

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

\*\*\*\*\*

<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30162801 BY MICHAEL AND SARAH SHEPHERD</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
--	-------------	--

\*\*\*\*\*

On December 31, 2024, Michael and Sarah Shepherd (Applicants) submitted an application for Beneficial Water Use Permit No. 76LJ 30162801 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 126.76 acre-feet (AF) for a beneficial fish and wildlife purpose. The Department published receipt of the application on its website. The application was determined to be correct and complete as of May 7, 2024. An Environmental Assessment for this application was completed on June 3, 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-SW
- Addenda:
  - Reservoir/ Place of Storage Addendum, Form 600-SA
- Attachments:
  - Narrative response to application questions, including:
  - Photos as proof of fish health and development (dated 2022-2023)
- Maps:
  - Various screenshotted maps of the location sourced from Google Earth, Montana Cadastral, and Flathead County Interactive Web Mapping (IMA) Portal (all undated)

Information Received after Application Filed

- A copy of the Applicants' Temporary Fish Pond Permit # 13049-1-0721-1 to stock Lower Foy Lake with Rainbow Trout was supplied to the Department via email on February 20, 2024.
- A printout of the Lakeshore Heights Howmeowner's Association (HOA) meeting minutes establishing signing authority of David Giradot as President of the Board was acquired from the HOA website on February 20, 2024.

- A verified-signature signed PDF of the application signed by all parties with possessory interest in the place of use, received via email April 24, 2024.

Information within the Department's Possession/Knowledge

- Certificate of Survey (COS) 17998, filed on August 30, 2007, accessed from Flathead County IMA on February 15, 2024
- 1979 USDA aerial imagery accessed from DNRC Converge Dataset
- U.S. Fish and Wildlife Service (USFWS) National Wetlands Inventory Wetlands Mapper application, accessed February 14, 2024
- 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: Physical Availability of Ponds, April 22, 2019
  - Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration, dated June 7, 2023
  - Technical Memorandum: Private Fish and Wildlife Appropriations under the Water Use Act, dated January 22, 1986

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; USFWS means U.S. Fish and Wildlife Service; FWP means Montana Fish, Wildlife and Parks; USDA means United States Department of Agriculture; CFS means cubic feet per second; 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 Applicants propose to utilize water from Lower Foy Lake (an “Unnamed Lake” in DNRC’s Water Rights Database), a permanently flooded freshwater pond as classified by the USFWS, from January 1<sup>st</sup> through December 31<sup>st</sup> of every year up to 126.76 AF, for fish and wildlife use. The Applicants propose to stock Lower Foy Lake with Rainbow Trout under permitting and guidance from FWP. The place of use is generally located in the NW ¼ of Section 23, Township 28 North, Range 22 West, Flathead County.

2. The proposed appropriation will be the first water right issued on Lower Foy Lake and will not be supplemental to any existing water rights.

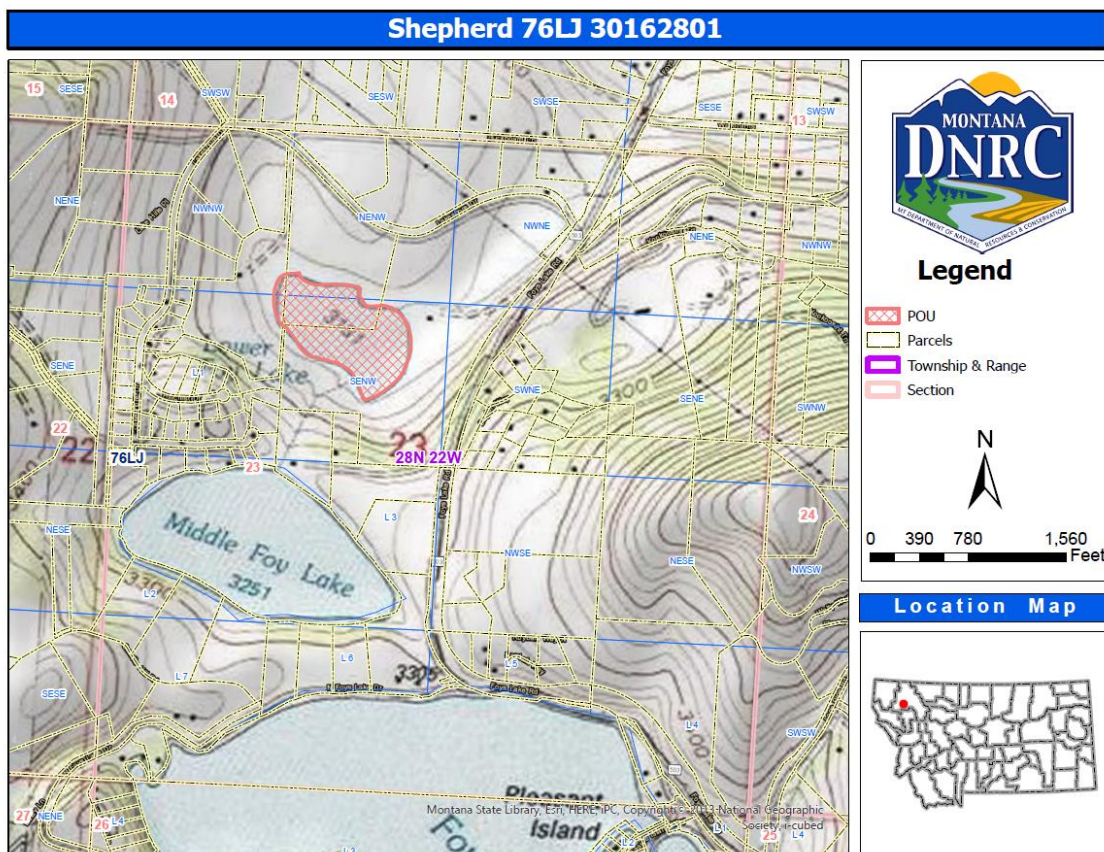


Figure 1: Map of Proposed Place of Use

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

**GENERAL CONCLUSIONS OF LAW**

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

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

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

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

- ... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
  - (a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
  - (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
    - (A) identification of physical water availability;
    - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
    - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of

diversion with the existing legal demands on the supply of water.

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

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

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

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and

specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

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

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

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

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

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

9. The Applicants propose to utilize up to 126.76 AF annually within Lower Foy Lake to support a beneficial fish and wildlife purpose.

10. The Lake exists today as a permanently flooded freshwater pond as classified by the USFWS. Lower Foy Lake was created by excavation of a wetland historically located within its current footprint to enhance wildlife habitat in the late 1970s. USDA aerial imagery proves existence of Lower Foy Lake in 1979. The Lake is fed by overflow from Middle Foy Lake and surrounding areas intermittently during spring runoff events. Overflow from Lower Foy Lake in the spring will spill over into Fisherman's Pond to the northeast and continue north and east through intermittent riverine drainages into Ashley Creek near the southwest region of Kalispell City Limits.

11. The USFWS National Wetlands Inventory lists Lower Foy Lake as an 19.21-acre freshwater pond. The Applicants' surface area measurement of 18.8 acres is approximately a 2 % difference from the USFWS measurement, therefore the Department finds the Applicants' surface area measurement is substantial and credible for use as a physical availability measurement.

12. The USFWS gives Lower Foy Lake a PABH classification, where:

- a. "P" represents a Palustrine system, with all of the following characteristics:
  - i. The waterbody area is less than 20 acres;
  - ii. Active wave-formed or bedrock shoreline features are lacking;
  - iii. Water depth in the deepest part of the basin is less than 8.2 feet at low water;
  - iv. Salinity due to ocean derived salts is less than 0.5 parts per trillion.
- b. "AB" represents an Aquatic Bed class, which includes wetlands and deepwater habitats dominated by plants that grow principally on or below the surface of the water for most of the growing season in most years.
- c. "H" represents a Permanently Flooded water regime, where water covers the substrate throughout the year in all years.
- d. The Applicants have provided a maximum depth measurement of 10 feet for the Lake, and have provided that the lake level will typically drop 1-2 feet each year in late summer due to lack of

inflow. Therefore, the Department finds the Applicants' maximum depth measurement is substantial and credible for use as a physical availability measurement.

13. The applicant has not applied for a flow rate to be associated with this application. There is no estimate of flow rate for this project, as there is no way to measure the inflow and outflow of the lake due to the intermittent characteristic of its sources and manual control structures are absent.

14. Pond (lake) volume is listed as an appropriate volume measurement technique to estimate physical availability in the DNRC Technical Memorandum "Physical Availability of Ponds."

15. The standard equation was used to estimate the volume of a pit pond (lake):

$$\begin{aligned} \text{Surface Area} * \text{max depth} * 0.5 (\text{contour factor}) &= \text{Pit Pond Volume} \\ 18.8 \text{ acres} * 10 \text{ ft} * 0.5 &= \mathbf{94 \text{ acre feet (AF)}} \end{aligned}$$

16. The DNRC Gridded Monthly Net Evaporation dataset was used to calculate evaporation from Lower Foy Lake. The annual evaporation around Lower Foy Lake as determined from the dataset is 20.91 inches per acre. Therefore:

$$\frac{20.91 \text{ in}}{\text{acre}} * \frac{1 \text{ ft}}{12 \text{ in}} * 18.8 \text{ surface acres} = \frac{\mathbf{32.76 \text{ AF}}}{\text{year}} \text{ of evaporation.}$$

The sum of yearly evaporation plus Lake volume is equal to the to the total amount of required appropriation:

$$32.76 \text{ AF (evap. volume)} + 94 \text{ AF (Lake volume)} = \mathbf{126.76 \text{ AF total appropriation volume.}}$$

17. The Department finds the requested volume of 126.76 AF annually as physically available in Lower Foy Lake during the proposed period of use.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

18. The area of potential impact is the reach of Lower Foy Lake. The inflows and outflows of Lower Foy Lake are intermittent and inactive outside of the spring runoff period. Furthermore, Lower Foy Lake is classified as a Permanently Flooded water regime by the USFWS, meaning that water covers the area throughout the year in all years.

19. There are no existing water rights on Lower Foy Lake. Inflows and outflows of the lake are a product of spring runoff, and overflows that are temporary in nature. Because there are no permanent connections to any other surface water sources, and there will be no further impoundment of the lake beyond what has existed since the 1970's, there are no other legal demands that require consideration.

20. The Department finds the proposed appropriation of 126.76 AF to be legally available during the proposed period of use.



**ADVERSE EFFECT**  
**FINDINGS OF FACT**

21. United States Department of Agriculture (USDA) aerial imagery demonstrates the existence of Lower Foy Lake since at least 1979. Furthermore, Lower Foy Lake is classified as a Permanently Flooded water regime by USFWS, meaning that water covers the area throughout the year in all years. There will be no new diversion or impounding of water because of the establishment of the fish and wildlife use.
22. There are no existing water rights out of Lower Foy Lake. As there are no permanent connections to any other surface water sources, and no consumptive use of water beyond the evaporation of the pond which has occurred for decades, there are no expected adverse effects to surrounding water users resulting from the establishment of a fish and wildlife purpose.
23. The Applicants have no plan to divert water in or out of the Lake in addition to the natural runoff that has occurred annually since its initial impoundment.
24. The Department finds the proposed use of 126.76 AF per year for a fish and wildlife purpose will not have an adverse effect on existing water users.

**ADEQUATE MEANS OF DIVERSION**  
**FINDINGS OF FACT**

25. A historical wetland was excavated in the late 1970s to expand what is now known as Lower Foy Lake. The Lake is intermittently fed by spring runoff from Middle Foy Lake and surrounding areas. Intermittent overflow from Lower Foy Lake occurs in the spring and runs northeast to Fisherman's Pond (also located on the Applicants' property) and to the north and east to where it joins Ashley Creek near the southwest boundary of Kalispell city limits. There is no manual control on the outflow of Lower Foy Lake. Aerial imagery, along with a Permanently Flooded designation by USFWS, provides evidence of the natural steady state of Lake impoundment.
26. The Applicants have no plan to divert water in or out of the Lake in addition to the natural runoff that has occurred annually since its initial impoundment in the late 1970s.
27. The Applicants plan to install an aeration system in Lower Foy Lake to improve water quality and habitat for fish populations.
28. The Department finds that the proposed means of diversion and conveyance are capable of supporting the proposed volume to be appropriated.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

29. The Applicants plan to utilize water within Lower Foy Lake to establish a beneficial fish and wildlife use. The Applicants will work with FWP to obtain permanent permitting and guidance to stock Lower Foy Lake with fish. The volume requested for beneficial use is 126.76 AF annually, which includes 94 AF for the volume of the Lake, and 32.76 AF for annual evaporation.

30. The Applicants' requested volume has been calculated in alignment with procedures outlined in the DNRC Technical Memoranda: "*Physical Availability of Ponds*" and "*Pond and Wetland Evaporation/Evapotranspiration*."

31. According to the DNRC Technical Memorandum "*Private Fish and Wildlife Appropriations under the Water Use Act*", dated 1986, "...private appropriations for fish and wildlife must involve some kind of diversion, impoundment, or withdrawal of water." The volume of the lake is contained by an impoundment established in the 1970s. Additionally, the memo states that "...proposed fish and wildlife appropriations must be measured against amounts reasonably needed for that use." The Applicants have proven aquatic suitability for fish habitat in Lower Foy Lake with their receipt of a temporary Fish Stocking Permit from FWP in 2021. Additionally, the Applicants' documented fish survival and growth in photos submitted with their application. This also proves that the requested volume, which includes the entire volume of the lake, is a reasonable amount needed for the fish & wildlife use.

32. Due to limited to no inflow/outflow in the lake in the late summer months, the Applicants plan to install an aeration system to improve water quality and habitat for the fish during times of water stagnancy.

33. The Department finds the proposed water use as beneficial, and the requested annual volume of 126.76 AF as reasonably justified.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

34. 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

35. 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.”

36. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987) (Applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

37. 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).

38. The Applicant has proven that water is physically available at the proposed point of appropriation in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 9-17).

### LEGAL AVAILABILITY

39. 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).

40. 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.

41. 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 18-20.)

#### ADVERSE EFFECT

42. 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.

43. 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).

44. 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).

45. 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).

46. 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.

47. 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).

48. 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 21-24).

#### ADEQUATE DIVERSION

49. 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.

50. 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.

51. 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 25-28).

#### BENEFICIAL USE

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

53. 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).

54. 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).

55. 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*.

56. Applicant proposes to use water for fish and wildlife which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence fish and wildlife is a beneficial use and that 126.76 AF of diverted volume is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 29-33)

POSSESSORY INTEREST

57. 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.

58. 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.

59. 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 34).

**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 30162801 should be GRANTED.

The Department determines the Applicant may appropriate water from Lower Foy Lake (Unnamed Lake), located in the NW ¼ of Section 23, Township 28 North, Range 22 West, Flathead County, by means of the Lower Foy Lake’s current state of impoundment, from January 1<sup>st</sup> to December 31<sup>st</sup> annually, up to 126.76 AF, for fish and wildlife purposes.

**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 3<sup>rd</sup> Day of June 2024.

/Original signed by Jim Ferch/  
Jim Ferch, Regional Manager  
Kalispell Regional Office  
Department of Natural Resources and Conservation



**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 3<sup>rd</sup> day of June, 2024 by first class United States mail.

MICHAEL AND SARAH SHEPHERD  
123 CREEK MEADOW CV  
LEANDER, TX 78641

\_\_\_\_\_  
KRISTAL KIEL  
KALISPELL Regional Office, (406) 752-2288

\_\_\_\_\_  
DATE