

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

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<b>APPLICATION FOR BENEFICIAL WATER USE</b>	)	<b>DRAFT PRELIMINARY</b>
<b>PERMIT NO. 76D 30170983 BY KURTIS</b>	)	<b>DETERMINATION TO GRANT</b>
<b>HAFFERMAN AND KATHY MINER</b>	)	<b>IN MODIFIED FORM</b>

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Kurtis Hafferman and Kathy Miner (Applicants) submitted Application for Beneficial Water Use Permit No. 76D 30170983 to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation on December 19, 2025. The Applicants propose to divert water from the Kootenai River at a rate of 18.0 gallons per minute up to 0.94 acre-feet to irrigate 0.86 acres of lawn and garden from April 1<sup>st</sup> to October 15<sup>th</sup> annually. The Department published receipt of the application on its website on December 22, 2025. A preapplication meeting was held between the Department and the Applicants on May 22, 2025, in which the Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Meeting Form on May 29, 2025. The Department delivered the Department Completed Technical Analyses on July 2, 2025. The application was determined to be correct and complete as of January 13, 2026. An Environmental Assessment for this application was completed on March 10, 2026.

**INFORMATION**

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Maps and Figures:
  - Climatic Area Map
  - Point of Diversion Design
  - Place of Use Map
  - Legal Locations POD and POU, Dated May 10, 2025
  - Lot Layout of the MBMI Development, Inc. Subdivision, Dated April 29, 2009

- Attachments
  - General Abstract 76D 30164146, Dated May 20, 2025
  - Possessory Interest, Dated March 3, 2021
  - Pump Operation and System Curve, Dated December 31, 2023
  - System Specifications and Cost
  - Conveyance System Specifications
- Department completed technical analyses based on information provided in the Preapplication Meeting Form, dated July 2, 2025

Information within the Department’s Possession/Knowledge

- Mean monthly stream flow data from United States Geological Survey (USGS) Gaging Station No. 12301933, Kootenai River below Libby Dam near Libby, MT. Period of record: October 1971 – January 2025.
- List of existing water rights on the Kootenai River from USGS Gaging Station No. 12301933 downstream to the Montana-Idaho border. This list is further divided into two reaches:
  - From USGS Gaging Station No. 12301933 downstream to the Applicants’ proposed POD.
  - From the Applicants’ proposed POD downstream to the Montana-Idaho border.

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:

<b>Department</b> or <b>DNRC</b> means the Department of Natural Resources and Conservation	
<b>NRCS</b> means the Natural Resource Conservation Service	
<b>AF</b> means acre-feet	<b>AOPI</b> means Area of Potential Impact
<b>ARM</b> means Administrative Rules of Montana	<b>MCA</b> means Montana Code Annotated
<b>FOF</b> means finding(s) of fact	<b>CFS</b> means cubic feet per second
<b>GPM</b> means gallons per minute	<b>USDA</b> United States Department of Agriculture
<b>PSI</b> means pounds per square inch	<b>POD</b> means point of diversion
<b>TDH</b> means total dynamic head	

## PROPOSED APPROPRIATION

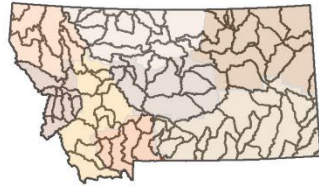
### FINDINGS OF FACT

1. The Applicants propose to divert water from Kootenai River by means of an electric pump from April 1<sup>st</sup> to October 15<sup>th</sup> annually at a rate of 18.0 GPM up to 0.94 AF to irrigate 0.86 acres annually. The proposed point of diversion is located in NWNENE Section 36, Township 31N, Range 31W, Lincoln County Montana. The proposed place of use is located in the SWSESE Section 25, Township 31N, Range 31W, Lincoln County, MT and in the NWNENE of Section 36, Township 31N, Range 31W, Lincoln County, Montana. The POD is in Water Right Basin 76D (Kootenai River) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.
2. Groundwater Certificate 76D 30164146 is currently being used to irrigate 0.86 acres on the property. The well will continue to provide water for lawn and garden until the provisional permit is approved. At that time the irrigation of lawn and garden from the well will cease on the majority of the 0.86 acres and will be utilized for only the lawn around the home (~0.1 acres) The remaining 0.76 acres will be irrigated via water from the Kootenai River once permitted. The water rights are overlapping as they will have an adjoining place of use but different points of diversion and different means of conveyance. The two systems will not be manifold. The rights will not be supplemental; the well will only be used if the surface water system is unavailable.
3. The application will be subject to the following condition to satisfy the beneficial use requirement: 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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

# 76D 30170983 KURTIS HAFFERMAN & KATHY MINER



0 0.04 0.08 0.16 Miles



Map Created: 1/21/2026  
 Author: Abigail Williams  
 Water Resource Specialist



USGS: The National Map; National Boundaries Dataset, 3DEP: Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS: Global Elevation, U.S. Census Bureau: TIGER/Line data; USFS: Road data; National Earth Data; U.S. Department of State: NEI; NOAA: National Centers for Environmental Information. Data refreshed October 27, 2025. Esri, HERE, IFC

### Legend

- Township & Range
- Section
- Quarter Sections
- Proposed Point of Diversion
- Proposed Place of Use
- Hafferman POU

**Figure 1:** Map of the Applicants' proposed point of diversion and place of use

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

**GENERAL CONCLUSIONS OF LAW**

4. 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 . . .

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

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

- (A) identification of physical water availability;
  - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
  - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
- (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
  - (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
  - (d) the proposed use of water is a beneficial use;
  - (e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;
  - (f) the water quality of a prior appropriator will not be adversely affected;
  - (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
  - (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- (2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by

the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

6. 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.

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

8. 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.

9. 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**

10. The Applicants propose to divert water from the Kootenai River at a rate of 18.0 GPM up to 0.94 AF/year to irrigate 0.86 acres of lawn and garden from April 1<sup>st</sup> to October 15<sup>th</sup>.

11. Physical availability was calculated using data from USGS Gaging Station No. 12301933 on the Kootenai River below Libby Dam near Libby, MT. This gage was selected as it is the nearest gage to the proposed POD and is located approximately 15.8 miles upstream of the proposed POD. The other USGS Gaging Station on the Kootenai River is USGS Gaging Station No. 12305000 Kootenai River at Leonia, ID, which is approximately 46 miles downstream of the proposed POD. The entire period of record for USGS Gaging Station No. 12301933 was used for this analysis, the date range is from October 1971 to January 2025. The Department calculated the physical availability using the following method:

- a. The Department calculated median of the mean monthly flow rates in CFS for the Kootenai River using USGS Gaging Station No. 12301933 records for each month of the proposed period of diversion (Table 2, column B). Those flow rates were converted to monthly volumes in AF (Table 2, column C) using the following equation found in the DNRC Water Calculation Guide: median of the mean monthly flow in (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month

- b. The Department calculated the monthly flow rates appropriated by existing users between USGS Gaging Station No. 12301933 and the proposed POD (Table 2, column D) by:
- I. Generating a list of existing water rights from USGS Gaging Station No. 12301933 down to the proposed POD (Table 1);
  - II. Designating uses as occurring during their recorded period of diversion; and,
  - III. 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.
- c. Since the gage used is upstream of the proposed POD, the Department subtracted out the flow rates of the existing rights between USGS Gaging Station No. 12301933 and the proposed POD (Table 2, column D) from the median of the mean monthly gage values (Table 2, column B) to determine physically available flows and volumes at the POD (Table 2, columns E-F).

<b>Table 1: Existing Legal Demand between the POD and USGS Gaging station No. 12301933</b>			
<b>Water Right Number</b>	<b>Water Right Type</b>	<b>Purpose</b>	<b>Flow Rate (CFS)</b>
76D 31188 00	PROVISIONAL PERMIT	IRRIGATION	0.02
76D 99744 00	PROVISIONAL PERMIT	IRRIGATION	1.33
76D 304 00	STATEMENT OF CLAIM	INDUSTRIAL	6.68
76D 42395 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.02
76D 33744 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.12
76D 33287 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.06
76D 216044 00	STATEMENT OF CLAIM	IRRIGATION	0.23
76D 30023375	PROVISIONAL PERMIT	IRRIGATION	0.12

<b>Table 2: Physical Availability of the Kootenai River at the Point of Diversion</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Median of the Mean Monthly Flow at USGS Gaging Station 12301933 (CFS)</b>	<b>Median of the Mean Monthly Volume at USGS Gaging Station 12301933 (AF)</b>	<b>Existing legal demands between USGS Gaging Station 12301933 and the POD (CFS)</b>	<b>Physically Available Water at POD (CFS)</b>	<b>Physically Available Water at POD (AF)</b>
April	4,254.00	252,687.60	8.56	4,245.44	252,179.14
May	9,169.00	562,793.22	8.58	9,160.42	562,266.58
June	14,600.00	867,240.00	8.58	14,591.42	866,730.35
July	10,900.00	669,042.00	8.58	10,891.42	668,515.36
August	9,524.00	584,583.12	8.58	9,515.42	584,056.48
September	8,504.00	505,137.60	8.58	8,495.42	504,627.95
October	6,785.50	416,493.99	7.11	6,778.39	416,057.58

12. Based on the physical availability analysis of the Kootenai River at the Applicants' proposed POD, the Department finds that the requested flow rate of 18.0 GPM (0.04 CFS) up to 0.94 AF of volume annually is physically available in the Kootenai River during the proposed period of diversion spanning from April 1<sup>st</sup> to October 15<sup>th</sup>.

### **LEGAL AVAILABILITY**

#### **FINDINGS OF FACT**

13. The Applicants propose to divert up to 0.94 AF of surface water from the Kootenai River at a flow rate of 18.0 GPM to irrigate 0.86 acres of lawn and garden from April 1<sup>st</sup> to October 15<sup>th</sup> annually. The Department determined the AOPI for this application to be the Kootenai River from the proposed POD to the Montana-Idaho border. The AOPI is appropriate as diversion of water at the proposed POD would reduce flow and volume of the river within this reach of the Kootenai River. The Department found 25 water rights within the AOPI to evaluate for legal availability (Table 3).

<b>Table 3: Kootenai River existing water rights between the POD and the Montana Idaho Border</b>			
<b>Water Right Number</b>	<b>Water Right Type</b>	<b>Purpose</b>	<b>Flow Rate (CFS)</b>
76D 141356 00	STATEMENT OF CLAIM	INDUSTRIAL	1.11
76D 143762 00	STATEMENT OF CLAIM	IRRIGATION	0.11
76D 141302 00	STATEMENT OF CLAIM	IRRIGATION	0.15
76D 29844 00	PROVISIONAL PERMIT	IRRIGATION	0.01
76D 100384 00	STATEMENT OF CLAIM	IRRIGATION	0.44
76D 216064 00	STATEMENT OF CLAIM	IRRIGATION	0.16
76D 5948 00	STATEMENT OF CLAIM	IRRIGATION	0.11
76D 140178 00	STATEMENT OF CLAIM	IRRIGATION	0.36
76D 31798 00	PROVISIONAL PERMIT	IRRIGATION	0.13
76D 43355 00	PROVISIONAL PERMIT	IRRIGATION	0.06
76D 140846 00	STATEMENT OF CLAIM	IRRIGATION	0.16
76D 22286 00	PROVISIONAL PERMIT	IRRIGATION	0.05
76D 43067 00	PROVISIONAL PERMIT	IRRIGATION	0.04
76D 141359 00	STATEMENT OF CLAIM	IRRIGATION	0.35
76D 29845 00	PROVISIONAL PERMIT	IRRIGATION	0.02
76D 100385 00	STATEMENT OF CLAIM	IRRIGATION	0.06
76D 2715 00	STATEMENT OF CLAIM	IRRIGATION	2
76D 109346 00	PROVISIONAL PERMIT	IRRIGATION	0.08
76D 30051149	PROVISIONAL PERMIT	LAWN AND GARDEN	0.02
76D 114086 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.02
76D 56444 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.06
76D 92427 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.03
76D 30158132	PROVISIONAL PERMIT	LAWN AND GARDEN	0.22
76D 115793 00	PROVISIONAL PERMIT	LAWN AND GARDEN	0.03
76D 100383 00	STATEMENT OF CLAIM	STOCK	0.04

14. The Department calculated physically available flows and volumes at the proposed point of diversion (Table 4, Columns B-C). The DNRC used the method below to quantify legal demand in the depleted reach during the period of diversion:

- a. The Department calculated the mean monthly flow rates in CFS for Kootenai River using USGS Gagin station No. 12301933 records for each month of the proposed period of diversion (Table 4, Column B). Those rates were then converted into monthly volumes (Table 4, Column C) using the following equation: median of the mean monthly flow (CFS) \* 1.98 (AF/day/CFS) \* # days per month = AF/month

- b. The Department calculated the monthly flows appropriated by existing users (Table 4, Column D) between the proposed point of diversion and the Montana Idaho border by:
- I. Generating a list of existing water rights from the proposed POD to the Montana/Idaho Border (this list is included in the application file and is available upon request);
  - II. Designating the uses as occurring during their periods of diversion;
  - III. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate per Department adjudication standards (quantification of said water rights is not a re-adjudication or historical use analysis); and,
  - IV. Assuming the flow rate of each existing water 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 is an appropriate measure of assessing existing water rights as it protects existing water users.

15. The Department subtracted the flow rates of the existing legal demands (Table 4, Column D) within the AOPI from the physically available water (Table 4, Column B) to get the legally available flow rates at the POD (Table 4, Column E). Legally available monthly flow rates were then converted into monthly volumes (Table 4, Column F).

<b>Table 4: Legal Availability of the Kootenai River from the point of diversion to the Idaho-Montana Border</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Physically Available Water at POD (CFS)</b>	<b>Physically Available Water at POD (AF)</b>	<b>Existing Legal Demands on the Kootenai River below the POD (CFS)</b>	<b>Legally Available Flow (CFS)</b>	<b>Legally Available Flow (AF)</b>
April	4,245.44	252,179.14	2.15	4,243.29	252,051.43
May	9,160.42	562,266.58	5.43	9,155	543,806.41
June	14,591.42	866,730.35	5.82	14,585.6	866,384.64
July	10,891.42	668,515.36	5.82	10,885.6	646,604.64
August	9,515.42	584,056.48	5.82	9,509.6	564,870.24
September	8,495.42	504,627.95	5.67	8,489.75	504,291.15
October	6,778.39	416,057.58	4.39	6,774	402,375.6

16. Based on the evaluation of legally available water, the Department finds that the requested flow rate of 18.0 GPM (0.04 CFS) up to 0.94 AF of volume is legally available in the Kootenai River at the proposed POD during the period of diversion from April 1<sup>st</sup> to October 15<sup>th</sup>.

### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

17. The Applicants propose to divert water from the Kootenai River at a rate of 18.0 GPM up to 0.94 AF to irrigate 0.86 acres for lawn and garden from April 1<sup>st</sup> to October 15<sup>th</sup>. The Applicants provided a plan showing they can regulate their water during times of shortage to ensure senior appropriators' water rights are met. The Applicants' plan is as follows:

- a. The Applicants will monitor the flow of the Kootenai River at the USGS Gaging Station 12301933 to assure there is adequate water to satisfy all existing water rights before using water.
- b. In the event of a water shortage the power to the pump can be shut off and diversion of water will stop.

18. The Applicants have shown that they can regulate their water usage and that a plan is in place to protect existing water users. The Department finds that water is both physically and legally available during the proposed period of diversion (FOF 12 and 16). The Department finds that the proposed water use will not adversely affect senior water users.

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

19. The Applicants propose to divert water from the Kootenai River at a rate of 18.0 GPM up to 0.94 AF/year to irrigate 0.86 acres of lawn and garden by means of a Grundfos 22 SQ10-160 pump and motor suspended in an 8-inch well casing that is buried into the bank of the river. A 6 ft length of 4-inch PVC pipe with fifty ¼-inch slots buried approximately 6 feet below the ordinary high-water mark connects to the bottom of the 8-inch well casing to allow intake of Kootenai River water by the pump. The pump outlet is connected to a 1-1/2-inch galvanized pipe set into a standard Boshart's 1-1/2-inch P-150-SS stainless steel pitless adapter that is connected to a 1-½-inch HDPE distribution line. The pump is powered by a 220V 60 Hz 50-amp power supply from the existing pump house.

20. The system is comprised of three irrigation zones and is designed so that only one irrigation zone will operate at a time. The water will be conveyed from the Kootenai River to the north section of the

property along the east side of the property through the 1-½-inch HDPE mainline. The mainline tees off into zones via 1-inch HDPE lateral lines before connecting to the sprinklers with a ¾-inch HDPE connection. The Applicant will control the irrigation in the zones via a Rainbird controller. Each of the three zones will operate with a mixture of 2.0 GPM lawn rotors and 1.0 GPM shrub rotors for the lawn and shrub irrigation with each zone having 6 rotors set to operate at 60 PSI.

21. The Applicants provided pump specifications and a TDH analysis for irrigation Zone 1 (the furthest zone). Comparing the THD to the pump specifications demonstrates that the pump can divert and convey water to each zone at a rate of 18.0 GPM.

22. The Department finds that the system can convey the proposed 18.0 GPM up to 0.94 AF annually based on the system design and specifications.

### **BENEFICIAL USE**

#### **FINDINGS OF FACT**

23. The Applicants request to divert water from the Kootenai River at a rate of 18.0 GPM up to 0.94 AF to irrigate 0.86 acres of lawn and garden from April 1<sup>st</sup> to October 15<sup>th</sup>.

24. The Applicant requested 0.86 acres of lawn and garden; the irrigation plan submitted with the application shows that only 0.76 acres of the requested 0.86 will be irrigated by the provisional permit upon issuance. The remaining 0.1 acres will be irrigated solely with the existing ground water certificate 76D 30164146 via a separate irrigation system designed to irrigate only around the home. The irrigation planned with this permit will irrigate mainly grass and some small shrubs on the main part of the property. The two irrigation systems will be operated separately and not manifold. The place of use for the groundwater certificate and the provisional permit will not be supplemental. The rights will not be supplemental as the well will only be used if the surface water system is unavailable. The Department finds the requested irrigated lawn and garden area will be 0.76 acres.

25. The Applicants' property is located within USDA NRCS Climatic Area III. The Applicants requested a period of diversion and a period of use from April 1<sup>st</sup> to October 15<sup>th</sup>, which differs from the USDA NRCS Climatic Area III standard of April 15<sup>th</sup> to October 15<sup>th</sup> as set forth in ARM 36.12.112 (1)(c)(iii). Since the Applicants did not provide any reasoning or justification for their non-standard period of diversion and period of use requests, the Department finds that the period of diversion and period of use will be modified to be from April 15<sup>th</sup> to October 15<sup>th</sup> (184 days) annually to conform to the DNRC standard for USDA NRCS Climatic Area III.

26. The Applicants requested a volume of 0.94 AF which they determined based on their planned system operation time rather than basing their request on DNRC standards or crop requirements. The Applicants' irrigation plan consists of irrigating each of their three zones for 30 minutes each, for 90 minutes per day total. The total amount of water needed to irrigate lawn and garden per day based off the applicants' calculations is 1,620 gallons (90 minutes x 18.0 GPM = 1,620 gallons). Over the 184-day period of diversion, the Applicants will require a volume of 0.92 AF (1,620 gallons/day x 184 days = 298,080 gallons; 298,080 gallons ÷ 325,851 gallons per AF = 0.92 AF). The Applicants calculated their requested volume 0.94 AF based on a 190-day irrigation period from April 1<sup>st</sup> to October 15<sup>th</sup> and assuming they will irrigate every day during the period of diversion (1,620 gallons/day x 190 days = 307,800 gallons; 307,800 gallons ÷ 325,851 gallons/AF = 0.94 AF).

Further, the Applicants cited DNRC sprinkler irrigation standards for USDA NRCS Climatic Area III found in ARM 36.12.115(2)(e) when comparing their requested volume to DNRC standard volumes. The standard referenced by the Applicants was incorrect for the lawn and garden purpose. The Department finds that the requested volume will be modified to 0.92 AF to conform to the modified period of use.

27. If diverted continuously throughout entire modified 184-day period of diversion, the requested flow rate of 18.0 GPM would result in a total diversion of 14.64 AF (18.0 GPM x 1,440 minutes/day x 184 days ÷ 325,851 gallons/AF = 14.64 AF/year). This proves the proposed flow rate is adequate to divert the modified annual volume of 0.92 AF.

28. Due to the Applicants' deviation from DNRC standards in their volume request, the proposed permit will be subject to the following measurement reporting condition to ensure the Applicant does not divert more volume than authorized:

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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

29. The Department finds that diverting water from the Kootenai River at a flow rate of 18.0 GPM up to the modified annual volume of 0.92 AF to irrigate the modified 0.76 acres of lawn and garden within the modified period of diversion and period of use of April 15<sup>th</sup> to October 15<sup>th</sup>, coupled with a monthly measurement reporting requirement, is a beneficial use and the requested flow rate and volume are reasonable to satisfy that use.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

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

### **CONCLUSIONS OF LAW**

#### **PHYSICAL AVAILABILITY**

31. 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.”

32. 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).

33. 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).

34. The Applicants have proven that water is physically available at the proposed point of diversion in the amount granted by the DNRC. Section 85-2-311(1)(a)(i), MCA. (FOF 10-12)

LEGAL AVAILABILITY

35. 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).

36. 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.

37. The Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the DNRC authorized, in the amount authorized, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 13-16)

ADVERSE EFFECT

38. 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.

39. 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).

40. 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).

41. 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).

42. 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.

43. 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).

44. The Applicants have proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF 17-18)

### ADEQUATE DIVERSION

45. 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.

46. 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.

47. The Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 19-22)

### BENEFICIAL USE

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

49. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. *E.g., McDonald; Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. *E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

50. 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).

51. 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*.

52. The Applicants propose to use water for lawn and garden irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. The Applicants have proven by a preponderance of the evidence that lawn and garden irrigation is a beneficial use and that 0.92 AF of diverted volume and 18.0 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 23-29)

### POSSESSORY INTEREST

53. 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.

54. 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.

55. The Applicants have proven by a preponderance of the evidence that they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 30)

### **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. 76D 30170983 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicants may divert water from the Kootenai River, by means of a pump, from April 15<sup>th</sup> to October 15<sup>th</sup> at 18.0 GPM up to 0.92 AF, from a point in the NWNENE Section 36, Township 31N, Range 31W, Lincoln County Montana, for lawn and garden use from April 15<sup>th</sup> to October 15<sup>th</sup>. The Applicant may irrigate lawn and garden on 0.76 acres. The place of use is located in the SWSESE Section 25, Township 31N, Range 31W, Lincoln County, MT and in the NWNENE of Section 36, Township 31N, Range 31W, Lincoln County, Montana.

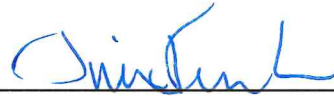
The application will be subject to the following condition:

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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

**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 day 11 of March, 2026.



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James Ferch, Manager  
Kalispell Regional Office  
Montana Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 11 day of March, 2026, by first class United States mail.

KURTIS M HAFFERMAN and KATHY M MINER  
PO BOX 1690  
LIBBY MT 59923-5001



ABIGAIL WILLIAMS

KALISPELL Regional Office, (406) 752-2288