

**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 DETERMINATION</b>
<b>PERMIT NO. 76K 30172668 BY )</b>	<b>TO GRANT PERMIT</b>
<b>R&amp;E ASSOCIATES OF MONTANA LLC )</b>	

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On March 12, 2026, R&E Associates of Montana LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76K 30172668 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 12 gallons per minute and 0.59 acre-feet for domestic and lawn & garden use. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on December 12, 2026, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on December 23, 2025. The Department delivered the Department-completed Technical Analysis on January 30, 2026. The application was determined to be correct and complete as of March 30, 2026. An Environmental Assessment for this application was completed on May 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
- Maps:
  - Schematic map of COS 6929, Lot 79 including proposed structure and point of diversion, dated December 2025
  - USGS 1:100,000 scale topographic map of Seeley Lake, Montana, showing general location of proposal, dated 1993

- USGS topographic map (unknown finer scale) showing location of proposal, undated
- Certificate of Survey for Diamond Bar L Ranch Third Lakeshore Tracts, dated 1958
- Department-completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated January 30, 2026

Information within the Department’s Possession/Knowledge

- Stream flow data for the Swan River from USGS Gaging Station #12369200 near Condon, MT
- Stream flow data for the Swan River from USGS Gaging Station #12370000 near Bigfork, MT
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Missoula Regional Office at (406) 542-5883 to request copies of the following documents.
  - Technical Memorandum: Physical Availability of Surface Water With Gage Data

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; CFS means cubic feet per second; GPD means gallons per day; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

**PROPOSED APPROPRIATION**

**FINDINGS OF FACT**

1. The Applicant proposes to divert water from Lindbergh Lake, by means of a pump, from January 1 through December 31 at 12 GPM. The applicant proposes to divert a total volume of

0.59 AF, from a point in the N2SESW Section 23, T19N, R17W, for domestic use from January 1 through December 31 and lawn & garden use from April 15 through October 15. The place of use is generally located in the N2SESW Section 23, T19N, R17W. Table 1 below provides a summary of the proposed use.

Table 1: Summary of Proposed Use

Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
12 GPM	0.51 AF	Domestic	01/01 – 12/31	N2SESW Sec. 23, T19N, R17W	N2SESW Sec. 23, T19N, R17W	03/12/2026
	0.08 AF	Lawn & Garden	04/15 – 10/15			

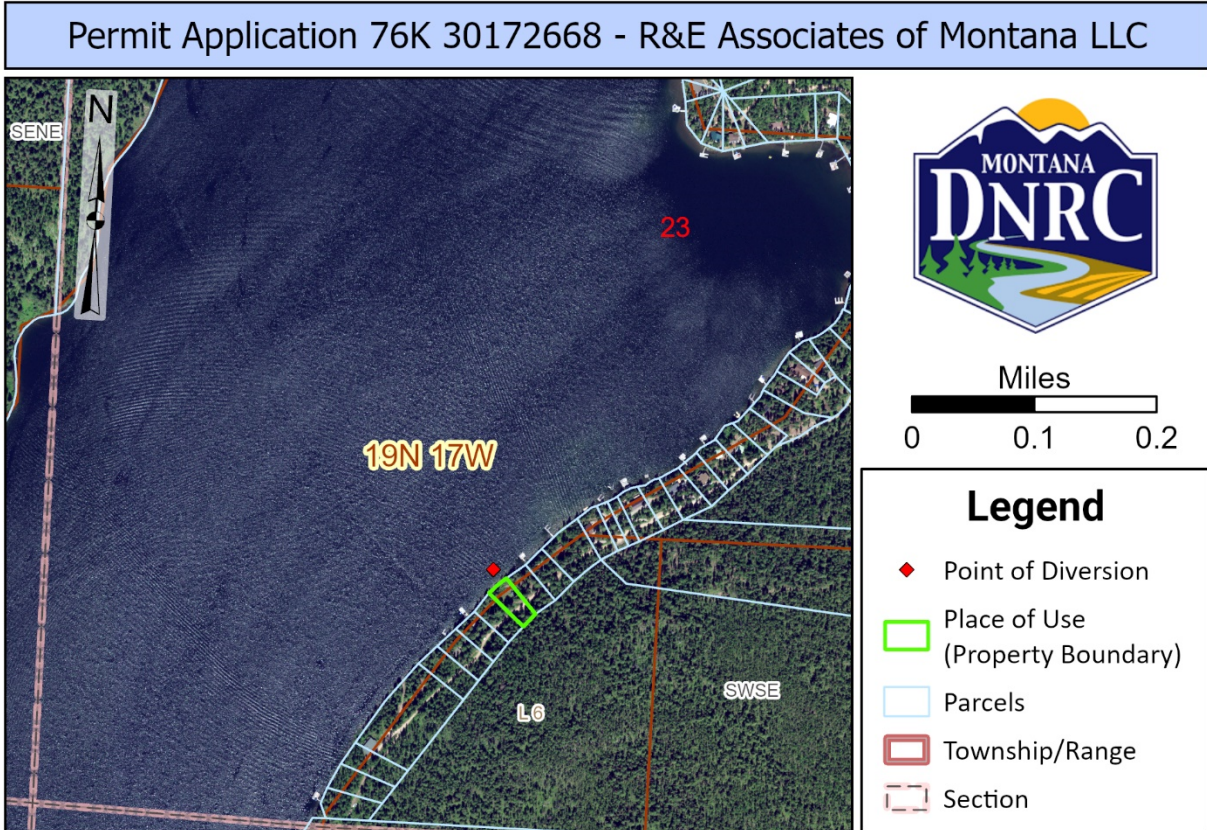


Figure 1. Map of proposed appropriation.

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

**GENERAL CONCLUSIONS OF LAW**

2. The Montana Constitution expressly recognizes in relevant part that:

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

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

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

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

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

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

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

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

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

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

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

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

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

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

8. The Applicant proposes to divert 0.59 AF of water at 12 GPM from Lindbergh Lake.

9. Lindbergh Lake is a natural water body located near the headwaters of the Swan River in the Mission Mountains. Water flowing out of Lindbergh Lake flows under 1000 ft before entering Cygnet Lake. After Cygnet Lake, the Swan River runs uninterrupted for approximately 57 river miles before entering Swan Lake.

10. The Department calculated the physical availability of water for the proposed appropriation using United States Geological Survey (USGS) stream flow data from USGS Gage #12369200 (Swan River near Condon), located in the NESWNW Section 8, T19N, R16W, approximately 4 miles downstream of the outlet of Cygnet Lake. USGS Gage #12369200 has a 20-year period of record from 1972 to 1992.

11. Because streamflow records do not extend to the present day, the Department relied on modeled flows generated by the USGS Streamflow Record Extension Facilitator (SREF) program. The SREF program works by comparing streamflows between two or more gages which have an overlapping period of record and creating a regression model. After recording at one gage ends, data from the gage with continuing records can be input into the regression model to estimate streamflow at the first gage. The department runs the SREF model on the Condon gage every 5-10 years, using data from USGS Gage #12370000 (Swan River near Bigfork). The most recent model extended the streamflow record to November 2023. The median deviation (error) for the model was -0.00697, and the root mean square error was 0.102, indicating a high degree of accuracy.

12. The Department used the extended record for USGS Gage #12369200 to calculate average (mean) flow rates for each month from October 1972 to November 2023. The median mean monthly flow rate was used as the typical flow rate in each month. These flow rates were then converted into monthly volumes.

13. The SREF model cannot account for water rights which were authorized after the measured period of record at Condon; therefore, the demands of water rights upstream of the gage with priority dates from October, 1992 (when the Condon gage stopped directly recording flows) to January, 2026 (when the Technical Analysis was conducted) were subtracted from the median of the mean monthly flows and volumes. Because the proposed point of diversion lies upstream of the Condon gage, the legal demands of water rights upstream of the gage and downstream of Lindbergh Lake were added. Physical availability was calculated as the median of the mean monthly flow after these two adjustments. Tables 1 and 2 show the flow rate and volume of water physically available on Lindbergh Lake.

<b>Table 1: Physical Availability (CFS) at POD Using Condon Gage #12369200 Extended Record</b>				
A	B	C	D	E
Month	Median of the Mean Flow (CFS)	Pre-1992 Demands Between POD and Gage (CFS)	Post-1992 Demands Above POD (CFS)	Physical Availability (CFS)
January	45.39	0.28	1.03	44.63
February	42.32	0.28	1.03	41.56
March	73.58	0.32	1.03	72.87
April	206.03	0.32	1.06	205.29
May	382.97	0.39	1.06	382.29
June	468.67	0.39	1.06	467.99
July	212.94	0.39	1.06	212.26
August	75.90	0.39	1.06	75.23
September	49.50	0.39	1.06	48.83
October	50.89	0.35	1.06	50.18
November	60.35	0.32	1.06	59.61
December	47.84	0.32	1.03	47.13

<b>Table 2: Physical Availability (AF) at POD Using Condon Gage #12369200 Extended Record</b>				
A	B	C	D	E
Month	Median of the Mean Volume (AF)	Pre-1992 Demands Between POD and Gage (AF)	Post-1992 Demands Above POD (AF)	Physical Availability (AF)
January	2790.08	0.82	1.74	2789.16
February	2349.86	0.82	1.74	2348.93
March	4523.22	0.92	1.74	4522.40
April	12256.92	1.27	3.31	12254.89
May	23542.18	1.83	3.31	23540.70
June	27880.98	1.83	3.56	27879.25
July	13089.78	1.83	3.56	13088.05
August	4666.00	1.83	3.56	4664.27
September	2944.76	1.83	3.56	2943.03
October	3128.18	1.73	3.56	3126.35
November	3590.22	0.92	1.83	3589.31
December	2940.79	0.92	1.74	2939.97

14. The Department finds that surface water is physically available in the amount the Applicant seeks to appropriate during the proposed period of diversion.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

15. The area of potential impact for this application is limited to the Swan River from its inflow into Lindbergh Lake to its outflow from Cygnet Lake. Per Department standard practice for area of potential impact analyses for surface water permits, downstream reservoirs and lakes are appropriate limits to the area of potential impact. Lindbergh Lake and Cygnet Lake are separated by less than 1000 ft and thus can be reasonably regarded as a single system.

Most of the water rights on the upper Swan River are for domestic and lawn & garden use on these two lakes, and this region is not one which experiences water shortages or disputes.

16. There are 87 surface water rights in the area of potential impact with a total legal demand of 3.99 CFS. These rights are listed in Appendix A of the Technical Analysis.

17. The monthly legal demands of water rights in terms of flow rate was quantified by assuming that the authorized flow for each right was fully utilized during each month of its period of diversion. Monthly volumes were calculated by assuming that flow rates were continuously appropriated throughout the month. Table 3, below, shows legal demands over the course of a year.

<b>Table 3: Legal Availability of Water on Lindbergh Lake</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 (CFS)</b>	<b>Physically Available Water (AF)</b>	<b>Legal Demands (CFS)</b>	<b>Legally Available Water (CFS)</b>	<b>Legally Available Water (AF)</b>
January	44.63	2789.16	3.16	41.47	2594.91
February	41.56	2348.93	3.16	38.40	2173.48
March	72.87	4522.40	3.20	69.67	4325.41
April	205.29	12254.89	3.45	201.84	12049.54
May	382.29	23540.70	3.97	378.32	23296.59
June	467.99	27879.25	3.99	464.00	27641.82
July	212.26	13088.05	3.99	208.27	12842.70
August	75.23	4664.27	3.99	71.24	4418.92
September	48.83	2943.03	3.99	44.84	2705.60
October	50.18	3126.35	3.96	46.22	2883.06
November	59.61	3589.31	3.68	55.93	3370.57
December	47.13	2939.97	3.24	43.89	2740.52

18. The Department finds the proposed appropriation of 12 GPM and 0.59 AF to be legally available during the proposed period of diversion.

### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

19. The Applicant provided an operation plan to prevent adverse effect to existing water users. In times of water shortage, lawn and garden will be discontinued first. If a legitimate call for water is made, the electric pump can be turned off. In this case, potable water for domestic use will be purchased and hauled to the site.

20. The Applicant has proven that enough water remains in the Lindbergh Lake and the Swan River to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 12 GPM and 0.59 AF.

21. The Department finds the proposed use of 0.59 AF will not have an adverse effect on existing water users.

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

22. The proposed means of diversion is a Flint & Walling Model 4F10S07305 4-inch submersible pump (3/4 HP, 12-stage). Manufacturer specifications indicate a nominal rating of 10 GPM and a maximum head of 375 ft. At the proposed static lift of 40 ft and an estimated operating pressure of 40 PSI, the calculated total dynamic head is approximately 132 ft. According to the manufacturer's pump curve, the system capacity at this head is approximately 13.5 GPM. A flow meter will be installed at or near the discharge point with regular logs recorded to ensure the flow rate does not exceed the 12 GPM limit.

23. Water is conveyed from the pump through 1.25-inch HDPE PVC pipe. The pipeline runs 75 ft from the point of diversion to the place of use and is buried at a depth of 6 ft for frost protection. Lawn and garden irrigation will be through a garden hose and small oscillating sprinkler.

24. 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**

25. The Applicant proposes to appropriate 0.59 AF of water; 0.51 AF for domestic use in a 6-bedroom house and 0.08 AF for lawn and garden irrigation of 0.03 acres. Per ARM 36.12.115(2)(a), domestic use is calculated as 300 GPD (0.34 AF/yr) plus 50 GPD (0.056 AF/yr) for each bedroom beyond 3; thus, the standard for a 6-bedroom house is  $0.34 + (3 \times 0.056) = 0.51$  AF. The standard for lawn & garden irrigation is 2.5 AF/ac per ARM 35.12.115(b); thus, the standard for 0.03 acres is  $2.5 \times 0.03 = 0.08$  AF. There are no DNRC standards for flow rate. In this case, the Department determines that a flow rate of 12 GPM is a reasonable amount for the proposed purposes.

26. The proposed period of use for the domestic purpose is year round, which is consistent with the standard listed in ARM 35.12.112(1)(a). The proposed period of use for lawn & garden irrigation is April 15 through October 15. The Administrative Rules of Montana do not list a standard for lawn & garden irrigation (a purpose which is distinct from crop irrigation); however, the Department regularly issues ground water certificates with periods of use for lawn & garden irrigation from April 1 to October 31. The proposed period of use falls within this span.

27. The Department finds the proposed water use is beneficial, and that the requested flow rate of 12 GPM and annual volume of 0.59 AF are reasonably justified per ARM 36.12.1802(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

28. The Applicant owns the property where water is to be put to beneficial use, which demonstrates possessory interest. The Department finds the possessory interest criterion to be met.

## **CONCLUSIONS OF LAW**

### **PHYSICAL AVAILABILITY**

29. 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.”

30. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987) (Applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

31. 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).

32. 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 8-14)

### **LEGAL AVAILABILITY**

33. 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).

34. 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.

35. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 15-18)

#### ADVERSE EFFECT

36. 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.

37. 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).

38. 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).

39. 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).

40. 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.

41. 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).

42. 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 19-21)]

#### ADEQUATE DIVERSION

43. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

44. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

45. 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 22-24).

#### BENEFICIAL USE

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

47. 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).

48. 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).

49. 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*.

50. Applicant proposes to use water for domestic use and lawn & garden irrigation which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence domestic use and lawn & garden irrigation is a beneficial use and that 0.59 AF of diverted volume and 12 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 25-27)

#### POSSESSORY INTEREST

51. 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.

52. 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.

53. 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 28)

### **PRELIMINARY DETERMINATION**

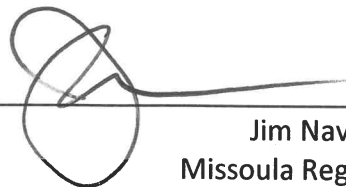
Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76K 30172668 should be granted.

The Department determines the Applicant may divert water from Lindbergh Lake, by means of a pump, from January 1 through December 31 at 12 GPM up to 0.59 AF, from a point in the N2SESW Section 23, T19N, R17W, Missoula County, for domestic use from January 1 through December 31 and lawn & garden use from April 15 through October 15. The place of use is located in the N2SESW Section 23, T19N, R17W, Missoula County. The Applicant may irrigate lawn and garden on 0.03 acres.

### **NOTICE**

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant 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 28th day of May, 2026.



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Jim Nave, Manager  
Missoula 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 was served upon all parties listed below on this 28th day of May, 2026, by first class United States mail.

R&E ASSOCIATES OF MONTANA LLC  
1636 W 1<sup>ST</sup> AVE  
SPOKANE, WA 99201-6010



Benjamin Thomas  
Water Conservation Specialist  
Missoula Regional Office  
(406) 542-5883