aquifer Test Report by DNRC Water Management Bureau Groundwater Hydrologist Evan Norman, dated August 27, 2021.
- Depletion Report by DNRC Water Management Bureau Groundwater Hydrologist Evan Norman, dated August 27, 2021.
- Mean monthly stream flow data for the Flathead River from USGS Gaging Station #12363000 at Columbia Falls, MT (period of record October 1951 – September 2021) used for physical/legal availability analysis.
- Mean monthly stream flow data for the Flathead River from USGS Gaging Station #12372000 near Polson, MT (period of record October 1938 – September 2021) used for physical/legal availability analysis.
- List of existing surface water rights on the Flathead River from the USGS gage #12363000 at Columbia Falls, MT to the Flathead Lake inlet used to quantify physical/legal availability and analyze adverse effect.
- List of existing surface water rights on Flathead Lake from the Flathead Lake inlet to the USGS gage # 12372000 near Polson, MT used to quantify physical/legal availability and analyze adverse effect.

The following information is routinely considered by the Department. It is not included in the administrative file for this application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents:

- DNRC Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer (2019).

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater by means of two wells (PWS #1, GWIC ID: 294724 and PWS #2, GWIC ID: 294725) at a flow rate of 195.0 GPM up to 15.77 AF annually for commercial use. Commercial use will occur year-round from January 1 – December 31. The well pumps will alternate each demand cycle.
2. The points of diversion (POD) are in the NENWSE, Section 3, Township 29N, Range 21W, Flathead County, Montana (Figure 1). The place of use (POU) is in the NENWSE, Section 3, Township 29N, Range 21W, Flathead 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.

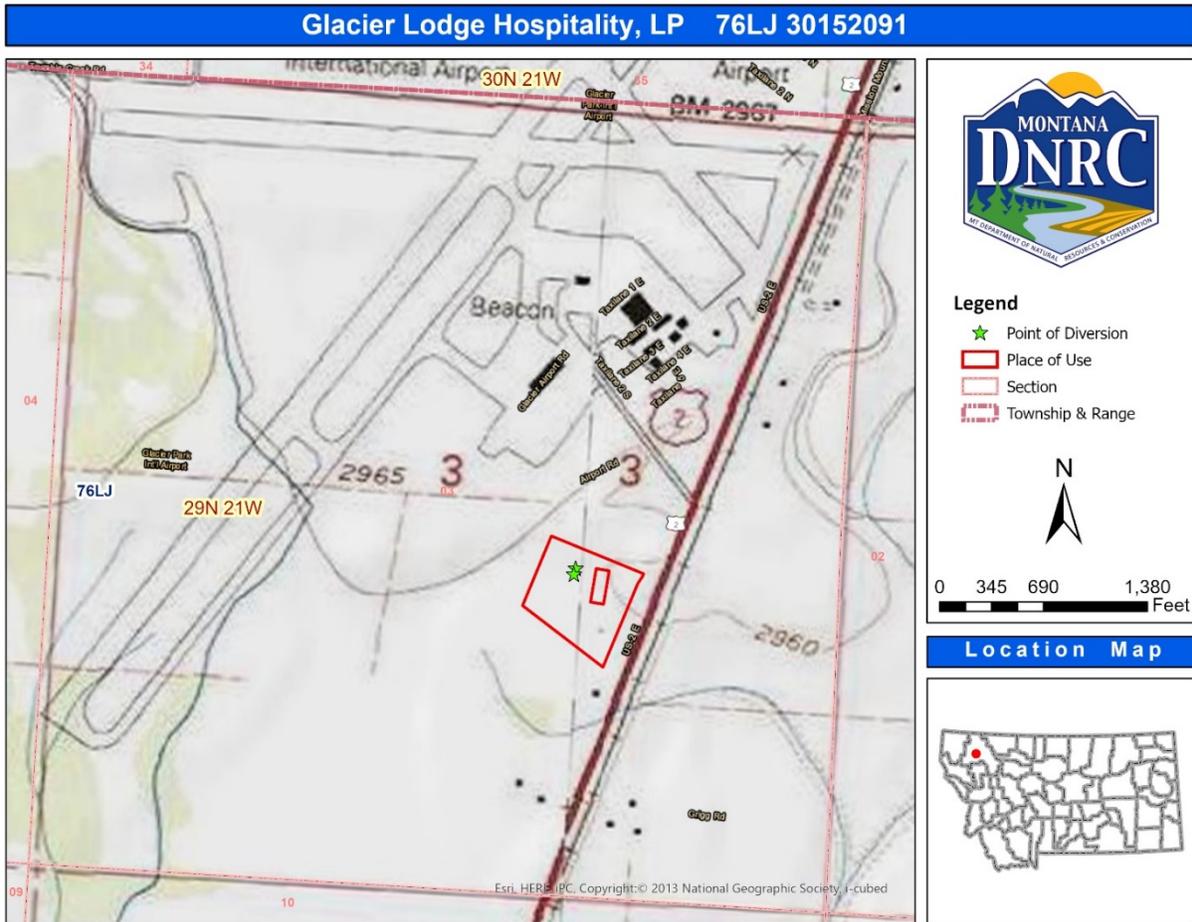


Figure 1: Map of proposed place of use and point of diversion(s)

3. Provisional Permit 76LJ 30011590 already serves the existing infrastructure at the POU. The current infrastructure consists of a 100-room hotel, restaurant, office building, domestic residence and lawn and garden irrigation. The Permit allows for diversion of 19.40 AF at 118.0 GPM for commercial (15.23 AF), domestic (0.42 AF) and lawn and garden (3.75 AF) uses from PWS #1 and PWS #2. The proposed water right seeks to appropriate additional volume at an increased flow rate for the existing 100 room hotel and washing facility, an additional 20 hotel rooms, and a convenience store. Water will be distributed via a common supply system. Combined, the flow rate shall not exceed 195.0 GPM and volume shall not exceed 35.17 AF per year.

4. The provisional beneficial water use permit will be subject to the following condition:

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

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

GENERAL CONCLUSIONS OF LAW

5. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the

state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

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

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

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

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

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

that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Physical Availability

FINDINGS OF FACT

11. A variance was granted by the DNRC Kalispell Regional Office from aquifer testing requirements as required in ARM 36.12.121(3)(j) on August 24, 2021, provided all other requirements were met. The variance was requested due to pumping/fluctuations in the monitoring well during evaluation.

12. The proposed wells were evaluated with a 30.8-hour (PWS #1) and 72-hour (PWS #2) aquifer test at 311 and 316 GPM, respectively. The maximum drawdown in PWS #1 was 17.51 feet below the static water levels (SWL) of 15.78 feet below top of casing (BTC), leaving 202.71 feet above the wells bottom. The maximum drawdown in PWS #2 was 11.31 feet below the SWL of 16.39 feet BTC, leaving 222.30 feet above the wells bottom. The flow rate for each aquifer test exceeded the requested maximum flow rate.

13. Drawdown was modeled for the period of diversion by assigning the proposed wells an assumed monthly pumping schedule (Column F, Table 1) and a calculated well efficiency. This

analysis uses the Neuman-Witherspoon (1969) solution with inputs of transmissivity = 6,700 ft²/day and storativity = 2.2 x 10⁻⁴.

14. The well efficiency was calculated from modeling the proposed well's respective aquifer test and dividing the predicted drawdown by the observed drawdown. The predicted actual drawdown with well loss was calculated by applying the well efficiency to the theoretical drawdown of 0.55 feet at the end of July. The last column in Table 2 gives the remaining available water column above the bottom of the well which is equal to the total available drawdown above the well bottom minus actual predicted drawdown and interference drawdown.

Table 1: Assumed Monthly Pumping Schedule for Proposed Volume Associated with Permit # 76LJ 30152091 and Total Diverted Volume with Existing Permit # 76LJ 30011590.					
Month	Proposed Volume (AF)	Proposed Diversion (GPM)	Total Diverted Volume (AF)	Total Diversions (GPM)	Well Diversions (GPM)
A	B	C	D	E	F
January	1.3	9.8	2.7	19.5	9.7
February	1.2	9.8	2.4	19.5	9.7
March	1.3	9.8	2.7	19.5	9.7
April	1.3	9.8	2.7	20.1	10.0
May	1.3	9.8	3.2	23.1	11.5
June	1.3	9.8	3.3	25.0	12.5
July	1.3	9.8	3.7	27.1	13.5
August	1.3	9.8	3.6	26.3	13.1
September	1.3	9.8	3.0	22.9	11.5
October	1.3	9.8	2.7	19.7	9.8
November	1.3	9.8	2.6	19.5	9.7
December	1.3	9.8	2.7	19.5	9.7
TOTAL	15.8	---	35.2	---	---

Table 2: Remaining Available Water Column for Proposed Wells							
Well	Well Total Depth	Pre-Test Static Water Level	Total Available Drawdown above Well Bottom	Well Efficiency	Predicted Drawdown		Remaining Available Water Column from Well Bottom
	(ft)	(ft btc)	(ft)	(%)	Theoretical (ft)	Actual (including well loss) (ft)	(ft)
PWS #1 (GWIC ID 294724)	235	15.78	220.22	55	0.55	0.98	218.96
PWS #2 (GWIC ID 294725)	250	16.39	233.61	87	0.55	0.60	232.73

15. Physical availability for the purpose of evaluating legal availability is evaluated pursuant to the memo to the Administrator, Water Resources Division dated December 12, 2019, entitled Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer (DNRC, 2019). As described in DNRC (2019), groundwater levels in the Deep Aquifer (and physical availability of groundwater in the context of a legal availability analysis) are effectively controlled by the stage of Flathead River and Flathead Lake. Therefore, physical and legal availability for this application is evaluated using streamflow from the Flathead River and Flathead Lake.

16. Flathead River – Physical Availability: Data from USGS Gage #12363000 at Columbia Falls, MT (period of record October 1951 – September 2021) and the method below were used to quantify physically available monthly flows and volumes in the depleted reach of the Flathead River during the period of surface water depletion (year-round).

17. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Flathead River using USGS Gage #12363000 records for each month of the year

(Table 3, column B). Those flows were converted to monthly volumes in AF (Table 3, column C) using the following equation found on DNRC Form 615:

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

18. For analysis of a reach where the gaging station used marks the upstream extent of the depleted reach, as is the case for this application, the median of the mean monthly gage value also represents physical availability for the reach (Table 3, columns B-C).

Table 3: Physical Availability Analysis of Flathead River from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake Inlet		
A	B	C
Month	Median of the Mean Monthly Flow at Gage 12363000 / Physically Available Water (CFS)	Median of the Mean Monthly Volume at Gage 12363000 / Physically Available Water (AF)
January	5,340.0	327,769.2
February	4,887.0	270,935.3
March	4,805.0	294,930.9
April	10,680.0	634,392.0
May	22,630.0	1,389,029.4
June	24,680.0	1,465,992.0
July	11,400.0	699,732.0
August	5,406.0	331,820.3
September	4,535.0	269,379.0
October	4,987.0	306,102.1
November	4,565.0	271,161.0
December	5,499.0	337,528.6

19. Flathead Lake – Physical Availability: Data from USGS Gage #12372000 near Polson, MT (period of record October 1938 – September 2021) and the method below were used to quantify physically available monthly flows and volumes in the depleted reach of Flathead Lake during the period of surface water depletion (year-round). USGS Gage #12372000 marks the downstream extent of the depleted reach of Flathead Lake. Department practice for physical availability analyses where the gage used is downstream of the depleted reach is to add the monthly flow rates

of existing water rights between the gage and the upstream extent (Flathead Lake inlet) of the depleted reach to the median of the mean monthly flows at the gage.

20. The Department calculated median of the mean monthly flow rates in CFS for Flathead Lake using USGS Gage #12372000 records for each month of the proposed period of depletion (Table 4, column B). Those flows were converted to monthly volumes in AF (Table 4, column C).

21. The Department calculated the monthly flows appropriated by existing users upstream of the gage on the source (Table 4, column D) by:

- i. Generating a list of existing water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);
- ii. Delegating irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Delegating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate; and,
- v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

22. Since the gage used is downstream of the depleted reach, the Department added in the flow rates of the existing rights between the Flathead Lake inlet and USGS Gage #12372000 (Table 4, column D) to the median of the mean monthly gage values (Table 4, column B) to determine physical availability in the depleted reach (Table 4, column E). Physically available monthly flows were then converted to monthly volumes (Table 4, column F) using the above-mentioned equation from DNRC Form 615.

Table 4: Physical Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage #12372000 near Polson, MT					
A	B	C	D	E	F
Month	Median of the Mean Monthly Flow at Gage 12372000 (CFS)	Median of the Mean Monthly Volume at Gage 12372000 (AF)	Existing Rights from Flathead Lake Inlet to Gage 12372000 (CFS)	Physically Available Water in Depleted Reach (CFS)	Physically Available Water in Depleted Reach (AF)
January	10,380.0	637,124.4	105.6	10,485.6	643,605.3
February	9,181.0	508,994.6	105.6	9,286.6	514,848.4
March	7,778.0	477,413.6	105.6	7,883.6	483,894.5
April	9,223.0	547,846.2	176.3	9,399.3	558,317.7
May	19,350.0	1,187,703.0	176.3	19,526.3	1,198,523.6
June	25,720.0	1,527,768.0	176.3	25,896.3	1,538,239.5
July	12,730.0	781,367.4	176.3	12,906.3	792,188.0
August	6,224.0	382,029.1	176.3	6,400.3	392,849.7
September	6,038.0	358,657.2	176.3	6,214.3	369,128.7
October	7,308.5	448,595.7	176.3	7,484.8	459,416.3
November	8,800.5	522,749.7	105.6	8,906.1	529,021.5
December	9,976.5	612,357.6	105.6	10,082.1	618,838.5

23. By applying a calculated well efficiency to the theoretical drawdown, the Department finds PWS #1 may experience a maximum drawdown of 1.26 feet, leaving 218.96 feet of available drawdown above the well bottom. PWS #2 may experience a maximum drawdown of 0.88 feet, leaving 232.73 feet of available drawdown above the well bottom. Pursuant to the 2019 DNRC Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer, groundwater levels in the Deep Aquifer are effectively controlled by the Flathead River and Flathead Lake. The Department finds that the amount of water that the Applicant proposes to appropriate, 195.0 GPM (0.43 CFS) up to 15.77 AF, in the Flathead River and Flathead Lake.

CONCLUSIONS OF LAW

24. 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.”

25. 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).

26. 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).

27. Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate (195.0 GPM up to 15.77 AF annually). § 85-2-311(1)(a)(i), MCA. (Findings of Fact (FOF) No. 11-23)

Legal Availability

FINDINGS OF FACT

28. The previously mentioned DNRC Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer states that groundwater levels within the Deep Aquifer are effectively controlled by the Flathead River and Flathead Lake. Therefore, these two sources were evaluated for legal availability based on the Applicant's proposed appropriation of 195.0 GPM up to 15.77 AF annually.

29. Additionally, a new groundwater use will reduce the discharge from the aquifer to any other hydraulically connected surface water sources. An analysis of potentially hydraulically connected surface water sources was completed by a DNRC groundwater hydrogeologist. The existing wells are located in the vicinity of Trumbull Creek. Trumbull Creek may be hydraulically connected to the Deep Aquifer and, if so, is a potentially affected surface water. Through an ArcGIS analysis of wells within 1,000 feet of Trumbull Creek with total depths of less than 50 feet, static water levels were generally greater than 10 feet below ground surface, indicating a lack of hydraulic

connection. Additionally, the department concludes in water right permit # 76LJ 30067027 (2.5 miles away) that Trumbull Creek is not hydraulically connected to the Deep Aquifer through the shallow aquifer. Smith (2000) estimates the confining unit in the Trumbull Creek area to be 100 feet thick. This evidence supports the department's conclusion that Trumbull Creek is not hydraulically connected for the purpose of evaluation of depletion for this application.

30. Surface water depletion by pumping in the source aquifer primarily occurs through propagation of drawdown through the overlying confining layer; therefore, depletion effects are expected to be dampened resulting in a constant year-round rate of depletion of 1.0 GPM up to 1.6 AF (Table 5). The depletion amount is equivalent to the proposed consumptive use; consumption with drain fields is assumed to be 10% of the total diverted volume. Based on previous Department water right determinations, the following surface waters will be depleted year-round by the proposed groundwater use:

- i. The Flathead River from United States Geological Survey (USGS) Gaging Station #12363000 at Columbia Falls, MT to the Flathead Lake inlet; and
- ii. Flathead Lake from the lake inlet down to USGS gage #12372000 near Polson, MT.

31. Total net depletions to the above-mentioned affected surface waters will accumulate in the Flathead River system downstream of Columbia Falls (Table 5). The legal availability analysis of the Flathead is evaluated in this section pursuant to the above-mentioned Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer (DNRC, 2019).

Table 5: Monthly Consumption & Surface Water Depletions			
Month	Consumption (AF)	Net Depletion (AF)	Net Depletion (GPM)
January	0.1	0.1	1.0
February	0.1	0.1	1.0
March	0.1	0.1	1.0
April	0.1	0.1	1.0
May	0.1	0.1	1.0
June	0.1	0.1	1.0
July	0.1	0.1	1.0
August	0.1	0.1	1.0
September	0.1	0.1	1.0
October	0.1	0.1	1.0
November	0.1	0.1	1.0
December	0.1	0.1	1.0
TOTAL	1.2	1.2	---

32. Flathead River – Legal Availability: Data from USGS Gage #12363000 at Columbia Falls, MT (period of record October 1951 – September 2021) and the method below were used to quantify legally available monthly flows and volumes in the depleted reach of the Flathead River during the period of surface water depletion (year-round).

33. Physically available monthly flows and volumes (Table 6, columns B-C) were quantified for the depleted reach of the Flathead River. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 6, columns D) by:

- i. Generating a list of existing water rights from USGS gage #12363000 at Columbia Falls, MT to the Flathead Lake inlet (list is included in the application file and available upon request);
- ii. Delegating irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Delegating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate; and,

- v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

34. The Department subtracted out the flow rates of the existing legal demands (Table 6, column D) within the area of potential impact from the physically available water (Table 6, column B) to determine legal availability within the area of potential impact (Table 6, column E). Legally available monthly flows were then converted to monthly volumes (Table 6, column F) using the above-mentioned equation from DNRC Form 615.

Table 6: Legal Availability Analysis of Flathead River from USGS Gage # 12363000 at Columbia Falls, MT to the Flathead Lake Inlet					
A	B	C	D	E	F
Month	Physically Available Water in the Depleted Reach (CFS)	Physically Available Water in the Depleted Reach (AF)	Existing Legal Demands from Gage 12363000 to Flathead Lake Inlet (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	5,340.0	327,769.2	3,508.3	1,831.7	112,428.5
February	4,887.0	270,935.3	3,508.3	1,378.7	76,434.0
March	4,805.0	294,930.9	3,508.3	1,296.7	79,590.2
April	10,680.0	634,392.0	6,814.0	3,866.0	229,638.8
May	22,630.0	1,389,029.4	8,289.0	14,341.0	880,248.9
June	24,680.0	1,465,992.0	8,289.0	16,391.0	973,623.8
July	11,400.0	699,732.0	5,566.0	5,834.0	358,089.3
August	5,406.0	331,820.3	3,664.0	1,742.0	106,922.3
September	4,535.0	269,379.0	3,664.0	871.0	51,735.8
October	4,987.0	306,102.1	3,664.0	1,323.0	81,204.1
November	4,565.0	271,161.0	3,508.3	1,056.7	62,766.8
December	5,499.0	337,528.6	3,508.3	1,990.7	122,187.9

35. Flathead Lake – Legal Availability: Data from USGS Gage #12372000 near Polson, MT (period of record October 1938 – September 2021) and the method below were used to quantify

legally available monthly flows and volumes in the depleted reach of Flathead Lake during the period of surface water depletion (year-round). USGS Gage #12372000 marks the downstream extent of the depleted reach of Flathead Lake. Department practice for legal availability analyses where the gage used is downstream of the depleted reach is to subtract the monthly flow rates of existing water rights between the gage and the upstream extent (Flathead Lake inlet) of the depleted reach from the physically available water.

36. The Department quantified physically available monthly flows and volumes (Table 7, columns B-C) for the depleted reach of Flathead Lake.

37. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 7, columns D) by:

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

38. The Department subtracted out the flow rates of the existing legal demands (Table 7, columns D) within the area of potential impact from the physically available water (Table 7, column B) to determine legal availability in the depleted reach (Table 7, column E). Legally available monthly flows were then converted to monthly volumes (Table 7, column F) using the above-mentioned equation from DNRC Form 615.

Table 7: Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage # 12372000 near Polson, MT					
A	B	C	D	E	F
Month	Physically Available Water in the Depleted Reach (CFS)	Physically Available Water in the Depleted Reach (AF)	Existing Legal Demands in Flathead Lake (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	10,485.6	643,605.3	105.6	10,380.0	637,124.4
February	9,286.6	514,848.4	105.6	9,181.0	508,994.6
March	7,883.6	483,894.5	105.6	7,778.0	477,413.6
April	9,399.3	558,317.7	176.3	9,223.0	547,846.2
May	19,526.3	1,198,523.6	176.3	19,350.0	1,187,703.0
June	25,896.3	1,538,239.5	176.3	25,720.0	1,527,768.0
July	12,906.3	792,188.0	176.3	12,730.0	781,367.4
August	6,400.3	392,849.7	176.3	6,224.0	382,029.1
September	6,214.3	369,128.7	176.3	6,038.0	358,657.2
October	7,484.8	459,416.3	176.3	7,308.5	448,595.7
November	8,906.1	529,021.5	105.6	8,800.5	522,749.7
December	10,082.1	618,838.5	105.6	9,976.5	612,357.6

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

40. Seli's Ksanka Qlispe' Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow

requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gage at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Seli's Ksanka Qlispe' Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Seli's Ksanka Qlispe' Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

41. 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 and 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.

42. Legal availability for this groundwater appropriation from the Flathead Deep Aquifer was evaluated via a surface water analysis of the Flathead River and Flathead Lake. The Department finds that the amount of water that the Applicant is proposing to appropriate, 195.0 GPM (0.43 CFS) up to 15.77 AF, is legally available in the Flathead River and Flathead Lake.

CONCLUSIONS OF LAW

43. 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).

44. 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.

45. 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.

46. 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*.

47. 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. (FOF 28-42)

Adverse Effect

FINDINGS OF FACT

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

- i. Initially implement commercial water rationing to 50 percent during extreme water shortage; and
- ii. Water supply can be turned off if a senior water right holder makes a valid call.

49. The evaluation of drawdown in other wells was done using the Neuman-Witherspoon (1969) solution with the following inputs: transmissivity = 6,700 ft²/day and storativity = 2.2 x 10⁻⁴. The two proposed wells were modeled as one well due to their close proximity. After the end of the fifth year of a constant pumping schedule (Table 8), modeling shows that drawdown does not exceed 1-foot.

Table 8: Assumed Monthly Pumping Schedule for Proposed Volume Associated with Permit # 76LJ 30152091 and Total Diverted Volume with Existing Permit # 76LJ 30011590.					
Month	Proposed Volume (AF)	Proposed Diversion (GPM)	Total Diverted Volume (AF)	Total Diversions (GPM)	Well Diversions (GPM)
A	B	C	D	E	F
January	1.3	9.8	2.7	19.5	9.7
February	1.2	9.8	2.4	19.5	9.7
March	1.3	9.8	2.7	19.5	9.7
April	1.3	9.8	2.7	20.1	10.0
May	1.3	9.8	3.2	23.1	11.5
June	1.3	9.8	3.3	25.0	12.5
July	1.3	9.8	3.7	27.1	13.5
August	1.3	9.8	3.6	26.3	13.1
September	1.3	9.8	3.0	22.9	11.5
October	1.3	9.8	2.7	19.7	9.8
November	1.3	9.8	2.6	19.5	9.7
December	1.3	9.8	2.7	19.5	9.7
TOTAL	15.8	---	35.2	---	---

50. Consumption with drain fields is assumed to be 10% of the total diverted volume. The Department has determined that the proposed use will result in a constant year-round rate of

depletion of 1.0 GPM (Table 8) to the Flathead River downstream of Columbia Falls, and Flathead Lake.

51. The Department finds no adverse effect to senior surface or groundwater appropriators on the affected surface and groundwater sources based on:

- i. The Department's findings that water is legally available in the Flathead River and Flathead Lake (and thus the Deep Aquifer);
- ii. The Applicant's plan to regulate their water use to satisfy the water rights of senior appropriators; and,
- iii. The analysis of potential drawdown in neighboring wells showing sufficient remaining available water columns.

CONCLUSIONS OF LAW

52. 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.

53. 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.

54. 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.

55. 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).

56. 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.

57. 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.

58. 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.

59. 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.

60. 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. (FOF 48-51)

Adequate Diversion

FINDINGS OF FACT

61. The applicant proposes to supply water by means of two production wells (PWS #1, GWIC ID: 294724 and PWS #2, GWIC ID: 294725). The production wells are completed in the Deep Alluvial Aquifer, which is comprised of alluvium beneath glacial deposits. PWS #1 is completed to a depth of 235-feet bgs (static water level: 12 feet btc). PWS #2 is completed to a depth of 250-feet bgs (static water level: 17 feet btc). Both PWS wells are equipped with Goulds Model 150H10-4 submersible pumps. The pumps can produce 195 GPM at a TDH of 165 feet based on the supplied pump specifications curve. The pumps operate on an alternating schedule and are controlled by a variable frequency drive (VFD) that maintains a minimum pressure set point of 55 psi. Adjacent to the wells is the pump house where two flow meters, captive air tanks, transducers and the VFD controller are located. From the pump house water is then distributed to the water distribution network via a four-inch PVC pipe. Total diverted volume will be continually monitored via a totalizer in the pump house.

62. The water system was designed by APEC Engineering, Inc. and was approved by the Montana Department of Environmental Quality (DEQ) prior to installation (PWSID MT0004982).

63. Aquifer properties were evaluated using a 72-hour drawdown and yield test performed on PWS #2 in 2017. Well efficiency and physical/legal availability were evaluated with a 30.8-hour aquifer test, performed at a flow rate of 311 GPM from PWS #1 and a 72-hour aquifer test, performed at a flow rate of 316 GPM from PWS #2. PWS #1 and PWS #2 were tested at a combined flow rate greater than the requested maximum flow rate.

64. Based on the results of the aquifer tests, a TDH of 165 feet, and the applicant-provided pump performance and system specifications, the Department finds the diversion and conveyance system adequate to supply the requested 195.0 GPM up to 15.77 AF annually.

CONCLUSIONS OF LAW

65. 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.

66. 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.

67. 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).

68. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

69. 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. (FOF 61-64)

Beneficial Use

FINDINGS OF FACT

70. The applicant proposes to divert up to 15.77 AF annually at a flow rate of 195.0 GPM. The Country Inn and Suites Hotel is an existing 100-room hotel. Current water uses on the property are included in Provisional Permit 76LJ 30011590. The applicant is proposing additional volume at an increased flow rate for the existing 100 room hotel and washing facility, an additional 20

hotel rooms, and a convenience store. Commercial use for the hotel expansion is estimated to be 48 GPD per guest using Circular DEQ-4. The applicant assumes occupancy at 2.5 guests per room, equating to 120 GPD per room (48 GPD * 2.5 guests = 120 GPD). In total, the 20-room expansion would require 2,400 GPD (120 GPD/room * 20 rooms = 2,400 GPD). The existing Provisional Permit 76LJ 30011590 estimated hotel water use at 80 GPD per room. To ensure that adequate volume is available to serve the existing 100 hotel rooms the applicant is requesting an additional 40 GPD per room (120 GPD – 80 GPD = 40 GPD). In total, the additional volume per room equates to 4,000 GPD (100 rooms * 40 GPD = 4,000 GPD). Additionally, an onsite washing facility was not including in the original Provisional Permit. There are 12 washing machines on the property that require an estimated 580 GPD. In total, the 12 washing machines would require 6,960 GPD (580 GPD * 12 washing machines = 6,960 GPD). The applicant is proposing to add a convenience store to the property that will require an estimated 3 GPD per customer. The applicant estimates that the store would service on average 240 customers per day. In total, the convenience store would require 720 GPD (3 GPD * 240 customers = 720 GPD).

71. The requested flow rate of 195.0 GPM is equal to the maximum calculated flow requirement. The Applicant is requesting this flow rate to account for the existing and proposed water uses. Average daily flow for both the existing and future uses is estimated to be 39 GPM. With a peaking factor of five, a peak instantaneous demand of 195.0 GPM was estimated.

72. The Department finds the water use is beneficial and the requested flow rate of 195.0 GPM and volume of 15.77 AF are reasonably justified.

73. The provisional beneficial water use permit will be subject to the following condition:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON

REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

CONCLUSIONS OF LAW

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

75. 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).

76. 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).

77. 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.

78. Applicant proposes to use water for commercial use, which is recognized as a beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that a commercial use is a beneficial use and that 15.77 AF of diverted volume, and 195.0 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 70-73)

Possessory Interest

FINDINGS OF FACT

79. This application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. 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.

CONCLUSIONS OF LAW

80. 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.

81. 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.

82. 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. (FOF 79)

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 30152090 should be GRANTED.

The Department determines the applicant may divert groundwater by means of two production wells from January 1 – December 31 at 195.0 GPM up to 15.77 AF annually for commercial use from January 1 – December 31. The pumps will operate independently, alternating each demand cycle. The points of diversion are in the NENWSE, Section 3, Township 29N, Range 21W, Flathead County, Montana. The place of use is in the NENWSE, Section 3, Township 29N, Range 21W, Flathead County, Montana.

Provisional Beneficial Water Use Permit No. 76LJ 30152091 will be subject to the following condition:

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 NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. 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 4th day of January 2022.

/Original signed by Kathy Olsen/
Kathy Olsen, Regional Manager
Kalispell Regional Water Resources 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 4th day of January 2022, by first class United States mail.

GLACIER LODGE HOSPITALITY, LP
3577 HIGHWAY 93 NORTH
KALISPELL, MT 59901

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTN: BRAD BENNETT
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

NAME
Kalispell Regional Office, (406) 752-2288

DATE