

THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

DNRC Water Resources
Billings Regional Office
1371 Rimtop Dr.
Billings, MT 59105-1978

February 2, 2026

LKM Properties, LLC
2016 Moore Lane
Billings, MT, 59101

Subject: Draft Preliminary Determination to Grant in Modified Form Beneficial Water Use Permit Application No. 43B 30171298

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a PERMIT authorization found in §85-2-311, MCA. The Department has preliminarily determined that the criteria can be met only with modifications to the original application, and this application should be granted in modified form. A copy of the Draft Preliminary Determination to Grant in Modified Form is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no written request for an extension is received by February 24, 2026, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "C. Strebeck".

Cassey Strebeck
Water Resource Specialist
Billings Regional Office, Montana DNRC
Cassey.Strebeck@mt.gov
406-247-4422



DNRC.MT.GOV

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43B 30171298 BY LKM PROPERTIES, LLC)))	DRAFT PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM PERMIT
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On November 14, 2025, LKM Properties, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 43B 30171298 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for a flow rate of 50 GPM, and up to 3.1 AF volume of surface water for Lawn & Garden Irrigation. The Department published the receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on July 8, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Form 600P-B on July 15, 2025. The Department delivered the Department-Completed Technical Analyses on September 5, 2025. The application was determined to be correct and complete as of December 8, 2025. An Environmental Assessment for this application was completed on January 28, 2026.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments:
 - Pump Information for a GX200 Honda Engine Pump model WP-2065HL
 - Pump Curve
 - Montana Sage Grouse Habitat Conservation Program letter dated July 11, 2025
- Maps:
 - Map of proposed project: place of use, proposed transitory point of diversion, and proposed pipeline conveyance system, overlaying aerial imagery from 2021, NAIP

- Department- completed technical analyses, dated September 5, 2025, based on information provided in the Preapplication Meeting Form

Information within the Department's Possession/Knowledge

- USGS Stream Gage No. 0619250; Yellowstone River at Livingston, MT, with a period of record from May 1, 1897, to October 31, 2024
- USGS Stream Gage No. 06214500; Yellowstone at Billings, MT, with a period of record from October 1, 1928, to February 28, 2025
- Surface Water Technical Analyses Report – Notice of Errata, dated February 2, 2026, sent with this Draft Preliminary Determination
- DNRC Water Right Information System (WRIS)
- National Hydrography Dataset (NHD)
- USGS StreamStats for Montana Chapter G
- USGS StreamStats web application at <https://streamstats.usgs.gov/ss/>.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available online or upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents:
 - Department Technical Memorandum: Physical Availability of Surface Water with Gage Data; Between Gages: Interpolation Method
 - Department Permit Application Manual (February 2025)

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

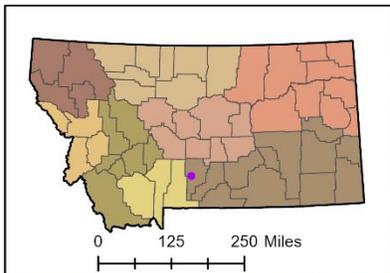
For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; AC means acres; AF means acre-feet; AF/YR means acre-feet per year; AOPI means Area of Potential Impact; CFS means cubic feet per second; FWP means Fish, Wildlife, and Parks; GPM means gallons per minute; F & W means Fish and Wildlife; and POD means Point of Diversion.

PROPOSED APPROPRIATION

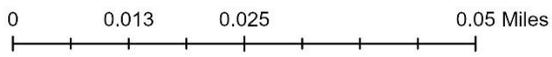
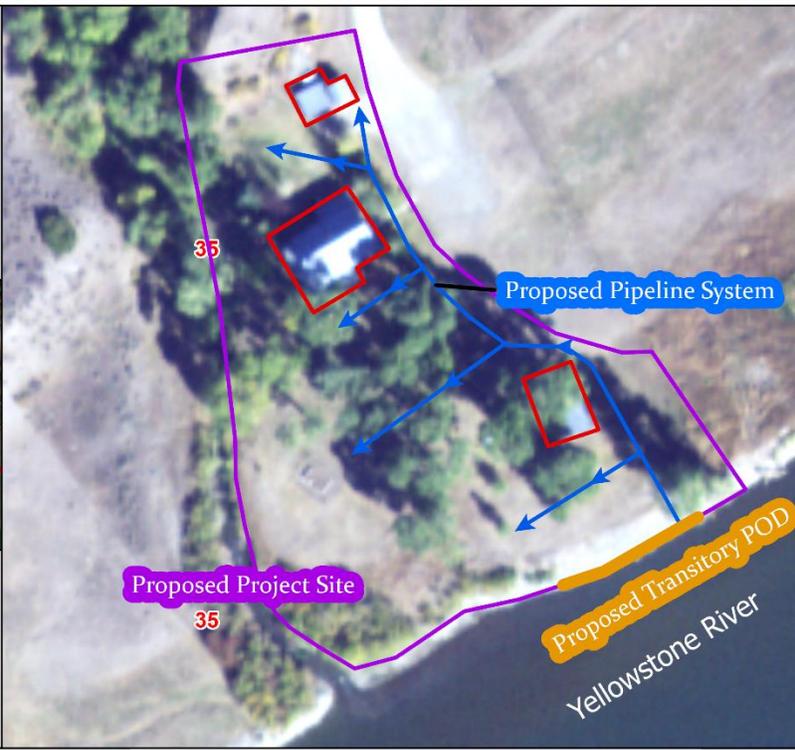
FINDINGS OF FACT

1. The Applicant proposes to divert water from the Yellowstone River, from April 15 to October 15, by means of a pump, from a transitory point of diversion, approximately 87 feet long, along the southern side of the Applicant's property boundary. The entire range of the proposed transitory point of diversion is located within the SWSWSE of Section 35, Township 1N, Range 13E, Sweet Grass County. The proposed use includes diverting at a flow rate of 50 GPM (0.11 CFS) and up to 3.1 AF of volume, for Lawn & Garden Irrigation from April 15 to October 15. The Applicant proposes to water 1.25 acres of lawn and garden. The place of use is located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County. From the transitory point of diversion, the Applicant plans to convey water from the Yellowstone River using a pump to pipelines and hoses that will distribute the water onto the 1.25 acres.
2. This permit, if granted, will not be supplemental to any other water rights.

43B 30171298 - LKM - Proposed



- Proposed Transitory POD
- Proposed Pipeline System
- Proposed Place of Use
- Impervious Surfaces



Map Created: 8/28/2025
 Author: Cassey Strebeck,
 Water Resource Specialist

Elements depicted on this map are for illustrative purposes and have not been surveyed by the Department. MontanaBaseMap: Montana State Library
 MSDI PLSS:
 USGS National Hydrography Dataset (NHD); USGS TNM - National Hydrography Dataset. Data refreshed January, 2018.
https://nhd.usgs.gov/NHD_High_Resolution.html
 Hybrid Reference Layer: Esri Community Maps Contributors, Montana State University, Montana State Library, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, Bureau of Land Management, EPA, NPS, US Census Bureau, USDA, USFWS
 World Imagery: Maxar
 2021 Aerials.

Scale: 1:1,000

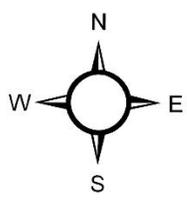


Figure 1. Proposed Place of Use and Conveyance for Application 43B 30171298

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

GENERAL CONCLUSIONS OF LAW

3. 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 . . .

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

- ... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
 - (a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
 - (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal

availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v.*

Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is
Draft Preliminary Determination to Grant in Modified Form
Application for Beneficial Water Use Permit No. 43B 30171298

required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

5. 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.

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

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see *also* Mont. Const. art. IX §3(1).

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

8. 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

9. The Applicant proposes to divert water from the Yellowstone River using a pump from a transitory point of diversion, approximately 87 feet long, along the southern side of the Applicant's property boundary, located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County at a flow rate of 50 GPM (0.11 CFS; $50 \text{ GPM} \times 1 \text{ CFS} / 448.8 \text{ GPM} = 0.11 \text{ CFS}$), up to 3.1 AF of volume, to be conveyed by pipelines for the irrigation of 1.25 acres of lawn and garden (FOF 1).

10. The Department determined the physical availability of water at the upstream point of the proposed transitory point of diversion on the Yellowstone River using stream gages, pursuant to ARM 36.12.1702(1)(a). The upstream and downstream points of the proposed transitory point of diversion are located between two gages. The Department used USGS Gage No. 06192500 Yellowstone River at Livingston, MT, the nearest upstream gage, approximately 31 river miles upstream from this project, with a period of record from May 1, 1897 to October 31, 2024; and USGS Gage No. 06214500 Yellowstone River at Billings, MT, the nearest downstream gage, approximately 90 miles downstream, with a period of record from October 1, 1928 to February 28, 2025. According to the DNRC Technical Memorandum: Physical Availability of Surface

Water with Gage Data dated November 1, 2019, when the proposed POD is located between

two stream gages on the same stream and both gages exhibit similar streamflow characteristics, then the physical availability at the proposed PODs will be determined using the interpolation method. These two gages meet the stream gaging requirements found in ARM 36.12.1702 and are acceptable for determining the physical and legal availability of surface water in this application.

11. The Department determined physical availability using a logarithmic interpolation method. Logarithmic interpolation is used when the proposed POD is located between two stream gages. This method estimates a streamflow characteristic at an intermediate location based on the basin drainage area at the gaged sites and the ungaged site (upstream point of the proposed transitory PODs). Several assumptions must be met in order for this method to be appropriate: 1) the ratio of the contributing drainage area to the ungaged site must be within 0.5 to 1.5 of the drainage areas for the stream gages, 2) periods of record for both gages must be similar, and 3) streamflow conditions must be similar at both stream gage locations. The ratio of the contributing drainage area at the upstream point of the proposed PODs is 1.4 to the Yellowstone River near Livingston and 0.4 to the Yellowstone River at Billings gages. The estimation technique was reviewed by the DNRC Water Sciences Bureau and was determined to be the best estimation technique available, even though the drainage basin area of the proposed POD is outside the acceptable range for the Billings gage. Both gages have a similar period of record. Both gages exhibit similar streamflow characteristics. As a result, the logarithmic interpolation is suitable for estimating physical water availability at the POD.

12. The following equation describes the logarithmic interpolation method, described further in DNRC (2019).

$$\log Q_u = \log Q_{g1} + \left(\frac{\log Q_{g2} - \log Q_{g1}}{\log A_{g2} - \log A_{g1}} \right) (\log A_u - \log A_{g1})$$

Where: Q = streamflow characteristic; A = drainage area; Subscripts g1 and g2 are gaged sites 1 and 2, respectively; Subscript u = ungaged site (proposed point of diversion)

13. Basin drainage area at the upstream point of the proposed transitory PODs was delineated using USGS StreamStats. Drainage area at the gage locations were taken from the USGS gaging station information web page.

14. The median of the mean monthly flow was calculated using the period of record for each gage. The median of the mean monthly flow was then used to estimate the mean monthly volume by multiplying the median of the mean monthly flow by 1.98 (the number of AF per day

per CFS) and the number of days in the respective month. Table 1 shows the median of the mean monthly flow and volume at the Livingston and Billings gages, as well as the interpolated flow and volume at the ungaged location (upstream point of the proposed transitory PODs). The interpolated data represent the estimated flow rate and volume physically available at the upstream location of the proposed transitory PODs on the Yellowstone River in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County.

Table 1: Interpolated flow rate & volume at proposed PODs using USGS gages at Livingston & Billings, MT

Month	USGS gage at Livingston 06192500 – gage 1, Upstream		USGS gage at Billings 06214500 – gage 2, Downstream		Interpolation at Proposed PODs	
	Median of the Mean Monthly Flow at gage 06192500 (CFS)	Median of the Mean Monthly Volume at gage 06192500 (AF)	Median of the Mean Monthly Flow at gage 06214500 (CFS)	Median of the Mean Monthly Volume at gage 06214500 (AF)	Interpolated Monthly Flow at the Ungaged Site (Proposed POD) (CFS)	Interpolated Monthly Volume at the Ungaged Site (Proposed POD) (AF)
April	1,903	113,038.20	3,971.50*	235,907.10*	2,320.63	137,845.14
May	7,207	442,365.66	12,885	790,881.30	8,429.51	517,403.20
June	13,315	790,911.00	24,270	1,441,638	15,655.03	929,908.60
July	7,319	449,240.22	12,405	761,418.9	8,438.15	517,933.37
August	3,332	204,518.16	4,571	280,567.98	3,628.55	222,720.55
September	2,270.5*	134,867.70*	3,717.50*	220,819.50*	2,593.39	154,047.22
October	1,916	117,604.08	3,911	240,057.18	2,322.56	142,558.59

*Differs from the September 5, 2025 Technical Analysis; see February 2, 2026 Surface Water Permit Technical Analyses Report – Notice of Errata

15. Typographical errors were discovered in the Department-completed Technical Analyses Report dated September 5, 2025. These typographical errors have no impact on the criteria findings for the Physical or Legal Availability analyses. The corrections are reflected in Table 1 of this Preliminary Determination and in the Surface Water Permit Technical Analyses Report – Notice of Errata dated February 2, 2026.

16. The Department finds that water is physically available in excess of the proposed flow rate and volume at the proposed PODs during the proposed period of diversion, April 15 to October 15.

LEGAL AVAILABILITY

FINDINGS OF FACT

17. The Department determined the legal availability of water in an area of potential impact (AOPI) that spans a reach of the Yellowstone River extending from the upstream point of the proposed transitory PODs located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County, downstream, approximately 3.5 river miles, to the confluence of Little Timber Creek and

the Yellowstone River located in the SWSWNE of Sec. 19, T1N, R14E, Sweet Grass County. This is an acceptable area of potential impact as the reach adds 55.8 square miles of drainage area, and Little Timber Creek is a significant hydrologic boundary.

18. There are 12 active water rights on the Yellowstone River within the AOPI: 11 Statements of Claim and one Conservation District Record. Of the 11 Statements of Claim, five are for irrigation, four are for livestock, and two are for fish and wildlife; the Conservation District Record is for irrigation. Table 2.

Table 2: Water Rights located in the AOPI

WR Number	WR Type	WR Owner	Purpose	Period of Diversion	CFS	AF	AU	Acres
43B 194349 00	Statement of Claim	MT Dept Of FWP	F & W	1-Nov to 15-Apr	1,200	395,014.0	-	-
43B 194350 00	Statement of Claim	MT Dept Of FWP	F & W	16-Apr to 31-Oct	2,000	789,234.0	-	-
43B 102620 00	Statement of Claim	Laubach, Alice Trust	Irrigation	1-Apr to 15-Oct	3.120	866.18*	-	322
43B 102623 00	Statement of Claim	Laubach, Alice Trust	Irrigation	1-Apr to 15-Oct	6.500	866.18*	-	322
43B 106352 00	Statement of Claim	Windbreak Ranch LLC	Irrigation	1-Apr to 15-Oct	3.380	941.5*	-	350
43B 106353 00	Statement of Claim	Windbreak Ranch LLC	Irrigation	1-Apr to 15-Oct	6.500	941.5*	-	350
43B 181151 00	Statement of Claim	Theorem River LLC	Irrigation	1-Jun to 1-Jul	15.92	1,129.8*	-	420
43B 102619 00	Statement of Claim	Laubach, Alice Trust	Stock	1-Jan to 31-Dec	0.0116*	8.415*	247.5	-
43B 106349 00	Statement of Claim	Windbreak Ranch LLC	Stock	1-Jan to 1-Nov	0.0097*	7.032*	247.5	-
43B 30137243	Statement of Claim	Theorem River LLC	Stock	1-Jan to 31-Dec	0.0341*	24.65*	725	-
43B 33999 00	Statement of Claim	Warren N Nunn	Stock	1-Jan to 31-Dec	0.0292*	21.165*	622.5	-
43-B 9948 00	Water Reservation	Sweet Grass County Conservation District	Irrigation	1-Apr to 15-Oct	363.40	46,245.0	-	15,313

*These values were calculated by DNRC staff using Department standards, per ARM 36.12.115.

19. The Department considers the entire Conservation District (CD) Reservation when a Conservation District Record is within an AOPI. The volume assigned to CD Reservation 43B 9948-00 accounts for the volume of all Conservation District Records associated with the CD Reservation and all unperfected volume, including Conservation District Record 43B 30105980. To not double-count the flow rate and volume of Conservation District Record 43B 30105980, owned by Sweet Grass CD and George Norsworthy, it was omitted from the AOPI, and the full reservation of Sweet Grass CD Reservation 43D 9948-00 was applied, utilizing the full flow rate of 363.40 CFS and the full allotted volume of 46,245 AF.

20. The flow rate and volume of all other water rights were taken from the face value on their respective abstracts. Water rights without a flow rate and/or volume were quantified based on their purpose and Department standard practices. The four (4) stock direct from source claims within the AOPI were quantified using the adjudication standard of 30 GPD per AU (0.34 AF/YR), with the flow rate in GPM back-calculated, and then converted to CFS, followed by 35 GPM (0.078 CFS) added to the final total flow rate. The five (5) irrigation claims had flow rates, were located in climatic area 2, and had their volume quantified based on 2.69 AF/AC, which is the lower end of the higher range at 60% efficient flood irrigation (ARM 36.12.115).

21. The flow rate of existing legal demands is calculated by combining the flow rate of all water rights within the area of potential impact, for each month of the proposed period of diversion.

22. The volume of existing legal demands is calculated by combining the volume of all water rights within the area of potential impact, for each month of the proposed period of diversion. To find the volume for a specific month of a water right, the volume is divided by the number of days in the period of diversion, giving the volume per day, then multiplying the volume per day by the number of days in the respective month.

23. Due to varying periods of diversion for Statement of Claim 43B 194349-00 (1,200 CFS, April 1 – 15) and Statement of Claim 43B 194350-00 (2,000 CFS, April 16 – 30), owned by Montana Department of Fish, Wildlife and Parks, the legal demand for April was calculated for April 1 – 15 and April 16 – 30. For April 1 – April 15, all water rights within this range were quantified based on the flow rate and the number of days (15), with 1,200 CFS for Statement of Claim 43B 194349-00, and no quantification for Statement of Claim 43B 194350-00. For April 16 – April 30, all water rights within this range were quantified based on the flow rate and the number of days (15), with 2,000 CFS for Statement of Claim 43B 194350-00 and no quantification for Statement of Claim 43B 194349-00.

24. Due to the periods of diversion ending on October 15th, for Statements of Claim 43B 102620-00 and 43B 102623-00, owned by the Laubach, Alice Trust; and Statements of Claim 43B 106352-00 and 43B 106353-00, owned by the Windbreak Ranch LLC, the legal demand for the month of October was assessed by October 1 – 15 and October 16 – 31. For October 1 – 15, all water rights within this range were quantified based on the flow rate and the number of days (15). For October 16 – 31, all water rights within this range were quantified based on the flow rate and the number of days (16).

25. The comparison between the physically and legally available flow rate in the Yellowstone River at the proposed upstream point of the proposed transitory POD located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County is shown in Table 3.

26. The comparison between the physically and legally available volume in the Yellowstone River at the proposed upstream point of the proposed transitory POD located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County is shown in Table 4.

Table 3: Legal Availability Analysis of the Available Flow Rate at the Proposed Point of Diversion

Month	April 1-15	April 16-30	Total April	May	June	July	Aug	Sept	Total October	October 1-15	October 16-31
Physically Available Flow Rate (CFS)	2,320.63	2,320.63	2,320.63	8,429.51	15,655.03	8,438.15	3,628.55	2,593.39	2,322.56	2,322.56	2,322.56
Existing Legal Demands in AOPI (CFS)	1583.06 ⁺	2,383.06 ⁺	2,383.06 ⁺	2,383.06 ⁺	2,398.98 ⁺	2,383.06 ⁺	2,363.56 ⁺				
Legally Available Water (CFS)	737.56	-62.44	-62.44	6,046.45	13,256.04	6,055.08	1,245.49	210.33	-60.50	-60.50	-41.00

All values were calculated by DNRC staff using Department standards, per ARM 36.12.115. All values were rounded to the hundredths place after calculations/conversions. +Sweet Grass Conservation Record 43B 30105980 was excluded from the legal demands as an individual right, since it was accounted for in the Sweet Grass Water Reservation.

Table 4: Legal Availability Analysis of the Available Volume at the Proposed Point of Diversion

Month	April 1-15	April 16-30	Total April	May	June	July	Aug	Sept	Total October	October 1-15	October 16-31
Physically Available Volume (AF)	68,922.57	68,922.57	137,845.14	517,403.20	929,908.60	517,933.37	222,720.55	154,047.22	142,558.59	68,979.96	73,578.63
Existing Legal Demands in AOPI (AF)	39,211.97 ⁺	63,007.94 ⁺	102,219.91 ⁺	130,216.40 ⁺	127,109.23 ⁺	130,216.40 ⁺	130,216.40 ⁺	126,015.87 ⁺	129,924.25 ⁺	63,007.94 ⁺	66,916.32 ⁺
Legally Available Water (AF)	29,710.60	5,914.63	35,625.23	387,186.80	802,799.37	387,716.97	92,504.14	28,031.34	12,634.33	5,972.02	6,662.31

All values were calculated by DNRC staff using Department standards, per ARM 36.12.115. All values were rounded to the hundredths place after calculations/conversions. +Sweet Grass Conservation Record 43B 30105980 was excluded from the legal demands as an individual right, since it was accounted for in the Sweet Grass Water Reservation.

27. The Department finds that the existing legal demand for the flow rate exceeds the physically available flow rate during April and October. Thus, the Department finds that the requested flow rate, 50 GPM (0.11 CFS), is not legally available to appropriate during the Applicant's proposed period of diversion, April 15 to October 15 (Table 3).

28. The Department finds that the requested volume of 3.1 AF is legally available at the proposed point of diversion from April 15 to October 15; however, the flow rate is not legally available during the originally proposed period of diversion.

29. Modifying the Applicant's proposed period of diversion, April 15 to October 15, to the legally available period of diversion and use of May 1 to September 30, the Department finds that the legal availability criterion for this application is met.

ADVERSE EFFECT

FINDINGS OF FACT

30. The Applicant's plan to prevent adverse effect is to shut down the pump and cease diversion, if a valid call is made by a senior water user.

31. The comparison of the physically available flow rate to the existing legal demands demonstrated that no flow rate would be legally available to the Applicant during the months of April or October, as shown in Table 3 (FOF 27). Appropriating during the months of April and/or October may cause an adverse effect to senior water users. A list of the water rights within the AOPI is in Table 2.

32. The Department proposes to reduce the period of diversion and use to May 1 to September 30 (FOF 29).

33. The Department finds that the proposed flow rate of 50 GPM and up to 3.1 AF of volume for Lawn & Garden Irrigation will not have adverse effects on existing water users, during the modified period of diversion and use, May 1 to September 30.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

34. The Applicant proposes to use a transitory point of diversion, approximately 87 feet long, along the southern side of the Applicant's property boundary located in the SWSWSE of Sec.

35, T1N, R13E, Sweet Grass.

35. The Applicant proposes to pump water from the Yellowstone River using a Honda WP-2065HL, with a 6.5 HP engine, and a capacity of up to 158 GPM. The flow rate can be manually

controlled and lowered to the requested flow rate of 50 GPM. The water will be conveyed through a 2.0" PVC mainline along the east side of the property that will have four (4) ¾-inch spigots. Hoses will be attached to the spigots that will decrease the flow to water the lawn and garden. This system will not endure any conveyance losses.

36. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

37. The Applicant proposes to divert up to 3.1 AF in volume, at a flow rate of 50 GPM, to water 1.25 acres of lawn and garden. Lawn & Garden Irrigation is recognized as a beneficial use under the Montana Water Use Act §_85-2-102(5), MCA.

38. The flow rate is based on the size of the pump, and the volume requested is calculated using Department standard for Lawn & Garden Irrigation of 2.5 acre-feet per acre on 1.25 acres (2.5 AF/acre x 1.25 acres = 3.1 AF), found in ARM 36.12.115.

39. The Applicant requests a period of diversion and a period of use from April 15 to October 15, which is the standard period of diversion and use for climatic area 3, where the place of use is located (ARM 36.12.112). However, the requested flow rate is not legally available in April or in October (FOF 27-29). The Department proposes reducing the period of diversion and period of use to May 1 through September 30, when the flow rate is legally available. This modification is within the standard period of diversion for Lawn & Garden Irrigation.

40. The Department finds the proposed water use is beneficial, and that the requested flow rate of 50 GPM and up to 3.1 AF in volume, during the modified period of diversion, are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

41. The Applicant signed the application form affirming that the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

42. 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.”
43. 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).
44. 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).
45. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 9-16)

LEGAL AVAILABILITY

46. 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).

47. 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.

48. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. *Id.*

49. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period from May 1 to September 30, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 17-29)

ADVERSE EFFECT

50. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See *Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

51. 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).

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

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

54. It is the Applicant’s burden to produce the required evidence. *E.g.*, *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Bostwick Properties, Inc.*, ¶ 21.

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

56. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF 30-33)

ADEQUATE DIVERSION

57. 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.

58. 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.

59. Collection of snowmelt and rain in lined ponds considered adequate means of diversion. *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989).

60. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA. (FOF 34-36)

BENEFICIAL USE

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

62. 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; Toohy v. Campbell* (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, *Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

63. Amount of water to be diverted must be shown precisely. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3 (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

64. It is the Applicant's burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 ("issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied"); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); *see also Royston; Ciotti*.

65. Applicant proposes to use water for Lawn & Garden Irrigation, which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that Lawn & Garden Irrigation is a beneficial use and that 3.1 AF of diverted volume

and 50 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 37-40)

POSSESSORY INTEREST

66. 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.

67. 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.

68. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 41)

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. 43B 30171298 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicant may divert water from the Yellowstone River, by means of a pump, from May 1 to September 30, at a flow rate of 50 GPM, up to 3.1 AF of volume, from a transitory point of diversion in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County, for Lawn & Garden Irrigation from May 1 to September 30. The Applicant may irrigate 1.25 acres of lawn and garden. The place of use is located in the SWSWSE of Sec. 35, T1N, R13E, Sweet Grass County.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant in Modified Form pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 2nd day of February 2026.

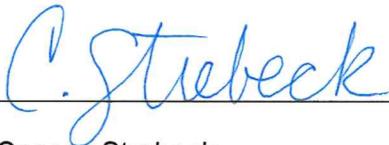


Heidi Christison
Billings Regional Manager
Department of Natural Resources and
Conservation
Water Resources Division
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Billings, MT, 59105

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 2nd day of February, 2026, by first class United States mail.

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