

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30164488 BY JAMES R. DEATS AND BEAR DEN RANCH, LLC</b>	) ) )	<b>DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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James R. Deats and Bear Den Ranch, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30164488 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation on October 17, 2025. The Applicant proposes diverting up to 44.57 acre-feet of volume annually at a flow rate of 200.0 gallons per minute from the Skyles Lake for irrigation, recreation, and fishery uses. The Department published receipt of the Application on its website on October 27, 2025. A preapplication meeting was held between the Department, the Applicant, and their consultant, Water and Environmental Technologies, on September 17, 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 March 14, 2025. The Department delivered the Technical Analyses Report on May 5, 2025. The Department sent the Applicant a deficiency letter under § 85-2-302, MCA, dated November 7, 2025. The Applicant responded with information dated November 19, 2025. The application was determined to be correct and complete as of December 18, 2025. An Environmental Assessment for this application was completed on January 28, 2026.

**INFORMATION**

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

**Application as filed:**

- Permit Preapplication Meeting Form, Form 600P
- Application for Beneficial Water Use Permit, Form 600.

- Attachments:
  - Attachment A: Adequate Means of Diversion and Operation
  - Attachment B: Point of Diversion Pump Specifications
  - Attachment C: Pump Design Calculations
  - Attachment D: Booster Pump Specifications
  - Attachment E: Irrigation Water Requirements – Flathead Orchard with Cover
  - Attachment F: Place of Storage Evaporative and Seepage Losses
- Maps/Figures:
  - Figure 1: Site Map
  - Figure 2: Preliminary Pond Design
- Application for Beneficial Water Use Permit, Permit Storage Addendum, Form 600-SA
- Application for Beneficial Water Use Permit, Technical Analysis Addendum, Form 600-TAA
  - Applicant-provided Technical Memorandum accompanying Form 600-TAA
  - Attachment A: Irrigation Water Requirements
  - Attachment B: Net Evaporative Losses

#### Information Received after Application Filed

- Letter from the Applicant’s consultant, Water and Environmental Technologies, dated November 18, 2025 responding to the Department’s deficiency letter dated November 7, 2025.
  - Attachments:
    - Attachment A: Climate Area Map
    - Attachment B: Web Soil Survey Soil Descriptions
    - Attachment C: Secretary of State Business Record

#### Information within the Department’s Possession/Knowledge

- DNRC Surface Water Permit Technical Analyses Report, dated May 5, 2025.
- Skyles Lake Bathymetry Survey Map. Survey conducted by the Montana Department of Fish, Wildlife, and Parks on July 18, 2011.
- List of existing surface water rights on Skyles Lake.

- 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: Pond and Wetland Evaporation/Evapotranspiration, dated June 7, 2023.
  - Montana Department of Fish, Wildlife, and Parks’ Fishery Division publication: A Guide to Building and Managing Private Fish Ponds in Montana, dated July, 2006.

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

For the purposes of this document:

<b>Department</b> or <b>DNRC</b> means the Montana Department of Natural Resources and Conservation	
<b>FWP</b> means the Montana Department of Fish, Wildlife, and Parks	
<b>AF</b> means acre-feet	<b>AOPI</b> means the Area of Potential Impact
<b>ARM</b> means Administrative Rules of Montana	<b>BGS</b> means below ground surface
<b>GPD</b> means gallons per day	<b>GPM</b> means gallons per minute
<b>MCA</b> means Montana Code Annotated	<b>POD</b> means point of diversion
<b>PSI</b> means pounds per square inch	<b>PVC</b> means polyvinyl chloride
<b>TDH</b> means total dynamic head	<b>VFD</b> means variable frequency drive

**PROPOSED APPROPRIATION**

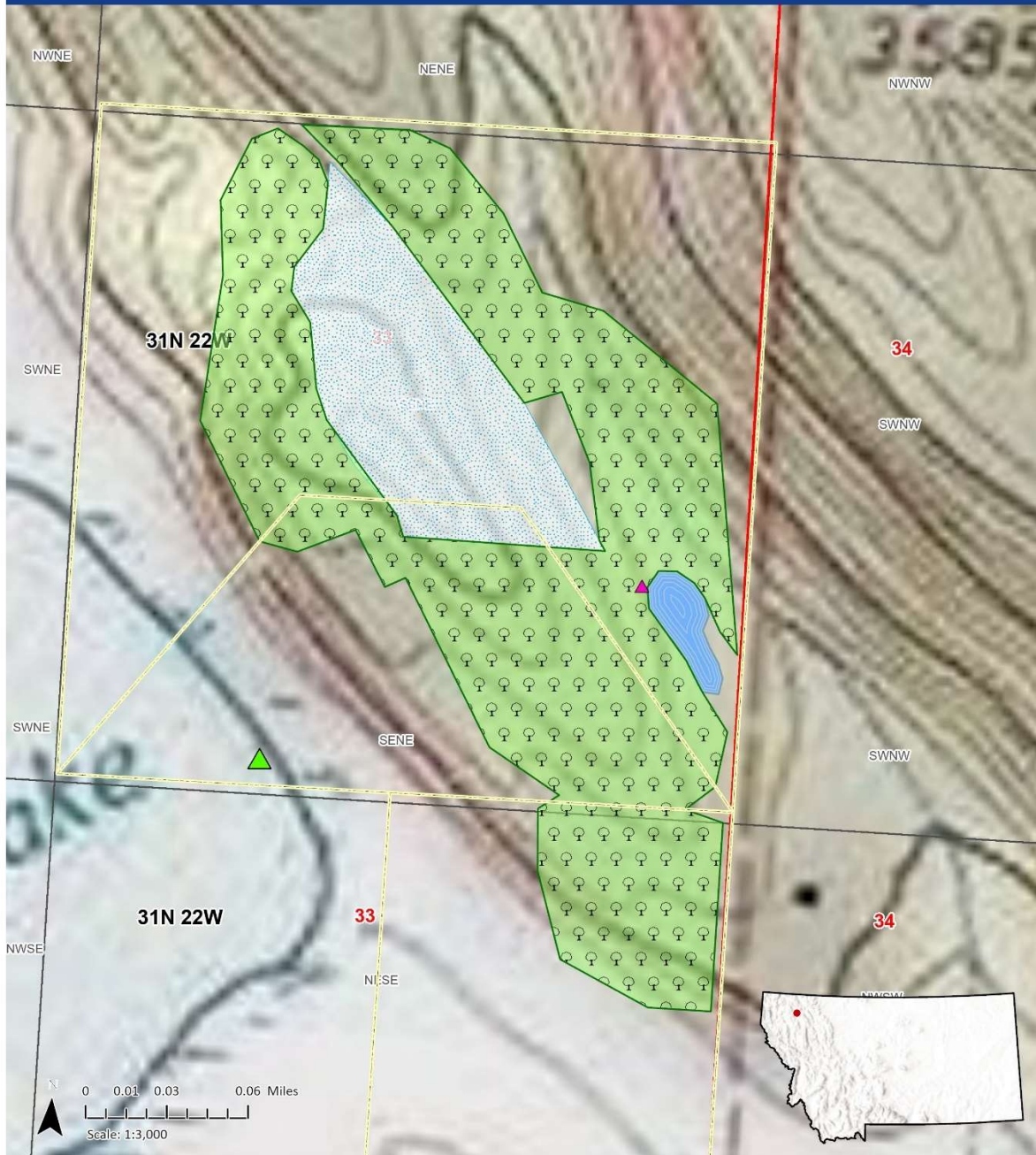
**FINDINGS OF FACT**

1. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 3.37 AF/year for fishery use (a 0.33-acre pond) from January 1 – December 31, up to 32.36 AF/year for irrigation of 21.32 acres of Christmas trees from April 20 – October 10, and up to 8.84 AF/year for recreation use (snowmaking for private ski lift and runs) from October 15 – March 15. The proposed total annual appropriation volume is 44.57 AF/year. The proposed POD is in

the SWSENE of Section 33, Township 31N, Range 22W, Flathead County, Montana (Figure 1). The proposed places of use are as follows (Figure 1):

- i. Fishery
    - a. SESENE of Section 33, Township 31N, Range 22W, Flathead County
  - ii. Irrigation
    - a. SENE of Section 33, Township 31N, Range 22W, Flathead County (18.6 acres)
    - b. NENESE of Section 33, Township 31N, Range 22W, Flathead County (2.72 acres)
  - iii. Recreation
    - a. SENE of Section 33, Township 31N, Range 22W, Flathead County
2. The Applicant will pump water from Skyles Lake to fill their proposed fishery/storage pond. The proposed pond will function both as the place of use for the fishery purpose and as an operational storage buffer pond for the irrigation and recreation purposes.
3. The POD is in Water Right Basin 76LJ (Flathead River, to and including Flathead Lake) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

Permit Application No. 76LJ 30164488  
 Deats, James / Bear Den Ranch LLC



Map Created: 1/7/2026  
 Author: Travis Wilson  
 Water Resource Specialist  
 Elements depicted on this map are for illustrative  
 purposes and have not been surveyed by the  
 Department. MSDI PLS:

- PLSS Township
- PLSS First Division
- Section
- Protracted Block

- PLSS Second Division
- Alliquot Part
- Remainder Alliquot Part
- Government Lot
- Unsubmerged Lot

- Recreation Place of Use
- Secondary POD
- Point of Diversion
- Irrigation Place of Use

- Fishery Place of Use
- Place of Use Parcels

Figure 1: Map of the proposed place of use and point of diversion.

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

**GENERAL CONCLUSIONS OF LAW**

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

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

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

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

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

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

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

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

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

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

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

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

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental

quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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

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

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

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

No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080 (1996), *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

*See also, Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

*Montana Power Co.*, 211 Mont. at 97-98, 685 P.2d at 340; *see also* Mont. Const. art. IX §3(1).

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

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

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

10. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 44.57 AF/year for irrigation use (32.36 AF/year), recreation use (8.84 AF/year), and fishery use (3.37 AF/year). Per ARM 36.12.1702(3)(a), the physical availability for a lake will be determined based on stored volume and if the volume of a lake has been quantified by a qualified entity based on bathymetric data, that volume will be used to quantify physical availability. The Montana Department of Fish, Wildlife, and Parks conducted a bathymetric survey of Skyles Lake on July 18, 2011 and found a volume for Skyles Lake of 388.0 AF.

11. The Department considers the Montana Department of Fish, Wildlife, and Parks to be a qualified entity and their quantification of Skyles Lake's volume based on bathymetric survey data to represent physically available volume. The Department finds that the amount of water the Applicant seeks to appropriate, 44.57 AF diverted at 200.0 GPM, is physically available in Skyles Lake.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

12. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 44.57 AF/year for irrigation use (32.36 AF/year), recreation use (8.84 AF/year), and fishery use (3.37 AF/year). The Department identified an AOPI for this application by considering the characteristics of the source and assessing connection to any downstream sources. There is an unnamed stream that intermittently flows out of Skyles Lake downstream to Spenser Lake. Due to the intermittent nature of this unnamed outflowing source, the Department determined that diversion of water from Skyles Lake will primarily reduce the volume of water in Skyles Lake. Therefore, the AOPI for this application was limited to the volume of Skyles Lake.

13. The Department found one surface water right (legal demand) within the AOPI (Table 1) and subtracted its volume from the physically available volume of Skyles Lake to quantify the legal availability of Skyles Lake water (Table 2).

<b>Table 1: Existing Legal Demand within the AOPI</b>		
<b>Water Right Number</b>	<b>Purpose</b>	<b>Volume (AF)</b>
76LJ 73508 00	LAWN AND GARDEN	4.0

<b>Table 2: Legal Availability of Skyles Lake</b>		
<b>Physically Available Volume (AF)</b>	<b>Existing Legal Demand Volume (AF)</b>	<b>Legally Available Volume (AF)</b>
388.0	4.0	384.0

14. The Department's comparison of the physically available volume of Skyles Lake water to the volume of the existing legal demand within the AOPI on Skyles Lake demonstrates that the proposed appropriation of 44.57 AF/year diverted at 200.0 GPM is legally available.

**ADVERSE EFFECT**

**FINDINGS OF FACT**

15. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 44.57 AF/year for irrigation use (32.36 AF/year), recreation use (8.84 AF/year), and fishery use (3.37 AF/year). The Applicant provided a plan showing they can regulate their water use to satisfy the water rights of senior appropriators. During times of water shortage, the Applicant will:

- i. Reduce irrigation application by 50 percent;
- ii. Reduce fishery/storage pond filling inflow to 25 percent; and,
- iii. Shut off the pump from Skyles Lake in response to a valid call for water by a senior appropriator.

16. The Applicant has proven that water is legally available in Skyles Lake and has demonstrated that they have a plan to regulate their diversion of water to protect senior appropriators during times of water shortage. Enough water remains in the source to meet existing legal demands as well as the requested volume of 44.57 AF/year diverted at 200.0 GPM. The Department finds that the proposed water use will not adversely affect senior water users.

## **ADEQUATE MEANS OF DIVERSION**

### **FINDINGS OF FACT**

17. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 44.57 AF/year for fishery use (3.37 AF/year), irrigation use (32.36 AF/year), and recreation use (8.84 AF/year) using a 15-HP Grundfos CR 32-3 A-G-A-E-HQQE (or equivalent) centrifugal pump. Water will be conveyed from Skyles Lake to the proposed fishery/storage pond through approximately 1,300 feet of buried 6-inch PVC pressure pipeline with gasketed joints and isolation valves at each end. The Applicant sized the conveyance pipeline to deliver 200.0 GPM with minimal friction head losses and calculated a TDH of 151.8 feet for the portion of the diversion and conveyance system from Skyles Lake to the fishery/storage pond. The Applicant provided the pump performance curve which demonstrates that the pump is capable of producing the requested 200.0 GPM at the maximum TDH of 151.8 feet.

18. The fishery/storage pond will serve both as the place of use for the fishery purpose and as an operational storage buffer pond for the irrigation and recreation purposes. Using the fishery/storage pond as an operational storage buffer pond will help ensure a continuous and stable source of water during active irrigation and recreation use since the fishery/storage pond volume can be partially drawn down while simultaneously pumping from Skyles Lake to recharge the fishery/storage pond both during and between irrigation and recreation use operating intervals. Water will be diverted from the fishery/storage pond at up to 400.0 GPM via a skid-mounted Monsoon Force Series pump, which is a self-contained, VFD-controlled pump station enclosed in a heated and ventilated aluminum housing that includes a 20- or 25-HP close-coupled centrifugal pump driven by a three-phase motor, suction and discharge isolation valves, check valve, and pressure transducer for automated pressure regulation. The VFD will automatically adjust motor speed to maintain constant discharge pressure to the irrigation main or snowmaking header.

19. During the irrigation season (April 10 – October 10), water will be pumped from the fishery/storage pond at up to 400.0 GPM for irrigation of 21.32 acres of Christmas trees. An automated irrigation system will regulate sprinklers in six zones served by HYDRORAIN rotor-type

(or similar) pop-up sprinkler heads, each with a capacity of 1.0 to 8.0 GPM. The sprinklers are grouped into selectable irrigation zones that can be operated sequentially. Multiple zones can be irrigated simultaneously to efficiently distribute water throughout the system. Each zone has been configured so the combined flow of operating sprinkler heads remains within the rated pump capacity. At peak operation, this configuration allows up to 50 sprinklers within the various zones to operate simultaneously at peak irrigation demand (8.0 GPM per head) while maintaining system pressure and efficiency. The farthest irrigation zone is designed to operate 50 sprinkler heads at 3.0 GPM each (150.0 GPM total). To maintain 50 PSI at the sprinkler heads, a pump discharge setpoint of 70-75 PSI is required. The Monsoon Force Series data shows that the 20-HP pump unit provides 72 PSI at 160.0 GPM, which would be adequate for irrigation of the farthest zone.

20. During the recreational snowmaking season (October 15 – March 15), water will be pumped from storage at up to 400.0 GPM for snowmaking gun operation when snowmaking conditions are ideal. Snowmaking guns will operate for four hours and then stand down for storage recovery.

21. Based on the system design and specifications, the Department finds that the diversion and conveyance system is adequate to supply the requested flow rate of 200.0 GPM up to an annual volume of 44.57 AF.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

22. The Applicant proposes to divert water from Skyles Lake by means of a pump at 200.0 GPM up to 44.57 AF/year for irrigation use (32.36 AF/year), recreation use (8.84 AF/year), and fishery use (3.37 AF/year). Water for both the irrigation and recreational snowmaking purposes will be drawn from the fishery/storage pond via a pump at up to 400.0 GPM.

#### **Irrigation**

23. The Applicant requests 32.36 AF/year for irrigation of 21.32 acres of Christmas trees. The Applicant's request is based on an annual crop consumptive volume requirement of 12.75 inches per acre (dry year, 80-percent chance) for orchard trees with vegetative ground cover in Climatic

Area IV derived from the Montana Irrigation Guide and an assumed 70% sprinkler application efficiency. Although the project lies within Climatic Area III, the Applicant provided evidence that the consumptive volume requirement values of the nearby Climatic Area IV are more appropriate based on the elevation, mountainous terrain, well-drained soils, and dense forest cover of the project site. Applying the sprinkler application efficiency factor to the annual crop consumptive volume requirement yields a volume of 1.52 AF/acre or 32.36 AF for the 21.32 acres of Christmas tree irrigation ( $12.75 \text{ in/acre} \div 0.7 \text{ efficiency factor} \div 12 \text{ in/ft} = 1.52 \text{ AF/acre} \times 21.32 \text{ acres} = 32.36 \text{ AF}$ ).

#### Recreation (snowmaking)

24. The Applicant requests 8.84 AF/year for recreation use. The recreation use consists of snowmaking to supplement natural snow on the Applicant's private ski runs served by their private ski lift. Per the Applicant, ideal conditions for snowmaking occur when the temperature is consistently between 20 and 26 degrees Fahrenheit and humidity is relatively low. The Applicant anticipates that ideal snowmaking conditions will occur 30 days per year within the requested period of use (October 15 – March 15). The Applicant calculated their annual recreation snowmaking volume based on a plan to operate a series of snowmaking guns for a period of four hours per day at up to 400.0 GPM. Over a four-hour pumping period, up to 96,000 gallons of water will be made into snow. This equates to 2,880,000 gallons, or 8.84 AF, of water made into snow during the 30 days of ideal conditions ( $400.0 \text{ GPM} \times 60 \text{ mins/hr} \times 4 \text{ hrs/day} \times 30 \text{ days/year} = 2,880,000 \text{ gal} \div 325,851 \text{ gal/AF} = 8.84 \text{ AF}$ ).

#### Fishery

25. The Applicant requests 3.37 AF/year for fishery use. The volume requested for this use is the volume required to fill the proposed fishery/storage pond and maintain the water level year round by accounting for seepage and evaporation.

- i. Fishery/storage pond capacity: The proposed fishery/storage pond will have a surface area of 0.33 acres and a maximum depth of 12.0 feet which equates to a volume capacity of 1.98 AF ( $0.33 \text{ acres} \times 12.0 \text{ ft} \times 0.5 \text{ contour factor} = 1.98 \text{ AF}$ ).

- ii. Fishery/storage pond seepage: The Applicant estimated seepage using the Idaho Department of Water Resources' Pond Loss Calculation Spreadsheet. The lithology displayed on the well log for the well on the Applicant's property shows sands and clays from ground surface down to 10 feet BGS and sands, clays, and gravels from 10 ft to 30 ft BGS. Per the calculation spreadsheet, the seepage rate for sand clay mixtures is 0.007 ft/day, which leads to an annual seepage loss of 0.84 AF for the 0.33-acre (14,374.8 ft<sup>2</sup>) fishery/storage pond ( $14,374.8 \text{ ft}^2 \times 0.007 \text{ ft/day} \times 7.48 \text{ gal/ft}^3 = 752.7 \text{ GPD} \times 365 \text{ days/year} \div 325,851 \text{ gal/AF} = 0.84 \text{ AF}$ ).
- iii. Fishery/storage pond evaporation: The Applicant estimated evaporation based on the DNRC gridded net evaporation ArcGIS layer. Per this layer, net annual evaporative losses at the project location equal 19.95 inches per acre, therefore the annual net evaporation for the 0.33-acre fishery/storage pond is 0.55 AF ( $19.95 \text{ in/acre} \div 12 \text{ in/ft} \times 0.33 \text{ acres} = 0.55 \text{ AF}$ ).
- iv. Total: The total volume of 3.37 AF for the fishery use is the fishery/storage pond capacity, plus seepage and net evaporation ( $1.98 \text{ AF} + 0.84 \text{ AF} + 0.55 \text{ AF} = 3.37 \text{ AF}$ ).

26. According to the FWP Fishery Division's July 2006 publication titled, "A Guide to Building and Managing Private Fish Ponds in Montana," pond depths of 12.0 to 15.0 feet over at least 25% of the pond bottom will provide an adequate cool water zone to store dissolved oxygen and provide fish a refuge from both winter and summer temperature extremes. The Applicant's proposed fishery/storage pond will be 12.0 ft deep which will lend to the health of the fishery. Additionally, the Applicant's planned use of the fishery/storage pond as a flow-through and operational storage component for both the irrigation and recreation uses will help prevent deleterious anoxic water conditions in the fishery pond through aeration and exchange of standing water with fresh water from Skyles Lake.

27. The Applicant must obtain a fish stocking license from FWP in order to legally stock fish in their pond to perfect the fishery use.

### Flow Rate

28. The requested flow rate of 200.0 GPM, if diverted continuously year-round, would result in a diversion of 322.6 AF annually ( $200.0 \text{ GPM} \times 525,600 \text{ min/year} \div 325,851 \text{ gal/AF} = 322.6 \text{ AF/year}$ ). This proves the proposed flow rate is adequate to divert the requested annual volume of 44.57 AF.

- i. In order to fill the proposed fishery/storage pond and offset the annual evaporation and seepage (3.37 AF), the Applicant will have to divert 200.0 GPM from the source for 91.5 hours (3.8 days) annually ( $3.37 \text{ AF} \times 325,851 \text{ gal/AF} \div 200.0 \text{ GPM} = 5,490.6 \text{ mins} \div 60 \text{ mins/hour} = 91.5 \text{ hours} \div 24 \text{ hours/day} = 3.8 \text{ days}$ ).
- ii. To satisfy their irrigation requirements (32.36 AF), the Applicant will have to divert 200.0 GPM from the source for 878.7 hours (36.6 days) within the 174-day period of use from April 20 – October 10 ( $32.36 \text{ AF} \times 325,851 \text{ gal/AF} \div 200.0 \text{ GPM} = 52,722.7 \text{ mins} \div 60 \text{ mins/hour} = 878.7 \text{ hours} \div 24 \text{ hours/day} = 36.6 \text{ days}$ ).
- iii. To satisfy their recreational snowmaking requirements (8.84 AF), the Applicant will have to divert 200.0 GPM from the source for 240.0 hours (10.0 days) within the 152-day period of use from October 15 – March 15 ( $8.84 \text{ AF} \times 325,851 \text{ gal/AF} \div 200.0 \text{ GPM} = 14,402.6 \text{ mins} \div 60 \text{ mins/hour} = 240.0 \text{ hours} \div 24 \text{ hours/day} = 10.0 \text{ days}$ ).

While the fishery period of use overlaps with both the irrigation and the recreation periods of use, the irrigation and recreation periods of use do not overlap with each other. The requested 200.0 GPM flow rate is capable of supplying the requested volumes during all periods of beneficial use overlap.

29. The Department finds that the proposed water uses are beneficial, and that the requested flow rate of 200.0 GPM up to an annual volume of 44.57 AF/year are reasonably justified.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

30. The Applicant signed the application form affirming they have 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**

31. Pursuant to § 85-2-311(1)(a)(i), MCA, an Applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate.”

32. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

33. An Applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the Applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

34. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10-11)

### **LEGAL AVAILABILITY**

35. Pursuant to § 85-2-311(1)(a), MCA, an Applicant must prove by a preponderance of the evidence that:

- (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the

department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

*E.g.*, ARM 36.12.101 and 36.12.120; *Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

36. It is the Applicant's burden to present evidence to prove water can be reasonably considered legally available. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the Applicant. The Supreme Court has instructed that those burdens are exacting.); *see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston* (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on Applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the Applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007) (permit denied for failure to prove legal availability); *see also* ARM 36.12.1705.

37. 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. § 85-2-311(1)(a)(ii), MCA. (FOF 12-14)

## ADVERSE EFFECT

38. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. *See Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

39. An Applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an Applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(5).

40. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 4 (2011).

41. In analyzing adverse effect to other appropriators, an Applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." *See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 816 P.2d 1054 (1991).

42. It is the Applicant's burden to produce the required evidence. *E.g.*, *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Bostwick Properties, Inc.*, ¶ 21.

43. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 8 (2011).

44. The 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. § 85-2-311(1)(b), MCA. (FOF 15-16)

#### ADEQUATE DIVERSION

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

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

47. 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. § 85-2-311(1)(c), MCA (FOF 17-21)

#### BENEFICIAL USE

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

49. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. *E.g., McDonald; Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. *E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003),

*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, *Dee Deaterly v. DNRC* , Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

50. Amount of water to be diverted must be shown precisely. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3 (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

51. It is the Applicant’s burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 (“issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied”); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); *see also Royston; Ciotti*.

52. The Applicant proposes to use water for irrigation, recreation, and fishery uses, which are recognized beneficial uses. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that irrigation, recreation, and fishery uses are beneficial uses and that 44.57 AF of volume diverted at 200.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 22-29)

#### POSSESSORY INTEREST

53. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the

proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

54. Pursuant to ARM 36.12.1802:

(1) An Applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the Applicant signs the application form affidavit, the representative shall state the relationship of the representative to the Applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

55. The 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. § 85-2-311(1)(e), MCA. (FOF 30)

### **DRAFT PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this DRAFT Preliminary Determination Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30164488 should be GRANTED.

The Department determines the Applicant may divert water from Skyles Lake by means of a pump at 200.0 GPM up to 3.37 AF/year for fishery use (a 0.33-acre pond) from January 1 – December 31, up to 32.36 AF/year for irrigation of 21.32 acres of Christmas trees from April 20 – October 10, and up to 8.84 AF/year for recreation use (snowmaking for private ski lift and runs) from October 15 – March 15. The proposed total annual appropriation volume is 44.57 AF/year. The point of diversion is in the SWSENE of Section 33, Township 31N, Range 22W, Flathead County, Montana. The places of use are as follows:

- i. Fishery
  - a. SESENE of Section 33, Township 31N, Range 22W, Flathead County
- ii. Irrigation
  - a. SENE of Section 33, Township 31N, Range 22W, Flathead County (18.6 acres)
  - b. NENESE of Section 33, Township 31N, Range 22W, Flathead County (2.72 acres)
- iii. Recreation
  - a. SENE of Section 33, Township 31N, Range 22W, Flathead County

**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 12<sup>th</sup> day of February, 2026.



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Travis Wilson, Water Resource Specialist  
Kalispell Regional Water Resources Office  
Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 12<sup>th</sup> day of February, 2026, by first class United States mail.

JAMES R. DEATS / BEAR DEN RANCH, LLC

PO BOX 4744

WHITEFISH MT 59937-4744

\*\*\*\*\*

*Via email:*

JOSH MALPASS, EIT

WATER AND ENVIRONMENTAL TECHNOLOGIES



TRAVIS WILSON

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