THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

Water Resources Division – Kalispell Regional Office 655 Timberwolf Pkwy, Ste. 4 Kalispell, MT 59901-1215 (406) 752-2288 DNRCKalispellWater@mt.gov

08/01/2025

SPP Montana LLC 6304 Peake Road Macon, GA 31210-9360

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 76LJ 30163655

Dear Applicant,

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

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no response is received by 8/22/2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

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



Please let me know if you have any questions.

Best,

Joseph Howerton Water Resources Specialist Kalispell Regional Office 655 Timberwolf Pkwy, Ste. 4 Kalispell, MT 59901-1215

Joseph P. Houverton

CC:

Jamie Graham Project Hydrogeologist Water & Environmental Technologies 102 Cooperative Way, Suite 100 Kalispell, MT 59901



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

* * * * * * *

APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 76LJ 30163655
BY SPP MONTANA LLC
PRELIMINARY DETERMINATION TO
GRANT PERMIT

* * * * * * *

On April 11, 2025, SPP Montana LLC submitted Application for Beneficial Water Use Permit No. 30163655 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1.67 cubic feet per second (CFS) and 112.74 acre-feet (AF) for Irrigation use. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated May 2, 2025. The Applicant responded with information dated May 6, 2025. A preapplication meeting was held between the Department and the Applicant on May 13, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on September 4, 2024. The Department delivered the Technical Analyses on October 15, 2024. The application was determined to be correct and complete as of June 5, 2025. An Environmental Assessment for this application was completed on August 1, 2025.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments:
 - o Attachment A Signed Form 600
 - o Attachment B Figures Project Location Map and Proposed Irrigation Map
 - Attachment C Irrigation System Preliminary Specifications and Head and Flow Rate Calculations

- Attachment D Documentation of Possessory Interest
- DNRC Technical Analysis Report Parts A & B (generated by the Water Sciences and Water Rights Bureaus, respectively, based on information provided in the Preapplication Meeting Form, dated October 15, 2024)
- Figures
 - Figure 1 Vicinity Map
 - Figure 2 Proposed Irrigation Map
 - o Figure 3 DNRC Site Vicinity Map (in the Technical Analysis)
- o Attachment A* Lazy Creek Streamflow Measurements June 29, 2023 May 17, 2024
- o Attachment B* Irrigation Water Requirements April 2, 2024
- * Attachments A & B are repeated, however these are different attachments

<u>Information within the Department's Possession/Knowledge</u>

- Lazy Creek StreamStats Report, dated September 5, 2024
- Deficiency Letter Sent, dated May 2, 2025
- 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.
 - DNRC Technical Memorandum: Consumptive Use Methodology, dated March 17,
 2010
 - DNRC Technical Memorandum: Consumptive Use Methodology Turf Grass, dated March 23, 2010
 - DNRC Technical Memorandum: Adverse Effect Determination [MCA 85-2-311, 360], dated November 2011
 - DNRC Technical Memorandum: Ditch Rights General Information, dated March 19, 2012
 - DNRC Technical Memorandum: Use of the Irrigation Water Requirements (IWR)
 Program, dated February 4, 2013
 - o DNRC Policy Memorandum: Return Flows, dated April 1, 2016

- DNRC Technical Memorandum: Physical Availability of Surface Water Without Gage Data, dated April 18, 2019
- DNRC Technical Memorandum: Surface Water Depletion for Regional Bedrock Aquifers, dated September 16, 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 or DNRC means the Department of Natural Resources and Conservation			
NRCS means the Natural Resource Conservation Service			
USDA means the United States Department of Agriculture			
DEQ means Department of Environmental C	Quality		
AF means acre-feet AOPI means area of potential impact			
CFS means cubic feet per second	FOF means finding(s) of fact		
GPM means gallons per minute	HDPE means high density polyethylene		
HP means horsepower	IWR means Irrigation Water Requirements		
POD means point of diversion	TDH means total dynamic head		

PROPOSED APPROPRIATION

- 1. The Applicant proposes to divert water from Lazy Creek, by means of a centrifugal pump, from May 1 to September 30 at 1.67 CFS up to 112.74 AF, from a point in the SE ½ of the NE ½ of the SE ½ of Section 25 Township 32 North, Range 23 West, Flathead County, Montana, for Irrigation of 55.54 acres. The Applicant proposes to divert water from the pump station via 6-inch diameter buried HDPE pipe to the center pivot and the junctions of the wheel line irrigation areas. 4-inch buried HDPE pipe will supply the irrigation wheel line, and no losses are anticipated.
- 2. The places of use and acreage for each are:
 - 25.72 acres in NE ¼ NE ¼ of Section 36 Township 32N Range 23W, Flathead County
 - 22.43 acres in E ½ SE ¼ of Section 25 Township 32N Range 23W, Flathead County

- 7.39 acres in S ½ NE of Section 25 Township 32N Range 23W, Flathead County
- 3. There are no supplemental rights to the proposed appropriation.
- 4. A flow meter capable of instantaneous readings with totalizer will be installed at the pump station to measure the volume diverted. The provisional beneficial water use permit will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

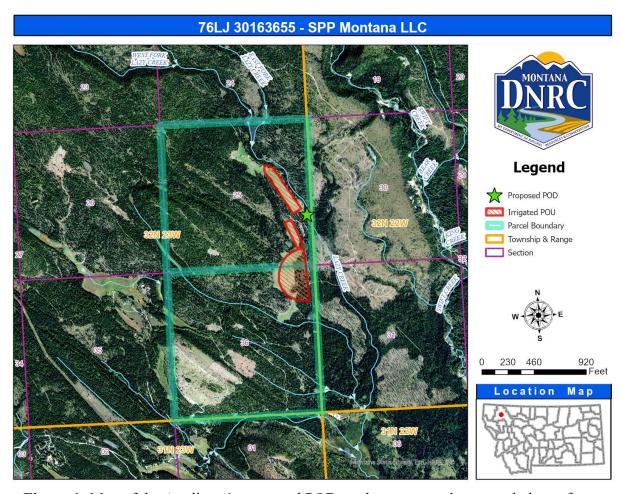


Figure 1: Map of the Applicant's proposed POD on the source and proposed place of use.

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

GENERAL CONCLUSIONS OF LAW

- 5. 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 . . .
- 6. 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.

- 7. 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.
- 8. 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).

9. 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.

10. 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

- 11. The Applicant proposes to divert surface water from Lazy Creek at 1.67 CFS up to 112.74 AF/year for irrigation use.
- 12. Physically available surface water volume within the Area of Potential Impact was found to be 1,061.9 AF in May, 885.1 AF in June, 534.0 AF in July, 515.6 AF in August, and 463.3 AF in September.
- 13. Lazy Creek is an ungaged, spring-fed perennial creek with no known existing flow data. Physical availability was calculated in accordance with ARM 36.12.1702(1)(b) & (6) and standard practices within the DNRC Technical Memorandum: *Physical Availability of Surface Water Without Gage Data*, dated April 18, 2019. Per the DNRC memo referenced above, estimation techniques do not apply to spring-fed streams, therefore the Applicant-provided measurements may be used by themselves so long as:
 - 1. Measurements are taken monthly during the proposed period of diversion, as prescribed in ARM 36.12.1702(5) & (6);
 - Measurements are considered valid based on measurement technique, location, and site conditions, and;
 - 3. Measurements are representative of average conditions for the source.
- 14. Applicant-provided discharge (flow) measurements (**Table 1**) were combined with Whitefish Lake Institute (WLI) discharge measurements (**Table 1**) to calculate physically available monthly volume (**Table 2**). The WLI data was collected from April 2007 to April 2023, and applicant-provided measurements data provided by Water & Environmental Technologies (WET) consultants on behalf of the applicant were collected for June-September Preliminary Determination to GRANT Page 9 of 24 Application for Beneficial Water Use Permit No. 76LJ 30163655

of 2023 and May 2024. The WLI mean monthly flows were averaged with the Applicant-provided measurement to generate a best-flow estimate. The Applicant-provided measurements were collected once per month from May through September. Volume was calculated by the Department using the following equation:

 $Volume = Measured\ Flow\ Rate\ (CFS)\ *(1.98\ AF/1\ CFS/day)\ *\#\ days\ in\ month$

	Table 1: Summary of Available Discharge Measurements (CFS)						
Year	May	June	July	August	September	Measurement Collection Entity	
2007	15.03	12.07	NA	8.71	NA	WLI	
2008	33.545	21.43	9.985	9.44	NA	WLI	
2009	16.78	NA	NA	6.59	NA	WLI	
2010	17.68	15.8	NA	NA	NA	WLI	
2012	NA	NA	NA	NA	NA	WLI	
2013	17.22	16.82	8.72	NA	NA	WLI	
2014	18.045	14.18	13.07	9.3	9.21	WLI	
2015	13.99	NA	NA	NA	NA	WLI	
2016	30.895	17.36	NA	9.97	NA	WLI	
2018	26.02	11.86	7.04	7.35	11.66	WLI	
2019	4.07	3.27	2.67	NA	3.14	WLI	
2020	5.34	NA	12.25	NA	NA	WLI	
2021	16.22	10.55	8.29	NA	NA	WLI	
2022	NA	32.5	NA	NA	NA	WLI	
2023	NA	7.56	7.19	7.55	7.15	WET	
2024	10.16	NA	NA	NA	NA	WET	
*Average Flow Rate							
(CFS)	17.3	14.9	8.7	8.4	7.8		
WLI Flow Rate (CFS)	17.9	15.6	8.9	8.6	8.0		
WET Volume (AF)	623.80	449.30	441.26	463.66	424.77		

Preliminary Determination to GRANT Application for Beneficial Water Use Permit No. 76LJ 30163655

**WLI						
Volume						
(AF)	1,098.7	926.6	546.3	527.9	475.2	

¹ NA = no measurement available

^{**} WLI volumes were not computed with the combined average flow rate. Rather, the average of the WLI flow rates were used in the volume calculations.

Table 2: Physical Availability of Lazy Creek near the Point of Diversion				
Month	Flow Rate (CFS)	Volume (AF)		
May	17.3	1,061.9		
June	14.9	885.1		
July	8.7	534.0		
August	8.4	515.6		
September	7.8	463.3		

15. Based on the WLI and Applicant-supplied measurements of monthly streamflows in Lazy Creek near the proposed POD, the Department finds that the amount of water the applicant seeks to appropriate – 112.74 AF diverted at a flow rate of 1.67 CFS – is physically available in Lazy Creek during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

16. The AOPI is within Lazy Creek, from the proposed POD downstream to the confluence with Whitefish Lake. Although reduced water in Lazy Creek resulting from the proposed appropriation will ultimately lower the amount of water entering Whitefish Lake, there are numerous sources that flow into Lazy Creek below the POD and into Whitefish Lake. It is indistinguishable to determine which source in particular may contribute to an existing appropriation on the Lake. To account for this, Lazy Creek downstream of the proposed POD to the confluence with Whitefish Lake is a reasonable AOPI.

² If there was more than one measurement in a month for WLI measurements, the measurements for that month were averaged

³ WET measurements were collected by WET on behalf of the Applicant

^{*} Average flow rate includes WLI and Applicant-provided measurements

- 17. There is one water right in the AOPI: Provisional Permit 76LJ 30048723; for irrigation and stock purposes up to 96 GPM (0.21 CFS) up to 16.26 AF per year. The period of diversion is 01/01 to 12/31 for stock watering and 04/15 to 10/15 for irrigation.
- 18. The comparison between physically available and legally available water in Lazy Creek is shown in Table 3 below, indicating that water is legally available for the proposed appropriation from May 1st September 30th.

Table 3: Legal Availability at the Point of Diversion on Lazy Creek						
A	В	C	D	E	F	G
Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands between POD to Whitefish Lake Inlet (CFS)	Existing Legal Demands between POD to Whitefish Lake Inlet (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
May	17.3	1,061.9	0.21	*16.26	17.09	1045.64
June	14.9	885.1	0.21	*16.26	14.69	868.84
July	8.7	534.0	0.21	*16.26	8.49	517.74
August	8.4	515.6	0.21	*16.26	8.19	499.34
September	7.8	463.3	0.21	*16.26	7.59	447.04

^{*} These are conservative estimates as the downstream water right holder can use their full allotted flow rate and volume in any of the months from May through September.

19. The Department finds the proposed appropriation of 1.67 CFS up to 112.74 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

20. The Applicant has provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during water shortages, the Applicant will turn off their pump when a senior appropriator makes a valid call for water. This includes existing senior water rights downstream of the proposed POD.

- 21. In response to call being made or instances of water shortage, the Applicant will: (1) reduce irrigation application by 50% (2) reduce irrigation application to 25% during times of intense shortage (3) turn off the pump in response to a valid being made by a senior appropriator.
- 22. The Applicant has proven physical availability of Lazy Creek water throughout the proposed period of use from May 1st through September 30th. The Applicant has proven that the proposed appropriation of 1.67 CFS up to an annual volume of 112.74 AF is legally available for irrigation from May 1st through September 30th annually. The Applicant has shown that they can regulate their water use via an implementation plan to protect senior water right users.
- 23. The Department finds the proposed water use of 1.67 CFS and 112.74 AF will not adversely affect existing water right users.

ADEQUATE MEANS OF DIVERSION

- 24. The Applicant proposes to divert water from Lazy Creek at 1.67 CFS up to 112.74 AF/year for irrigation uses.
- 25. The diversion will use a Cornell mode 3YH 50 HP pump (or equivalent). This is a pad mounted centrifugal pump, which will be installed at a pumping station adjacent to the POD at Lazy Creek. The pump is capable of delivering 1.67 CFS at an operating TDH of 169 feet. No losses are anticipated with conveyance as piping will be utilized throughout the place of use to deliver water. Note that all three sprinkler systems will be operating concurrently.
- 26. Water will be conveyed from the pump station via 6-inch diameter buried HDPE pipe to the center pivot and the junctions of the wheel line irrigation areas. 4-inch buried HDPE pipe will supply the irrigation wheel line. Water will be delivered within the place of use via a 1,000-foot Reinke Electrogator II center pivot and two 300-foot wheel lines with 7-foot diameter wheels and 4-inch pipe. Wheel lines will have six rotor heads at 60-foot intervals along the wheel line. Risers will be located every 60 feet along the main line to supply irrigation across the field.
- 27. Nine-hour irrigation sets are planned during peak irrigation season with up to five irrigation days per week. The center pivot and two wheel lines will operate concurrently. The center pivot requires a flow rate of 622 GPM. The rotors will operate at a flow rate of approximately 10.8 GPM individually. Each wheel line will operate at approximately 64 GPM (128 GPM for both wheel

- lines). A total flow rate of 750 GPM is required for site irrigation, which mirrors the requested flow rate of 1.67 CFS.
- 28. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

- 29. The Applicant proposes to divert water from Lazy Creek at 1.67 CFS up to 112.74 AF/year for irrigation uses. The proposed flow rate and volume will enable the Applicant to irrigate a maximum of 55.54 acres. 25.72 acres are in the NE ¼ of the NE ¼ of Section 36 Township 32N Range 23W, Flathead County. 22.43 acres are in the E ½ SE ¼ of Section 25 Township 32N Range 23W, Flathead County. 7.39 acres are in the S ½ NE of Section 25 Township 32N Range 23W, Flathead County. The POD is located in the SE ¼ of the NE ¼ of the SE ¼ of Section 25 Township 32N Range 23W, Flathead County. The means of diversion is via a pump in Lazy Creek. Diverted water is conveyed via pipeline to the irrigation system. The irrigation method is via wheel line sprinklers and a center pivot system. The proposed period of diversion is from May 1st through September 30th.
- 30. The Applicant requests to divert 112.74 AF to irrigate 55.54 acres. The flow rate was calculated utilizing an equation developed by Washington State University to determine the pumping requirements for an agricultural field. The flow rate was further justified based upon the needs of the pivot and wheel line demands. The center pivot requires a flow rate of 622 GPM. The rotors will operate at a flow rate of approximately 10.8 GPM individually. Each wheel line will operate at approximately 64 GPM (128 GPM for both wheel lines). All systems will operate concurrently for a total flow rate of approximately 750 GPM.
- 31. The requested volume is 2.03 AF/ac which was derived from the NRCS Irrigation Water Requirements program for pasture grass in this location. The Applicant's properties are located in USDA Natural Resources Conservation Service climatic area III. The Applicant requests the period of diversion and period of use of May 1 September 30 which begins after and ends before standards set forth for USDA Natural Resources Conservation Service climatic area III per ARM 36.12.112(1)(c)(iii). The Department finds the proposed water use is beneficial, and

that the requested flow rate of 1.67 CFS and annual volume of 112.74 AF are reasonably justified.

- 32. The flow rate was calculated utilizing an equation developed by Washington State University to determine the pumping requirements for an agricultural field. The requested irrigation volume falls slightly under established department standards and was calculated utilizing DNRC's consumptive use methodology with NRCS IWR software and an assumed 70 percent irrigation efficiency.
- 33. The provisional beneficial water use permit will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

POSSESSORY INTEREST

- 34. The Applicant signed the application form affirming the Applicant has possessory interest in the property where the water is to be put to beneficial use.
- 35. The Department finds that the Applicant has possessory interest in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

- 36. 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."
- 37. 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).
- 38. 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).
- 39. 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 11-15)

LEGAL AVAILABILITY

- 40. 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).
- 41. 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.
- 42. In analyzing legal availability for surface water, Applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under § 85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.
- 43. 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 16-19)

ADVERSE EFFECT

- 44. 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.
- 45. 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).
- 46. 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).
- 47. 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).
- 48. 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.
- 49. 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).

50. 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 20-23)

ADEQUATE DIVERSION

- 51. 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.
- 52. 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.
- 53. 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 24-28)

BENEFICIAL USE

- 54. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
- 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).
- 56. 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).
- 57. It is the Applicant's burden to produce the required evidence. <u>Bostwick Properties, Inc. v. DNRC</u>, 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.
- 58. Applicant proposes to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 112.74 AF of diverted volume and 1.67 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 29-33)

POSSESSORY INTEREST

- 59. 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.
- 60. 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.
- 61. 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 34-35)

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 30163655 should be GRANTED.

The Department determines the Applicant may divert water from Lazy Creek by means of a pump from May 1st through September 30th at 1.67 CFS up to 112.74 AF from a point in the SE ½ of the NE ½ of the SE ¼ of Section 25 Township 32N Range 23W, Flathead County, for irrigation use from May 1st through September 30th. The Applicant may irrigate 55.54 acres. The place of use is located in the:

- NE ¹/₄ NE ¹/₄ of Section 36 Township 32N Range 23W, Flathead County
- E ½ SE ¼ of Section 25 Township 32N Range 23W, Flathead County
- S ½ NE of Section 25 Township 32N Range 23W, Flathead County

The provisional beneficial water use permit will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. IN THE EVENT THAT AUTHORIZED FLOW RATES AND/OR VOLUMES HAVE BEEN EXCEEDED DURING PERFECTION OF THE PERMIT OR THE APPROPRIATOR FAILS TO SUBMIT ANNUAL REPORTS, THE DEPARTMENT MAY CONTINUE TO REQUIRE ANNUAL SUBMISSIONS OF MONTHLY FLOW RATE AND VOLUME RECORDS. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

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

DATED this 1st day of August 2025.

James Ferch, Regional Manager

Kalispell Regional Water Resources Office Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the <u>PRELIMINARY DETERMINATION TO</u>

<u>GRANT</u> was served upon all parties listed below on this 1st day of August, 2025, by first class United States mail.

SPP MONTANA LLC 6304 PEAKE RD MACON, GA 31210-3960

via email:

JAMIE GRAHAM
WATER & ENVIRONMENTAL TECHNOLOGIES
102 COOPERATIVE WAY, SUITE 100
KALISPELL, MT 59901

JOSEPH HOWERTON

greeph P. Howerton

Kalispell Regional Office, (406) 752-2288