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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30161004 BY MARLOS LIQUID ASSETS COMPANY	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On July 13th, 2023, Marlos Liquid Assets Company, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30161004 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 90 gallons per minute (GPM) and 15.15 acre-feet (AF) for commercial and lawn and garden beneficial uses. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on June 26th, 2023. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated November 13th, 2023. The Applicant responded with information dated January 12th, 2024. The application was determined to be correct and complete as of March 4th, 2024. An Environmental Assessment for this application was completed on March 21st, 2024.

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-GW
- Addenda:
    - Aquifer Testing Addendum, Form 600-ATA
- Attachments:
    - C1.10 – Site Plan by Jackola Engineering dated 04/01/2023;
    - C1.20 – Site Utility Plan by Jackola Engineering dated 04/01/2023;
    - C2.22 – Water System Schematic by Jackola Engineering dated 04/01/2023;
    - Variance Request for Aquifer Testing Letter from Hydrometrics, Inc. to DNRC, dated 06/29/2023;

- Variance for Aquifer Testing Approval Letter from DNRC to Hydrometrics Inc., dated 07/07/2023;

- Maps:
  - Figure 1. Well and Site Locations dated 05/12/2023;
  - Figure GW.4. 24 Hour Aquifer Test Well Locations dated 06/02/2023;
  - Figure ATA.2A. 24 Hour Aquifer Test Well Locations dated 06/01/2023;

Information Received after Application Filed

- Deficiency Letter from DNRC to Applicant and Hydrometrics, Inc., dated 11/13/2023;
- Deficiency Response Letter from Hydrometrics, Inc. to DNRC, dated 01/12/2024 including:
  - Big Sky Waterslides Hotel Project Engineering Report by Jackola Engineering, dated 06/22/2023;
  - Pump and Water Meter Cutsheets; and,
  - C2.20 – Water Notes and Details Schematic by Jackola Engineering, dated 06/22/2023.

Information within the Department's Possession/Knowledge

- Groundwater Permit Report by DNRC Water Sciences Bureau, Groundwater Hydrologist, dated 02/28/2024;
- Montana Department of Environmental Quality Discharge Permit No. MTX000289;
- Montana Department of Environmental Quality Public Water Supply Registration MT0002953;
- Montana Department of Environmental Quality; Circular DEQ-2: Design Standards for Public Sewage Systems;
- Montana Department of Environmental Quality; Circular DEQ-3: Standards for Non-Community Public Water Systems; and,
- 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 Kalispell Regional Office at 406-752-2288 to request copies of the following documents:
  - Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer dated December 12, 2019.

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

For the purposes of this document, Department of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AF/YR means acre-feet per year; GWC means groundwater certificate; GWIC means the Montana Bureau of Mines and Geology's Groundwater Information Center; T means Transmissivity; S means Storativity; USDA means United States Department of Agriculture; IWR means the USDA Natural Resources Conservation Services' Irrigation Water Requirement program; MT DEQ means Montana Department of Environmental Quality; PWS means Public Water Supply; PSI means pounds per square inch.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater by means of a well (GWIC ID# 85474) from 1/1 – 12/31 at 90 GPM up to 15.15 AF/YR, from a point in the SWNWNWSW of Section 15, Township 30 North (N), Range 20 West (W), Flathead County, Montana. The Applicant proposes to expand the existing "Big Sky Waterpark" commercial uses by 13 AF/YR for use from 1/1 – 12/31. Lawn and garden is proposed to increase by 2.15 AF/YR from 4/20 – 10/10. The total volume requested is 15.15 AF/YR. The place of use is in the NWNWSW of Section 15, Township 30N, Range 20W, Flathead County, Montana.

2. The point of diversion proposed for this appropriation (GWIC ID# 85474) was completed on April 7, 1978, to a total depth of 215 feet below ground surface, and a static water level of 40 feet below ground surface.

3. The proposed point of diversion is located approximately 3,500-feet east of the Flathead River and approximately two miles southeast of Columbia Falls.

4. The total demand for "Big Sky Waterpark" including the proposed new uses is 20.65 AF/YR. The proposed appropriation is supplemental to existing GWC 76LJ 52748-00. The volume distribution between the existing GWC and proposed appropriation is shown below in **Table 1**.

Table 1. Total Demands for "Big Sky Waterslides"			
Purpose	**GWC 76LJ 52748-00**	**[Proposed] 76LJ 30161004**	**Total**
Commercial	2.30 AF	13.00 AF	15.30 AF
Lawn and Garden	3.20 AF	2.15 AF	5.35 AF
Total	5.50 AF	15.15 AF	20.65 AF

5. Existing GWC 76LJ 52748-00 has a priority date of June 14th, 1983, and is for commercial (including lawn & garden) use, for 90 GPM and up to 5.50 AF/YR from 5/15 – 9/15. The proposed appropriation and GWC share a point of diversion. The Applicant will not exceed a total maximum flow rate of 90 GPM.

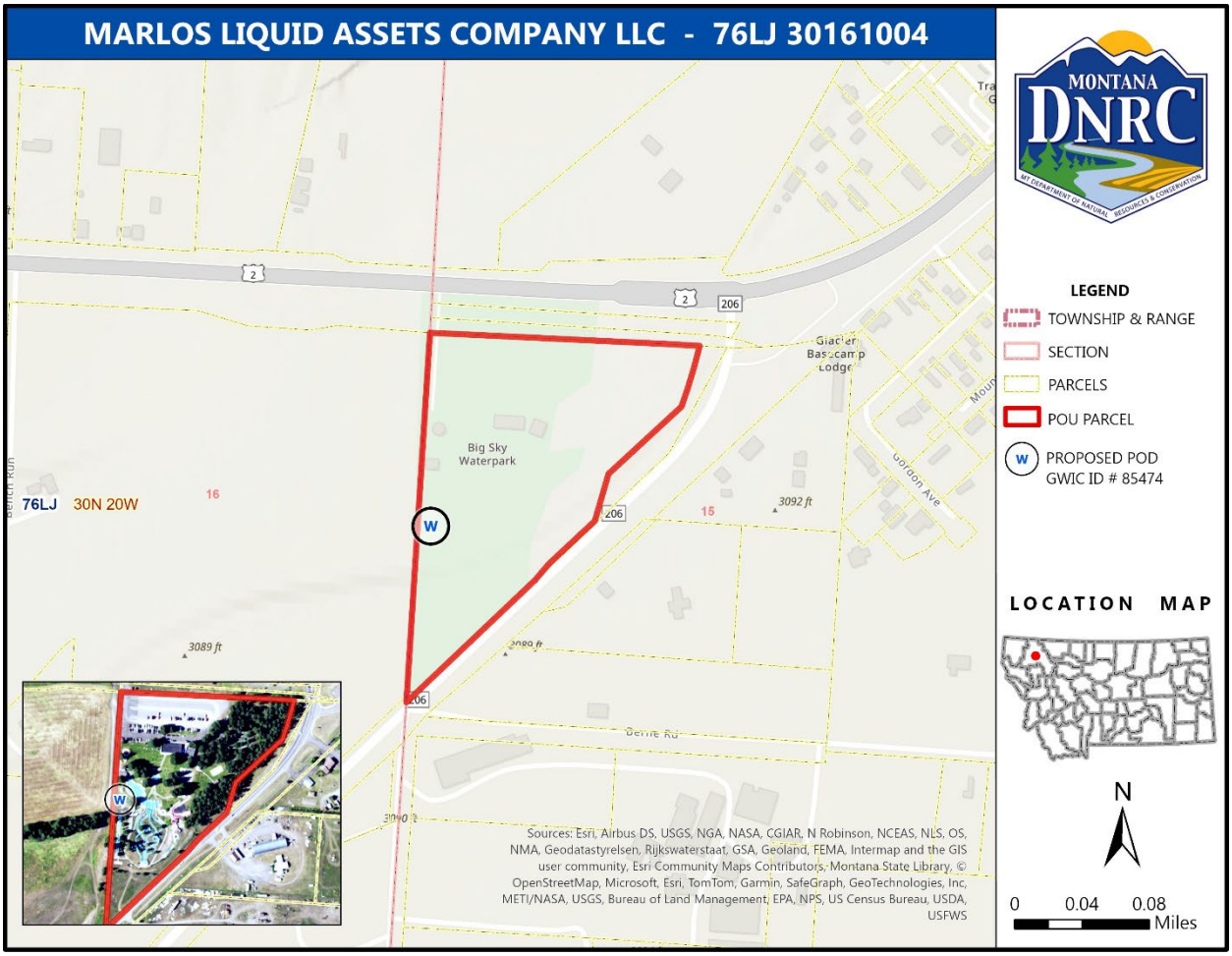

Figure 1. Map of the POD and proposed project location.

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

GENERAL CONCLUSIONS OF LAW

6. 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 . . .

7. 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.

8. 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.

9. 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).

10. 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.

11. 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

12. The proposed use of water is for commercial operations and lawn and garden irrigation. The Applicant is proposing to expand the current commercial operations, a water park known as "Big Sky Waterslides", to include year-round hotel use, a restaurant, and an indoor pool for a total of 13 AF per year at 90 GPM. The Applicant is proposing to increase the total lawn and garden area to 2.14 acres for 2.15 AF per year at 90 GPM. The total proposed appropriation is for 15.15 AF of water annually.

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

14. *Flathead River – Physical Availability (quantified for the purpose of analyzing physical availability of the Deep Aquifer):* The Flathead River is evaluated from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake inlet. USGS Gage #12363000 is nearest to the depleted reach and the date range used includes the entire period of record for this Gage (October 1951 – January 2024).

15. The physical availability of Flathead River water is quantified monthly. The DNRC used the method below to quantify physically available monthly flow rates and volumes in the depleted reach during the period of surface water depletion (year-round):

a. The Department calculated median of the mean monthly flow rates in CFS for the Flathead River using USGS Gage #12363000 records for each month of the year (**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 Water Calculation Guide:

i. Median of the mean monthly flow (CFS) x 1.98 (AF/day/1 CFS) x days per month = AF per month.

b. For analysis of a reach where the gaging station used is the upstream extent of the depleted reach, as is the case for this application, the median of the mean monthly gage values also represents physical availability for the reach (**Table 2**, columns B-C).

Table 2. Physical Availability Analysis of Flathead River from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake Inlet

A	B	C
Month	**Median of the Mean Monthly Flow Rate at Gage 12363000 (CFS)**	**Median of the Mean Monthly Volume at Gage 12363000 (AF)**
January	5,111.5	313,743.9
February	4,851.0	268,939.4
March	4,805.0	294,930.9
April	10,680.0	634,392.0
May	22,660.0	1,390,870.8
June	24,680.0	1,465,992.0
July	11,400.0	699,732.0
August	5,406.0	331,820.3
September	4,346.0	258,152.4
October	4,929.0	302,542.0
November	4,546.0	270,032.4
December	5,498.5	337,497.9

16. *Flathead Lake – Physical Availability (quantified for the purpose of analyzing physical availability of the Deep Aquifer):* Flathead Lake is evaluated from the lake inlet downstream to USGS Gage #12372000 Flathead River near Polson, MT. USGS Gage #12372000 marks the downstream extent of the depleted reach and the date range used includes the entire period of record for this Gage (October 1938 – November 2023).

17. The physical availability of Flathead Lake water is quantified monthly. The DNRC used the method below to quantify physically available monthly flow rates and volumes in the depleted reach during the period of surface water depletion (year-round):

a. The Department calculated median of the mean monthly flow rates in CFS for Flathead Lake using USGS Gage #12372000 records for each month of the proposed period of depletion (**Table 3**, column B). Those flow rates were converted to monthly volumes in AF (**Table 3**, column C).

b. The Department calculated the monthly flow rates appropriated by existing users upstream of the Gage on the source (**Table 3**, column D) by:

i. Generating a list of existing surface water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);
ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
iii. Designating all other water uses as year-round uses;
iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards (quantification of said water rights is not a readjudication or historical use analysis); and,
v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

c. Since the Gage is downstream of the depleted reach, the Department added the flow rates of the existing rights between the Flathead Lake inlet and USGS Gage #12372000 (**Table 3**, column D) to the median of the mean monthly gage values (**Table 3**, column B) to determine physical availability in the depleted reach (**Table 3**, column E). Physically available monthly flow rates were then converted to monthly volumes (**Table 3**, column F).

Table 3. Physical Availability Analysis of Flathead Lake from the Flathead Lake inlet to USGS Gage #12372000 near Polson, MT					
A	**B**	**C**	**D**	**E**	**F**
Month	**Median of the Mean Monthly Flow Rate at Gage 12372000 (CFS)**	**Median of the Mean Monthly Volume at Gage 12372000 (AF)**	**Existing Rights from Flathead Lake Inlet to Gage 12372000 (CFS)**	**Physically Available Water in Depleted Reach (CFS)**	**Physically Available Water in Depleted Reach (AF)**
January	10,380.0	637,124.4	105.7	10,485.7	643,610.8
February	9,166.0	508,163.0	105.7	9,271.7	514,021.7
March	7,778.0	477,413.6	105.7	7,883.7	483,900.1
April	9,223.0	547,846.2	176.5	9,399.5	558,332.0
May	18,570.0	1,139,826.0	176.5	18,746.5	1,150,661.9
June	25,720.0	1,527,768.0	176.5	25,896.5	1,538,253.8
July	12,730.0	781,367.4	176.5	12,906.5	792,202.7
August	6,136.0	376,627.7	176.5	6,312.5	387,463.0
September	6,006.0	356,756.4	176.5	6,182.5	367,242.2
October	7,231.0	443,808.1	176.5	7,407.0	454,643.4
November	8,556.0	508,226.4	105.7	8,661.7	514,503.6
December	9,883.0	606,618.5	105.7	9,988.7	613,105.0

18. Streamflow data analysis of the Flathead River and Flathead Lake shows physically available monthly flow rates and volumes in those sources exceeding the proposed appropriations' flow rate and volume. The Department finds water in the amount the Applicant proposes to appropriate, up to 90 GPM and 15.15 AF per year, is physically available in the aquifer and hydraulically connected surface waters during the proposed period of diversion and at the point of diversion location.

LEGAL AVAILABILITY

FINDINGS OF FACT

19. Legal availability is evaluated pursuant to *DNRC (2019)*. Groundwater levels in the Deep Aquifer are effectively controlled by the stage of Flathead River and Flathead Lake. These two sources will be evaluated for the purpose of quantifying legal availability of the Deep Aquifer.

20. Legal availability is also evaluated for surface water sources that may be depleted as a result of groundwater pumping. The DNRC has identified the Flathead River, downstream of Columbia Falls, will experience constant year-round depletions from the proposed appropriation. Flathead River is evaluated for the purposes of *DNRC (2019)* and for net depletions. Surface water depletion by pumping in the Deep Aquifer primarily occurs through propagation drawdown through the overlaying confining layer.

21. Seli'š Ksanka Qlispe' Dam near Polson is the control structure for Flathead Lake, and depletions to Flathead Lake will reduce the total volume of water leaving the Lake (passing over/through the dam). USGS Gage #12372000 is approximately 0.6 miles downstream of the dam.

22. *Flathead River – Legal Availability (quantified for the purpose of analyzing legal availability of the Deep Aquifer and legal availability of itself due to depletions):* The Flathead River west of the project area is evaluated from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake inlet. Legal availability of the Flathead River is quantified monthly. The DNRC used the method below to quantify legally available monthly flow rates and volumes in the depleted reach during the period of surface water depletion (year-round):

a. The Department quantified physically available monthly flow rates and volumes (**Table 4**, columns B-C) for the depleted reach of the Flathead River.
b. The Department calculated the monthly flow rates appropriated by existing users (legal demands) on the source within the depleted reach (**Table 4**, column D) by:
    i. Generating a list of existing surface water rights from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake inlet (list is included in the application file and available upon request);
    ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
    iii. Designating all other water uses as year-round uses;
    iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards (quantification of said water rights is not a readjudication or historical use analysis); and,
    v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.
c. The Department subtracted the flow rates of the existing legal demands (**Table 4**, column D) within the depleted reach from the physically available water (**Table 4**,

column B) to determine legal availability within the depleted reach (**Table 4**, column E). Legally available monthly flow rates were then converted to monthly volumes (**Table 4**, column F).

Table 4. Legal Availability Analysis of Flathead River from USGS Gage #12363000 at Columbia Falls, MT to the Flathead Lake Inlet

A	B	C	D	E	F
Month	**Physically Available Water in the Depleted Reach (CFS)**	**Physically Available Water in the Depleted Reach (AF)**	**Existing Legal Demands from Gage 12363000 to Flathead Lake Inlet (CFS)**	**Physically Available Water Minus Existing Legal Demands (CFS)**	**Physically Available Water Minus Existing Legal Demands (AF)**
January	5,111.5	313,743.9	3,508.3	1,603.2	98,403.2
February	4,851.0	268,939.4	3,508.3	1,342.7	74,438.2
March	4,805.0	294,930.9	3,508.3	1,296.7	79,590.2
April	10,680.0	634,392.0	6,814.1	3,865.9	229,637.0
May	22,660.0	1,390,870.8	8,289.1	14,370.9	882,088.5
June	24,680.0	1,465,992.0	8,289.1	16,390.9	973,622.0
July	11,400.0	699,732.0	5,566.1	5,833.9	358,087.4
August	5,406.0	331,820.3	3,664.1	1,741.9	106,920.5
September	4,346.0	258,152.4	3,664.1	681.9	40,507.4
October	4,929.0	302,542.0	3,664.1	1,264.9	77,642.2
November	4,546.0	270,032.4	3,508.3	1,037.7	61,638.2
December	5,498.5	337,497.9	3,508.3	1,990.2	122,157.2

23. Net depletion is equal to consumption for a proposed groundwater use and is described as the calculated volume, rate, timing, and location of reductions to surface water that are offset by return flows (non-consumed water).

24. Net depletion is evaluated by the following:

a. Quantifying the consumptive volume associated with the proposed use by:

i. Consumption for commercial use is based upon the wastewater disposal method, which is a drainfield for this application. Drainfield treatment is associated with a 10% consumption rate, resulting in 1.53 AF of annual consumption for the commercial uses. The consumptive volume for commercial uses associated with the proposed appropriation is 1.30 AF of the total diverted volume of 1.53 AF.

ii. Monthly consumption for the lawn and garden are calculated using the IWR program with inputs consistent with DNRC consumptive use rules in ARM 36.12.1902 for pasture grass and sprinkler irrigation. The inputs used in this calculation are dry year, 1-inch net irrigation application, 0.25-

inches of carryover moisture at the beginning and end of the growing season and have IWR re-calculate start and end date using default temperature.

iii. The annual consumptive volume for the lawn and garden of 2.14 acres is 3.75 AF in total based on 70% efficiency for sprinkler irrigation. The consumptive volume for lawn and garden associated with the proposed appropriation is 1.5 AF of the total diverted volume of 3.75 AF.

iv. The total annual consumption for commercial and lawn and garden associated with this permit application is 2.8 AF/YR.

b. Identifying hydraulically connected surface waters:

i. The source aquifer is the confined alluvial deep aquifer within the Flathead Valley. No perennial surface water bodies are located between the Flathead River to the west of the proposed point of diversion and to the aquifer boundary along the mountain front to the east of the proposed point of diversion. In addition, the proposed point of diversion is located 0.7 miles from the Flathead River west of the project area, downstream of Columbia Falls would be the potentially affected surface water body as a result of groundwater pumping.

c. Calculating the monthly rate and timing of depletions to the affected surface water:

i. Modeling is not necessary in this situation where the proposed use is constant year-round because of the depth to the source aquifer and the distance to the affected stream reach. Modeling of depletions is simplified because the proposed place of use is located the same relative distance from the affected surface water as the proposed well and all non-consumed water infiltrates the source aquifer and returns to the surface water source as return flows. Under these assumptions, depletion is modeled based on withdrawal of the monthly consumed amounts.

ii. Depletion by the Applicant's proposed appropriation from the Deep Aquifer would primarily occur through propagation of drawdown through the overlying confining layer to the Flathead River west of the project area, downstream of Columbia Falls. The depth of the wells and semi-confining unit cause depletion effects to be dampened resulting in a

constant year-round depletion (**Table 5**) even though consumption from the proposed appropriation is concentrated in the summer.

Table 5. Total Consumption and Net Depletion to the Flathead River from the Proposed Appropriation			
A	**B**	**C**	**D**
Month	**Consumption (AF)**	**Flathead River Depletions (AF)**	**Flathead River Depletions (GPM)**
January	0.1	0.2	1.7
February	0.1	0.2	1.7
March	0.1	0.2	1.7
April	0.1	0.2	1.7
May	0.3	0.2	1.7
June	0.4	0.2	1.7
July	0.5	0.2	1.7
August	0.5	0.2	1.7
September	0.3	0.2	1.7
October	0.1	0.2	1.7
November	0.1	0.2	1.7
December	0.1	0.2	1.7
Total	2.8	2.8	-

25. The Department finds that the amount of water depleted from the Flathead River, 2.8 AF/YR, to be legally available year-round.

26. *Flathead Lake – Legal Availability (quantified for the purpose of analyzing legal availability of the Deep Aquifer):* Flathead Lake is evaluated from the Lake inlet down to USGS Gage #12372000 near Polson, MT. Legal availability of Flathead Lake is quantified monthly. The DNRC used the method below to quantify legally available monthly flow rates and volumes in the depleted reach during the period of surface water depletion (year-round):

a. The Department quantified physically available monthly flow rates and volumes (**Table 6**, columns B-C) for the depleted reach of Flathead Lake.
b. The Department calculated the monthly flow rates appropriated by existing users (legal demands) on the source within the depleted reach (**Table 6**, column D) by:
    i. Generating a list of existing surface water rights from the Flathead Lake inlet to USGS Gage #12372000 (list is included in the application file and available upon request);
    ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
    iii. Designating all other water uses as year-round uses;

iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards (quantification of said water rights is not a readjudication or historical use analysis); and,

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

c. The Department subtracted the flow rates of the existing legal demands (**Table 6**, column D) within the depleted reach from the physically available water (**Table 6**, column B) to determine legal availability in the depleted reach (**Table 6**, column E). Legally available monthly flow rates were then converted to monthly volumes (**Table 6**, column F).

Table 6. Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage #12372000 near Polson, MT

A	B	C	D	E	F
Month	**Physically Available Water in the Depleted Reach (CFS)**	**Physically Available Water in the Depleted Reach (AF)**	**Existing Legal Demands from the Flathead Lake Inlet to USGS Gage #12372000 (CFS)**	**Physically Available Water Minus Existing Legal Demands (CFS)**	**Physically Available Water Minus Existing Legal Demands (AF)**
January	10,485.7	643,610.8	105.7	10,380.0	637,124.4
February	9,271.7	514,021.7	105.7	9,166.0	508,163.0
March	7,883.7	483,900.1	105.7	7,778.0	477,413.6
April	9,399.5	558,332.0	176.5	9,223.0	547,846.2
May	18,746.5	1,150,661.9	176.5	18,570.0	1,139,826.6
June	25,896.5	1,538,253.8	176.5	25,720.0	1,527,768.0
July	12,906.5	792,202.7	176.5	12,730.0	781,367.4
August	6,312.5	387,463.0	176.5	6,136.0	376,627.7
September	6,182.5	367,242.2	176.5	6,006.0	356,756.4
October	7,407.0	454,643.4	176.5	7,230.5	443,808.1
November	8,661.7	514,503.6	105.7	8,556.0	508,226.4
December	9,988.7	613,105.0	105.7	9,883.0	606,618.5

27. The comparison between physically available and legally available water in the Flathead River and Flathead Lake indicates that water is legally available for the proposed appropriation.
28. The Department finds the proposed appropriation of 90 GPM and up to 15.15 AF/YR to be legally available during the proposed period of use at the location of the proposed point of diversion.

ADVERSE EFFECT

FINDINGS OF FACT

29. The Applicant provided a plan in the event of a water shortage. If a call by a senior appropriator is made, the Applicant will initially shutter the water park operations, cease lawn and garden irrigation, and reduce the diverted volume. The Applicant will rely on existing GWC 76LJ 52748-00 for 5.5 AF/YR and 90 GPM, that has a priority date of April 3, 1950, to operate partial commercial operations.
30. The Applicant can shut off the well pump entirely if call is made by an appropriator that is senior to both the proposed permit and existing GWC 76LJ 52748-00.
31. To determine if the proposed water use will not cause adverse effects to other water users, the Department considered the available drawdown of groundwater appropriations with listed well depth and static water level that are within the 1-foot drawdown countour.
32. The drawdown in existing wells was modeled for proposed conditions using the following inputs: Neuman-Witherspoon (1969) solution, T = 510.5 ft^2/day, S = $2.7x10^{-5}$, and the monthly pumping schedule identified in **Table 9** for a period of five years. Only volume attributed to this Permit Application 76LJ 30161004 (**Table 8**, column D) were used for modeling drawdown in existing wells. The one foot drawdown contour occurs at 1,500-ft at the end of the fifth July. **Table 7** lists the seven active water rights with wells that are located within the drawdown countour and remaining water column in each well.

Table 7. Water Rights Completed in the Deep Aquifer in the 1-foot Drawdown Contour					
A	B	C	D	E	F
Water Right No.	Total Well Depth (ft)	Well Static Water Level (ft)	Distance from Proposed POD (ft)	Predicted Drawdown (ft)	Remaining Water Column (ft)
76LJ 105266-00	335.0	85.0	688.0	0.8	249.2
76LJ 105351-00	196.0	55.0	935.0	0.7	140.3
76LJ 13093-00	193.0	60.0	1016.0	0.7	132.3
76LJ 30045967	284.0	78.0	1067.0	0.7	205.3
76LJ 30157981	335.0	85.0	688.0	0.8	249.2
76LJ 52748-00	215.0	40.0	472.0	0.9	174.1
76LJ 74-00	191.0	30.0	1032.0	0.7	160.3

33. The technical groundwater analysis was provided by the DNRC Water Sciences Bureau, Groundwater Hydrologist Jack Landers, in the Groundwater Permit Report dated February 28, 2024. This analysis was performed using the Applicant-supplied aquifer test data and application details.

34. The point of diversion is an onsite PWS system that is a groundwater transient, non-community system. The diversion adheres to the MT DEQ PWS standards as it is registered with the MT DEQ under PWS ID# MT0002953.

35. The proposed project adheres to the MT DEQ water quality standards; § 75-5 MCA and ARM 17.30.5(7)(10), as the Applicant has obtained a MT DEQ discharge permit, Permit No. MTX000289.

36. The Department finds the proposed use of 15.15 AF/YR, with a consumed volume of 2.8 AF/YR, and a flow rate of 90 GPM, will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

37. The proposed means of diversion includes a PWS well (GWIC ID# 85474) located on the western side of the property. The supply well pumps into an underground 12,000-gallon storage tank passing through a 2-inch totalizing water meter. The well pump is a submersible Franklin Electric pump model 90S4, capable of producing 80 GPM at 275-feet of head. The total loss to the commercial pumphouse is 164.84-feet, and to the storage tank is 227.43-feet.

38. The pump is controlled by float switches located in the storage tank; at peak season maximum water demand the pump will cycle approximately 16-17 times per day and low/off season demand the pump will cycle 4-5 times per day. The float switches include high and low water alarms and the well pump on and off control switches.

39. The water is gravity fed from the storage tank to either the existing pool pump house or the proposed commercial pumphouse through 4” class (CL) 100 PVC piping. In the pump house, water can be distributed to refill the pools, to the irrigation system, or to the commercial buildings. The pool refill water is sent to a recirculation booster pump system and distributed from the pool pump house. The pool pumphouse booster station consists of three hydro-pneumatic pressure tanks and a pressure switch to control the booster pump to mainatin an operating pressure between 50-80 PSI.

40. The irrigation and commercial water is pressurized by a separate booster pump/pressure tank system and distributed out in new 3” HDPE DR-9 piping and the existing 4” PVC CL 160 SDR 26 piping. The commercial buildings and irrigation booster station is designed to meet the peak instantaneous demand of 205 GPM at a working pressure of 70 PSI. The new booster station is a Grundfos Hydro MPC-E 2CRE20-3. The station consists of two electronically commutated motor (ECM) pumps each capable of supplying a flowrate of 105 GPM. From this booster station, the water supply can flow to the commercial buildings or to the irrigation system. The irrigation system includes a reduced pressure zone valve backflow preventor to prevent contamination of the commercial water supply.

41. If the booster pumps or storage reservoir are out of service, the commercial building will include a manual bypass supply to pump water directly from the well to the commercial pump house at 48 PSI.

42. The diversion operation plans were created by licensed engineers at Jackola Engineering & Architecture, Inc. in compliance with MT DEQ Circulars 2, 3, and 4. The Applicant has obtained the proper MT DEQ authorizations: PWS ID# MT0002953 and Discharge Permit No. MTX000289.

43. An evaluation of adequacy of potentially available water column remaining in the production well is modeled using the Neuman-Witherspoon (1969) solution with a T = 510.5 ft^2/day and S = $2.7x10^{-5}$. Predicted theoretical drawdown for the production well is modeled for the period of diversion using the monthly pumping schedule identified in **Table 8** and **Table 9**. The Applicant requests 13.0 AF for commercial purposes and 2.15 AF for lawn and garden irrigation of 2.14 acres. The net irrigation requirement calculated for the Kalispell WSO Airport station (MT4558) listed in the IWR program was used to apportion the monthly irrigation demand shown in **Table 8**, column B. The 13.0 AF for commercial volume was apportioned evenly through January – December based on the number of days in the month.

44. Since GWC 76LJ 52748-00 is supplemental to this Permit Application, the volume of the existing GWC (**Table 8**, column C) was included to evaluate adequacy of diversion (Additional Drawdown, **Table 10**). The period of use and diversion for the GWC is May 15 – September 15; lawn and garden (3.2 AF/YR) was apportioned according to the IWR schedule for the Kalispell WSO Airport station and commercial (2.3 AF/YR) was apportioned evenly between May 15 – September 15.

Table 8. Assumed Monthly Pumping Schedule (Volume) for the Production Well

A	B	C		D		E
Month	**IWR Creston (in)**	**Existing GWC 76LJ 52748-00**		**Proposed Permit 76LJ 30161004**		**Total Diverted Volume (AF)**
		L&G Irrigation (AF)	*Commercial (AF)*	*L&G Irrigation (AF)*	*Commercial (AF)*	
January	0.0	0.0	0.0	0.0	1.1	1.1
February	0.0	0.0	0.0	0.0	1.0	1.0
March	0.0	0.0	0.0	0.0	1.1	1.1
April	0.4	0.0	0.0	0.0	1.1	1.1
May	2.3	0.4	0.3	0.3	1.1	2.1
June	3.5	0.6	0.6	0.4	1.1	2.7
July	4.9	0.9	0.6	0.6	1.1	3.2
August	4.4	0.8	0.6	0.5	1.1	3.0
September	2.2	0.4	0.3	0.3	1.1	2.0
October	0.1	0.0	0.0	0.0	1.1	1.1
November	0.0	0.0	0.0	0.0	1.1	1.1
December	0.0	0.0	0.0	0.0	1.1	1.1
Total	17.8	3.2	2.3	2.2	13.0	20.7

Table 9. Assumed Monthly Pumping Schedule (Flow Rate) for the Production Well			
A	**B**	**C**	**D**
Month	**Existing GWC 76LJ 52748-00 (GPM)**	**Proposed Permit 76LJ 30161004 (GPM)**	**Total Flow Rate (GPM)**
January	0.0	8.1	8.1
February	0.0	8.1	8.1
March	0.0	8.1	8.1
April	0.0	8.7	8.7
May	4.5	10.5	15.1
June	9.5	10.9	20.4
July	11.5	12.0	23.5
August	10.8	11.6	22.4
September	4.3	10.5	14.8
October	0.0	8.3	8.3
November	0.0	8.1	8.1
December	0.0	8.1	8.1

45. Identified in **Table 10**, total drawdown is the sum of the theoretical drawdown for Permit Application 76LJ 30161004 and the additional drawdown from existing GWC 76LJ 52748-00 with well loss. Only one well is proposed, as such no interference drawdown was calculated. Well loss is calculated by dividing the predicted theoretical drawdown by a well efficiency value. Well efficiency is calculated by dividing the modeled maximum drawdown for the aquifer test by the maximum observed drawdown of the aquifer test. The remaining available water column for the production well is 151.5-ft and is equal to the available drawdown above the bottom of the well minus total drawdown.

Table 10. Remaining Available Water Column for the Production Well	
Drawdown Estimate	**Production Well**
Total Depth at Bottom of Perforated Interval (ft)	216.0
Pre-Test Static Water Level (ft btc)	48.1
Available Drawdown Above Bottom of Perforations (ft)	167.9
Observed Drawdown of Aquifer Test (ft)	31.7
Modeled Drawdown Using Mean Aquifer Test Rate (ft)	22.3
Well Efficiency (%)	70
Predicted Theoretical Maximum Drawdown (ft)	6.0
Additional Drawdown (from existing GWC) (ft)	5.5
Predicted Drawdown with Well Loss (ft)	16.4
Total Drawdown (ft)	16.4
Remaining Available Water Column (ft)	151.5

46. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate of 90 GPM and annual volume of 15.15 AF/YR.

47. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the total project volume of 20.65 AF/YR for the supplemental GWC 76LJ 52748-00 and Proposed Permit 76LJ 30161004.

BENEFICIAL USE

FINDINGS OF FACT

48. The Applicant requests 13.00 AF/YR for commercial uses from 1/1 – 12/31, annually.

a. The volume was calculated pursuant to Circulars DEQ-2 and DEQ-3. The Engineering report utilized the original design report, attendance rates and recorded flows from similarly sized water parks in Washington and Idaho, and the proposed number of visitors of the new facility to calculate the proposed annual volume for commercial use. **Table 11** shows the proposed commercial water demands.

b. The Applicant added additional losses into the proposed commercial volume calculations that were not included in the existing GWC 76LJ 52748-00 to account for all water being used and consumed by the appropriation.

Table 11. Proposed Commercial Water Demands

A	B	C	D	E	F	G	H
Source	**Unit Type**	**# of Units**	**Usage (GPD/Unit)**	**Usage Duration (Day/Year)**	**Average Daily Demand (GPD)**	**Annual Volume (Gal)**	**Annual Volume (AF)**
Hotel Guest	Guest[1]	160	48	365	7,680	2,803,200	8.60
Hotel Employee	Employee	10	10	365	100	36,500	0.11
Restaurant	Meals	300	3	365	900	328,500	1.01
Indoor Pool	Gallons	1	25,000	365	500	207,500	0.64
Fire Suppression Storage Tank	Gallons	1	48,000	1	0	48,000	0.15
Outdoor Pool (Fill)	Gallons	1	150,000	1	0	150,000	0.46
Outdoor Pool (Losses)	Gallons	1	7,375	90	7,375	663,750	2.04
Total					16,555	4,237,450	13.00

[1] There are 80 rooms proposed for the hotel with an assumed two guests per room.

c. The period of use requested, 1/1 – 12/31, is justified based on the operation of the project in accordance with ARM 36.12.112(3). The hotel, restaurant, and indoor pool are proposed to be a year-round operation, with the outdoor waterpark operations running approximately from May – September, as weather permits.

d. Consumption for commercial use is based upon the wastewater disposal method (drainfield). Drainfield treatment method is associated with a 10% consumption rate, resulting in 1.30 AF of annual consumption for the proposed commercial uses. Consumption calculation inputs and parameters are outlined in Legal Availability Findings of Fact section of this document.

49. The Applicant requests 2.15 AF/YR to irrigate 0.86 additional acres of lawn and garden from 4/20 – 10/10, annually. In combination with the existing GWC, the Applicant will require a total of 5.35 AF/YR to irrigate a total 2.14 acres.

a. The volume is based on DNRC water use standards found in ARM 36.12.115(2)(b) of 2.50 AF per acre of lawn and garden: [2.14 acres x 2.50 AF/acre = 5.35 AF total], [0.86 acres x 2.50 AF/acre = 2.15 AF proposed].

b. The period of use for lawn and garden, 4/20 – 10/10, is consistent with DNRC period of use and period of diversion standards for USDA Natural Resources Conservation Service climatic area IV, found in ARM 36.12.112(1)(c)(iv).

c. The Department calcuted the consumptive volume of lawn and garden, 1.50 AF/YR, using the IWR program with inputs consistent with DNRC consumptive use rules in ARM 36.12.1902 for pasture grass and sprinkler irrigation. Consumption calculation inputs and parameters are outlined in Legal Availability Findings of Fact section of this document.

50. The proposed flow rate of 90 GPM is utilized to fill the 12,000 gallon underground storage tank. From the storage tank, the applicant can increase the flow rate needed for the commercial and irrigation operations and peak instantaneous demand. Peak instantaneous demand is calculated at 205 GPM based on the number and fixture types within the hotel/restaurant.

51. The Department finds the proposed water use is beneficial, and that the requested flow rate of 90 GPM and annual volume of 15.15 AF are reasonably justified per ARM 36.12.1801.

POSSESSORY INTEREST

FINDINGS OF FACT

52. The Applicant signed the application form affirming 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

53. 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."

54. 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).

55. 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).

56. 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 12-18)

LEGAL AVAILABILITY

57. 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).

58. 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.

59. Pursuant to *Montana Trout Unlimited v. DNRC*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. *E.g., Wesmont Developers v. DNRC*, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (mitigation of depletion required), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also Robert and Marlene Takle v. DNRC et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), and *Perkins v. Kramer*, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing Loyning v. Rankin* (1946), 118 Mont. 235, 165 P.2d 1006; *Granite Ditch Co. v.*

Anderson (1983), 204 Mont. 10, 662 P.2d 1312; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.* (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.* 63997*-42M by Joseph F. Crisafulli* (DNRC Final Order 1990) (since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by Applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage).

60. Because the Applicant bears the burden of proof as to legal availability, the Applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. Section 85-2-311(a)(ii), MCA. Absent such proof, the Applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

61. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. *Robert and Marlene Takle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007 *)*(permit granted)*, affirmed*, *Montana River Action Network et al. v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim*

Helmer (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; Applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, Applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. *Royston, supra*.

62. 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 19-28)

ADVERSE EFFECT

63. 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.

64. 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).

65. 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).

66. 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).

67. 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.

68. 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).

69. 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 29-36)

ADEQUATE DIVERSION

70. 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.

71. 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.

72. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No.* 41I-105511 *by Flying J Inc.* (DNRC Final Order 1999).

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

74. 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 37-47).

BENEFICIAL USE

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

76. 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).

77. 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).

78. 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*.

79. Applicant proposes to use water for commercial and lawn and garden irrigation which are recognized as beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence commercial use and lawn and garden irrigation are beneficial uses and that 15.15 AF of diverted volume and 90 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 48-51)

POSSESSORY INTEREST

80. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

81. Pursuant to ARM 36.12.1802:

> (1) An Applicant or a representative shall sign the application affidavit to affirm the following:
> (a) the statements on the application and all information submitted with the application are true and correct and
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
> (2) If a representative of the Applicant signs the application form affidavit, the representative shall state the relationship of the representative to the Applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
> (3) The department may require a copy of the written consent of the person having the possessory interest.

82. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 52)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30161004 should be GRANTED.

The Department determines the Applicant may divert groundwater, by means of a 215-feet deep well, from 1/1 – 12/31 at 90 GPM up to 15.15 AF, from a point in the SWNWNWSW of Section 15, Township 30N, Range 20W, Flathead County, Montana, for commercial use from 1/1 – 12/31, and lawn and garden irrigation from 4/20 – 10/10. The Applicant may irrigate lawn and garden on 2.14 acres. The place of use is located in the NWNWSW of Section 15, Township 30N, Range 20W, Flathead County, Montana.

NOTICE

The Department will provide public notice of this application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

Dated this 27th day of May, 2024.

/Original signed by Jim Ferch/
Jim 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 PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 27th day of May, 2024, by first class United States mail.

MARLOS LIQUID ASSETS COMPANY, LLC
50230 US HIGHWAY 93
POLSON, MT 59860-7069

HYDROMETRICS, INC.
% MARK BROOKE
3020 BOZEMAN AVENUE
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