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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30165286 BY LESLIE SVETICH AND DEAN WHITEHEAD	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On September 26, 2025, Dean Whitehead and Leslie Svetich (Applicants) submitted Application for Beneficial Water Use Permit No. 76LJ 30165286 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 99.8 gallons per minute (GPM) and a total volume of 41.86 acre-feet (AF) for irrigation, lawn and garden, domestic and stock purposes. The Department published receipt of the application on its website on September 29, 2025. A preapplication meeting was held between the Department and the Applicant on February 4, 2025, 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 August 1, 2025. The Department delivered the analyses on September 22, 2025. The application was determined to be correct and complete as of October 14, 2025. An Environmental Assessment for this application was Completed on November 26, 2025. The Department provided notice of opportunity to provide public comments to this application per § 85-2-307(4), MCA on January 21, 2026. The Department received two public comments, and this updated Preliminary Determination addresses those public comments.

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:
    - Appendix A - Maps
    - Appendix B - General Abstracts of overlapping water rights 76LJ 311 00 and 76LJ 94396 00, 76LJ 94396 00 well log (GWIC 146215) and RLK Hydro Map of 76LJ 311 00 historic irrigation, dated April 7, 2010

- Appendix C – Email correspondence between Consultant and Water Sciences Bureau employee Kim Bolhuis, Irrigation Water Requirements calculation sheet, Form No 633 Aquifer Test Data
- Appendix E – Production well log (GWIC ID 331749), Grundfos pump curve, Well Buster Arteisian Well Packer installation manual and data sheet, Cornell Centrifuge Booser Pump Specifications and performance curves, sprinkler specifications (Micro Rain MR58, Rain Bird 5000 series rotor, K-rain 75 rotor, Orbit 5300 series rotor)
- Appendix F – Hydrogeologic Maps
- Appendix G – Proof of Possessory Interest – Warranty Deed
- Appendix H – DNRC Approvals (preapplication complete letter, technical analyses cover letter and Technical Analyses)

- Maps:
  - Vicinity Map, dated August 1, 2025
  - Supplemental POD & POU Map, dated August 1, 2025
  - POU Irrigation and Types Map, dated August 1, 2025
  - Water Line Detail Map, dated August 1, 2025
  - Potentiometric Map, dated August 1, 2025
  - Pump House Map, dated August 1, 2025
  - Hydrogeologic Maps
    - Surficial Geologic Map, LaFave, undated
    - Depth to Deep Alluvium, LaFave, undated
    - Contours of Perched Aquifers in Kalispell, Konizeski, undated
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated September 22, 2025.

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

- Department granted variance from aquifer testing requirements ARM 36.12.121(3)(a) and (3)(g)
- Aquifer Test Report by DNRC Water Sciences Bureau Groundwater Hydrologist Kim Bolhuis
- Mean monthly stream flow data for the Flathead River from USGS Gaging Station No. 1236300. Period of record: October 1951 - March 2025

- List of existing surface water rights on the Flathead River from USGS Gaging Station No. 12363000 at Columbia Falls, MT, down to the point of depletions.
- List of existing groundwater rights in the source aquifer that are expected to experience drawdown greater than one foot.

- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Missoula Regional Office at 406-721-4284 to request copies of the following documents. The Department Standard Practice for Determining Physical Availability of Surface Water and Determining Ara of Potential Impact Analysis can also be found in the Permit Manual.
  - Department Standard Practice for Determining Physical Availability of Surface Water
  - Department Standard Practice for Determining Area of Potential Impact Analysis
  - DNRC 2019 Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
  - Technical Memorandum: DNRC's Use of the Irrigation Water Requirements (IWR) Program, dated February 4, 2013.

Public Comments Received

- The Department received two comments for the Preliminary Determination. One comment (C. Ted and Debra N. Roundy) received was not considered because the submitted form did not include any narrative response of how the permit application criteria was not adequately addressed in the preliminary determination. The Department has considered one public comment (Barbara Schroeder) on the adverse effect analysis and has updated the criteria analysis for adverse effect. The public comments received can be found in the administrative file.
  - One public comment was received regarding adverse effect. That comment expressed concerns of protecting water supply and potential drawdown to their groundwater right (well). The Department has considered this comment and has not modified the criteria analyses or preliminary determination decision.

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

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; AF/AC means acre-feet per acre; BGS means below ground surface, and TDH means total dynamic head.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater by means of a single well (GWIC ID: 331749, completed to 480-feet BGS) in Government Lot 6 in the SENWSE of Section 33, Township 28N, Range 20W, Flathead County. The proposed uses of water are 2.10 acres of lawn and garden irrigation, 14.22 acres of alfalfa irrigation, 0.68 acres of shelter-belt drip irrigation, stock and in-house domestic purposes. The stock use will consist of 150 chickens, 8 horses, 4 cows and 15 sheep (totaling 20.5 AUs) and the domestic use is requested for a single residential dwelling. Diversions will occur from April 15 to October 15 for irrigation and lawn and garden purposes and from Janurary 1 to December 31 for the stock and domestic purposes. The Applicant requests to divert water at a maximum rate of 99.8 GPM, with a total diverted volume of 41.86 AF. Of the requested volume, 35.98 AF will be used for irrigation purposes, including 34.28 AF for alfalfa irrigation and 6.95 AF for lawn and garden (which encompasses 1.7 AF for shelterbelt irrigation). The domestic use will use 0.28 AF and 0.35 AF will be used for stock watering. The Place of Use (POU) is in the S2N2SE of Sec. 33, Township 28N, Range 20W, Flathead County. Figure 1 below shows the proposed Point of Diversion (POD) and POU.

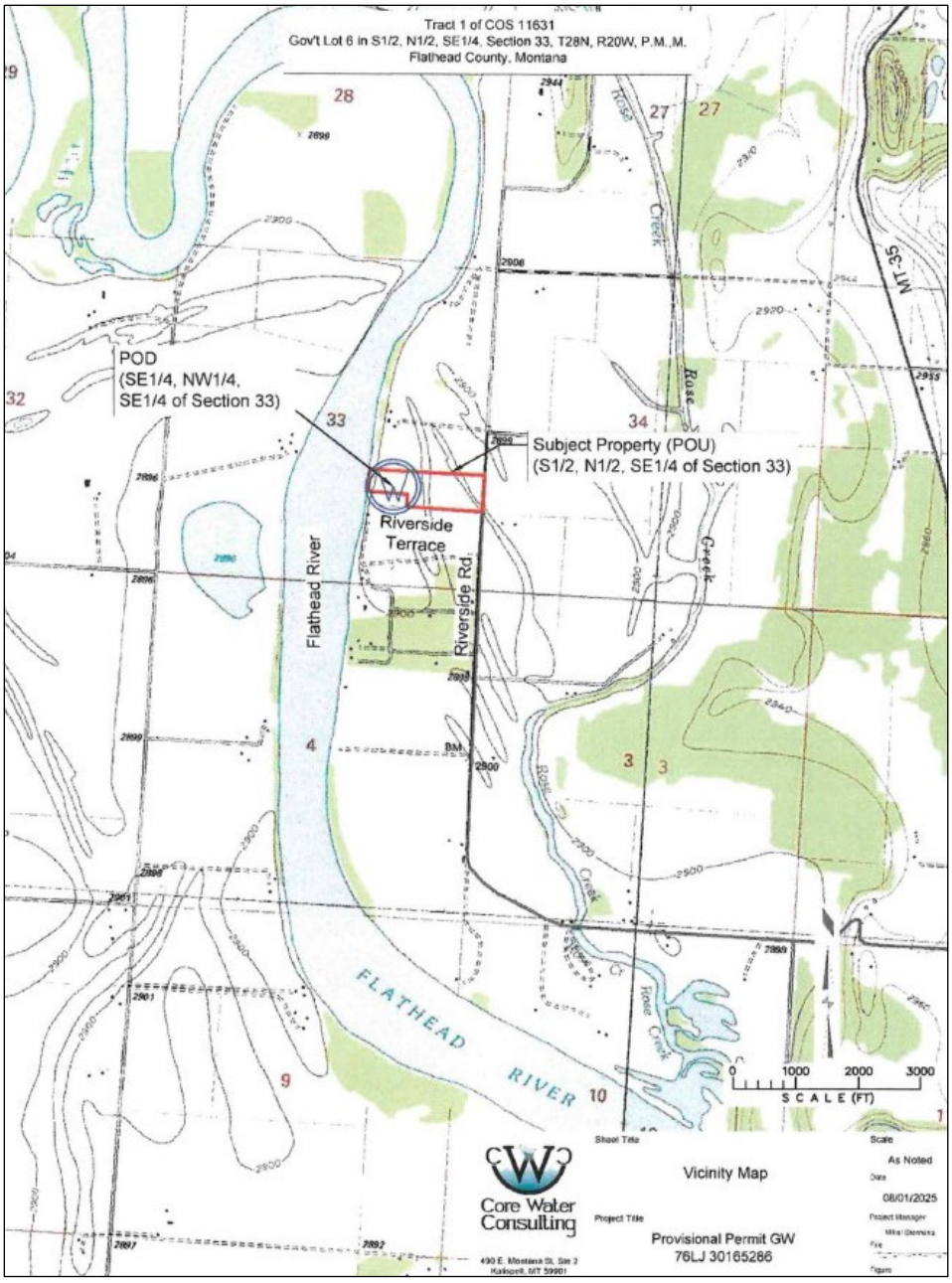

Figure 1. Map of the proposed place of use and point of diversion

2. The proposed POD is located approximately 0.07 miles east of the Flathead River and approximately 0.95 miles west of an intermittent reach of Rose Creek. The POD is in Department Administrative Basin 76LJ (Flathead River, to and including Flathead Lake), and in an area that is not subject to water right basin closures or controlled groundwater areas.

3. The Applicant is co-owner of overlapping irrigation Statement of Claim 76LJ 311 00, which authorizes irrigation from the Flathead River via three POD's on the Applicant's property and several other adjacent properties. The claimed place of use of 76LJ 311 00 completely overlaps with the proposed lawn and garden, alfalfa and shelter-belt irrigated POU's. Due to destabilization of the riverbank at the Applicant's diversion intake under 76LJ 311 00, as well as necessary repairs of the diversion infrastructure, the Applicant requests to divert groundwater under this proposal to supplement the irrigation use from right 76LJ 311 00. The Applicants are also owners of Groundwater Certificate 76LJ 94396 00 for a single domestic purpose and 0.5 acres of lawn and garden irrigation. The proposed water use under this application will not be supplemental to right 76LJ 94396 00 as the proposed domestic use is for a separate structure yet to be built, and the lawn and garden use will not coincide with that authorized under 76LJ 94396 00.

4. The Applicant plans to use a totalizing flow meter to record their annual diversions. To satisfy the Adverse Effect criterion, the proposed provisional permit will be subject to the following condition upon issuance:

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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

§ 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

FINDINGS OF FACT

11. The Applicant proposes to divert groundwater at 99.8 GPM up to 41.86 AF per year for crop, lawn and garden and shelter-belt irrigation, domestic and stock purposes. The applicant proposes using 34.28 AF for to irrigate 14.22 acres of alfalfa, 1.70 AF for 0.68 acres of shelter-belt irrigation, 5.25 AF for 2.10 acres of lawn and garden irrigation, 0.28 AF for domestic and 0.35 AF for stock use.

12. To address the aquifer testing requirements of Administrative Rules of Montana (ARM) 36.12.121, the Applicant submitted Form 633 – Aquifer Test Data Form and Form 653 – Aquifer Variance Request on behalf of ARM 36.12.121(3)(a) and 36.12.121(3)(g). These variances were requested to allow the Applicant to depart from the average pumping rate by more than +/- 5% and deviate from monitoring background water levels in the production well and observation well for at least two days prior to beginning the aquifer test. The Applicant experienced fluctuations in the first 30 minutes of the test and background data was collected 40 minutes less than the two-day period as required by ARM 36.12.121(3)(g). The Department granted all requested variances on July 30, 2025.

13. The observation well used during aquifer test (GWIC ID: 146215, used for the Applicant’s groundwater domestic/lawn and garden right 76LJ 94396 00) was completed in the Deep Alluvial Aquifer and had virtually no drawdown (0.33 ft). For estimation of the aquifer properties, the Department designated the production well as penetrating well within the bedrock aquifer. The

Department also reviewed several nearby aquifer tests completed in the bedrock aquifer from the Flathead Valley to compare the aquifer properties.

14. The Department determined that the proposed well is appropriating groundwater from a bedrock aquifer. The Department evaluated groundwater availability in the source aquifer based on the Berglund et al. (2024) groundwater budget for the east Flathead Valley Basin-fill aquifer system (see figure 7 in the Groundwater Permit Technical Analyses Report- Part A). Recharge into the aquifer system totals on average 57,137 AF per year and includes lake infiltration, mountain block, surficial mountain-front, and areal recharge, and groundwater inflow along the southern boundary of the study area. Berglund et al., (2024) suggest the Deep Aquifer is semi-confined in areas with more regional hydraulic connection to the shallower aquifer and bedrock of the Swan Mountain Range.

15. The Department finds that the amount of groundwater the Applicant seeks to appropriate, 99.8 GPM and 41.86 AF, is physically available in the source aquifer for the Applicant's proposed uses and their respective proposed periods of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

Legal Availability of Groundwater

16. The Applicant proposes to divert groundwater at 99.80 GPM up to 41.86 AF per year for domestic, stock, lawn and garden irrigation, and crop and shelterbelt irrigation. Physical groundwater availability for comparison with legal demands was evaluated by calculating groundwater flux through the ZOI corresponding to the 0.01-foot drawdown contour.

17. The Department determined the legal availability of water in the source aquifer by subtracting legal demands of existing water rights in the ZOI of the proposed POD from the amount of water physically available in the source aquifer.

18. Physically available groundwater volume within the ZOI was found to be 57,137 AF per year. There are 3,009 groundwater rights (legal demands) within the ZOI, the total volume of which will be compared to the physically available groundwater volume within the ZOI. All groundwater rights in the East Flathead study area (Berglund et al., 2024) were quantified for the legal demands.

19. The area of the proposed water use is not within a controlled groundwater area. Currently under § 85-2-306, MCA, the maximum volume allowed under a Certificate outside a controlled

groundwater area is 10 AF. For those Certificates in the Technical Analysis Report – Part A, Appendix A without specific volumes, the Department assigned a volume of 10 AF to each right.

20. The Technical Analyses Report – Part A, Appendix A also included Statement of Claims and without assigned volumes. For the Statement of Claims, Department allocated the volume claimed on the original application if it was reasonable to the Department's standards for that purpose found in ARM 36.12.115. If the volume was not reasonable, the Department calculated the volume based on the water use standards in ARM 36.12.115. For irrigation claims without volumes, the table in ARM 36.12.115(2)(e) was used, with a low range of 60% efficiency and the lower number of the range given for that efficiency in the appropriate climatic area/region. The number of acres on the water right was multiplied by the lower number of the range in the climatic area. A list of these water rights (both with assigned volumes and those without) are in the administrative file for this Application.

21. The groundwater rights within the ZOI have a calculated total annual appropriation of 33,820.8 AF per year. Subtracting the legal demands of 33,820.8 AF from the calculated volume of 57,137 AF of annual recharge in the aquifer leaves a remainder of 23,316.2 AF (57,137 AF physically available – 33,820.8 AF of legal demands) of groundwater legally available.

22. The Department finds groundwater to be legally available for the proposed appropriation of 99.8 GPM and up to 41.86 AF during the proposed period of use.

23. The Department identified two potentially hydraulically connected surface water sources, the Flathead River and Rose Creek. Due to the depth of the production well and the presence of overlying aquifers and thin confining layer, net depletions from pumping in the bedrock aquifer will result in year-round depletions to the Flathead River. The Department determined that the proportion of net depletions that would accumulate in the Flathead River is 99%, while Rose Creek would receive 1%. When connected surface water sources receive less than 10% of modeled depletions, it is the Department's standard practice to exclude them from consideration. Therefore, all net depletions from the proposed groundwater use were apportioned to the Flathead River.

24. The Department evaluated physical groundwater availability by calculating groundwater flux through the Zone of Influence (ZOI) determined by a 0.01-foot drawdown contour surrounding the point of diversion. The ZOI was calculated using the Moench (1984) solution with a transmissivity (T) value of 542.5 ft^2/day. No storativity value could be derived from the aquifer test data so the Department used the matrix storativity of 0.0004 from a nearby bedrock aquifer test (water right 76LJ 30069431). The Department's Water Sciences Bureau did not define the range of the ZOI,

but they calculated that 1-foot drawdown contour extends out to the bedrock boundary at the end of the fifth year of pumping of the proposed annual pumping schedule. (The pumping schedule is represented in Table 7 of the Technical Analyses- Part A). Based on the pumping schedule, the Flathead River was modeled to experience a total of 29.24 AF of net depletions, occurring throughout every month of the year. The depletions also occurred at a constant rate of 18.13 GPM each month (see Table 2 in the Technical Analyses- Part A).

25. The Department determined that depletions to the Flathead River would begin along the western edge of the SENWSE of Section 33, Township 28N, Range 20W, Flathead County. Physical availability of the Flathead River from USGS Gaging Station No. 12363000 to the point of depletions was quantified monthly. The Department used the Flathead River at Columbia Falls, MT USGS Gaging Station No. 12363000 (entire period of record October 1951 – March 2025) to quantify the physically available monthly flow rates and volumes in this reach during the period of groundwater diversion and resulting year-round surface water depletions. USGS Gage No. 12363000 is the nearest gage to the initial point of depletions on Flathead River and is approximately 30.5 miles upstream of the beginning of the depleted reach. To calculate physical availability at the point where depletions begin, the Department subtracted the flow rate of the existing water rights from the median of the mean monthly flow obtained from the gage data. **Table 1** below displays the amount of water physically available in the Flathead River at the initial point of depletion.

Table 1. Physical Availability at the proposed point of diversion

Table 2: Physical Availability of the Flathead River at the Initial Point of Depletion					
A	**B**	**C**	**D**	**E**	**F**
Month	**Median of the Mean Monthly Flow at Gage 12363000 (CFS)**	**Median of the Mean Monthly Volume at Gage 12363000 (AF)**	**Existing Rights from Gage 12363000 to the Initial Point of Depletion (CFS)**	**Physically Available Flow at the Initial Point of Depletion (CFS)**	**Physically Available Volume at the Initial Point of Depletion (AF)**
January	5,074.0	311,442.1	1.7	5,072.3	311,336.5
February	4,750.0	263,340.0	1.7	4,748.3	263,244.6

March	4,739.0	290,879.8	2.4	4,736.6	290,733.7
April	10,535.0	625,779.0	60.0	10,475.0	622,217.4
May	22,645.0	1,389,950.1	116.6	22,528.5	1,382,796.3
June	24,615.0	1,462,131.0	130.1	24,484.9	1,454,401.9
July	11,280.0	692,366.4	130.1	11,149.9	684,379.6
August	5,403.5	331,666.8	129.1	5,274.4	323,741.4
September	4,423.5	262,755.9	114.2	4,309.3	255,974.2
October	4,903.0	300,946.1	56.9	4,846.1	297,454.2
November	4,527.0	268,903.8	1.7	4,525.3	268,801.6
December	5,498.0	337,467.2	1.7	5,496.3	337,361.7

Legal Availability of Surface Water

26. The Department determined in its technical analysis that Rose Creek and the Flathead River were hydraulically connected to the source aquifer from which the Applicant proposes to appropriate water from. Rose Creek is approximately 5,053 feet from the production well and the Flathead River is approximately 409 feet from the production well. Per procedures described in Section 3.2 of a guidance document developed by the Province of British Columbia (2016) for determining the effect of groundwater diversion on specific streams, depletions are apportioned through an iterative process based on invers-distance squared stream weights (see Section 8.2 of the Department's Technical Analyses – Part A). Any streams experiencing less than 10% of total depletions are eliminated from consideration. Rose Creek was determined to receive 1% of net surface water depletions, so all net surface water depletions were apportioned to the Flathead River for the purpose of the legal availability analysis.

27. The location where surface water depletions begin to accrue to the Flathead River was identified as the western edge of the SENWSE, Section 33, Township 28 North, Range 20 West, Flathead County (see Figure 9 on Page 22 of the Department's Technical Analyses – Part A). Depletions to surface water were assumed to be equivalent to the amount of water consumed on an annual basis. The Applicant proposes to divert water for lawn and garden, crop and shelterbelt irrigation, domestic use and stock use. For the 2.78 acres of lawn and garden and shelter-belt irrigation, the Department standard of 2.5 AF/AC was used with an irrigation efficiency of 70%. The consumed volume for lawn and garden and shelter-belt irrigation was calculated to be 4.87 AF (2.5 AF/AC x 2.78 AC x 0.7). Consumptive use for 14.22 acres of alfalfa irrigation was calculated using a diverted volume of 2.41 AF/AC and an irrigation efficiency of 70% to calculate a consumed volume of 24.0 AF (2.41 AF/AC x 14.22 AC x 0.7). The standard percentage of consumption for domestic use with waste drainfields was determined to be 10% of the total

domestic volume. The Applicant is requesting 0.28 AF for domestic use and the domestic consumed volume is calculated to be 0.03 AF. Stock use consists of a diverted volume of 0.35 AF and is considered 100% consumed. The Department determined that total consumption/depletion to the Flathead River was 29.24 AF, occurring year-round. The amount and timing of those depletions was modeled by the Department, and they are shown in **Table 2** represents the consumed volumes and associated net depletions to the Flathead River.

Table 2. Monthly depletions to the Flathead River

Month	Lawn and Garden Consumed Volume (AF)	Crop Irrigation Consumed Volume (AF)	Stock Consumed Volume (AF)	Domestic Consumed Volume (AF)	Total Consumed Volume (AF)	Flathead River Net Depletion (AF)	Flathead River Net Depletion (GPM)
January	0	0	0.03	0.002	0.03	2.48	18.13
February	0	0	0.03	0.002	0.03	2.24	18.13
March	0	0	0.03	0.002	0.03	2.48	18.13
April	0.07	0	0.03	0.002	0.11	2.40	18.13
May	0.6	1.75	0.03	0.002	2.4	2.48	18.13
June	0.94	5.44	0.03	0.002	6.41	2.40	18.13
July	1.38	7.63	0.03	0.002	9.04	2.48	18.13
August	1.24	6.66	0.03	0.002	7.93	2.48	18.13
September	0.59	2.52	0.03	0.002	3.14	2.40	18.13
October	0.03	0	0.03	0.002	0.06	2.48	18.13
November	0	0	0.03	0.002	0.03	2.40	18.13
December	0	0	0.03	0.002	0.03	2.48	18.13
Total	4.87	24.0	0.35	0.03	29.24	29.24	

28. The local area of potential impact is defined as the section of the Flathead River from the point where depletions begin, downstream to the inlet of Flathead Lake. The impacted area was not extended downstream into Flathead Lake since that source is well characterized as having positive legally availability for its existing users based on its storage volume, the flow-through of the Flathead River, and the contribution of water from the Swan River.

29. To assess if water is legally available in the locally depleted reach of the Flathead River in excess of the modeled depletions, the Department conducted a legal availability analysis of the Flathead River from USGS Gage # 12363000 “Flathead River at Columbia Falls” downstream to the inlet of Flathead Lake. The legal demands of water rights with points of diversion in this reach

were analyzed to calculate the legal availability of water in the Flathead River at the point of depletions.

30. The comparison between physically available and legally available water in the Flathead River is shown in Table 3 below, indicating that surface water is legally available for the proposed appropriation in every month of the year.

Table 3. Flathead River legal availability in locally depleted reach.

Month	Physical Availability at Effected Reach (CFS)	Physical Availability In Effected Reach (AF)	Existing Legal Demands in Effected Reach (CFS)	Existing Legal Demands at Effected Reach (AF)	Physical Availability - Legal Demands (CFS)	Physical Availability - Legal Demands (AF)
January	5,074.0	311,442.1	3,502.3	214,973.0	1,571.7	96,469.1
February	4,750.0	263,340.0	3,502.3	194,169.2	1,247.7	69,170.8
March	4,739.0	290,879.8	3,503.0	215,013.5	1,236.0	75,866.3
April	10,535.0	625,779.0	6,671.8	396,304.3	3,863.2	229,474.7
May	22,645.0	1,389,950.1	8,164.8	501,154.2	14,480.2	888,795.9
June	24,615.0	1,462,131.0	8,165.3	485,016.4	16,449.7	977,114.6
July	11,280.0	692,366.4	8,165.3	501,183.6	3,114.7	191,182.8
August	5,403.5	331,666.8	3,540.3	217,301.1	1,863.2	114,365.7
September	4,423.5	262,755.9	3,540.2	210,289.0	883.3	52,466.9
October	4,903.0	300,946.1	3,522.0	216,181.0	1,381.0	84,765.2
November	4,527.0	268,903.8	3,502.4	208,042.0	1,024.6	60,861.8
December	5,498.0	337,467.2	3,502.3	214,973.0	1,995.7	122,494.2

31. The Department finds the proposed appropriation of 99.8 GPM and up to 41.86 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

32. In the event a legitimate call for water is made, the Applicant first proposes to reduce irrigation by 50 percent, and then fully cease irrigation if water shortages persist or a call to cease all diversion is received. Similarly, domestic use will be reduced by 50% initially, and then fully discontinued if a call to cease all diversion is received. In this scenario the Applicant will

temporarily obtain their potable water until the call is lifted. The Department finds these measures to be reasonable plans of control.

33. Using the Moench (1984, slab blocks) solution for double-porosity aquifers, saturated thickness (b) of 205 feet, data from the Applicant's 24-hour aquifer test and estimations of aquifer properties, the Department modeled whether any existing wells in the source aquifer near the proposed well would experience drawdown of 1-foot or more. Due to the presence of till, and that the production well was completed within approximately 200 feet of the bedrock aquifer, adverse effect to existing groundwater wells was considered only in those nearby wells also completed in the bedrock aquifer.

34. Drawdown was modeled at the end of July, the month with the highest pumping rate, in the fifth year of pumping and the 1-foot drawdown contour extends out to the bedrock boundary, as shown in Figure 9 on Page 17 of the Department's Technical Analyses – Part A. The assumed proposed monthly pumping schedule for the proposed well is described in Table 7 of the Department's Technical Analyses – Part A.

35. The Department modeled that drawdown greater than 1-foot occurs within 16 groundwater rights, listed in Table 4 below. Of those 16 water rights, those with known depths and static water levels will have remaining water columns.

Table 4. Groundwater rights modeled to experience 1 foot or more of drawdown

Water Right	Owner(s)	Well Depth (ft)	Static Water Level (ft)	Drawdown	Distance from Proposed Well (ft)
76LJ 30015318	LUCKE, PATRICIA KATHERINE REVOCABLE TRUST	400	82	1.8	965.4
76LJ 30171415	EAKIN-BECK REVOCABLE TRUST	0	0	1.8	1000.7
76LJ 30109261	DUBLIN, H GRADY LIVING TRUST	620	0	1.8	1000.7
76LJ 36824 00	DIETRICH LIVING TRUST	0	0	1.8	1000.7
76LJ 30015827	COLEEN R BAARS	365	0	1.5	1704.2
76LJ 30133878	KATHY H KUSLER; PAUL W KUSLER	320	2.5	1.5	1720.0
76LJ 30164721	CHARLES E ASH; SUSAN E NEUMAN ASH	225	0	1.5	1720.0
76LJ 39821 00	JAMES B TROYER	195	0	1.5	1813.2

76LJ 39822 00	JAMES B TROYER	195	0	1.5	1813.2
76LJ 68860 00	JEANNE M HEINE; TYLER J HEINE	0	0	1.4	1991.0
76LJ 30149238	RICE FAMILY TRUST	320	0	1.4	2212.7
76LJ 116248 00	VICTORIA BALDWIN; EVAN MUELA	360	0	1.4	2216.0
76LJ 60951 00	CALVIN T ROUNDY; DEBRA N ROUNDY	425	60	1.3	2403.6
76LJ 73507 00	KATHLEEN A WINKLEY	0	0	1.3	2403.6
76LJ 40498 00	ROBERTA J WHITE	0	0	1.2	2835.3
76LJ 1021 00	RALPH L BENJAMIN; RUBY A BENJAMIN; GILDART FAMILY TRUST	414	0	1.2	2835.3

36. The Applicant's groundwater appropriation will result in 29.24 AF of depletions to the Flathead River. When comparing the physical availability and legal demands on the Flathead River, the Department demonstrated that water is always available for the proposed appropriations (see Tables 1 and 2 in the physical and legal availability criteria sections above).

37. To ensure that the permitted volume is not exceeded and that senior water users are not adversely affected, upon issuance the provisional permit will be subject to the measurement condition described in Finding of Fact No. 4.

38. The Department finds the propsed use of 41.86 AF diverted volume, 29.24 AF of consumed volume and 99.8 GPM will not have an adverse effect on existing water users.

ISSUES RAISED BY PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSE

39. The Department considered one comment regarding adverse effect (Schroeder). This comment raised two issues.

40. Issue 1: That the project will adversely affect the drawdown levels of nearby wells. The commentor cited that the water level in their well dropped, and that they recently needed to deepen their well as a result. The commenter further stated that the application does not adequately address how drawdown in nearby wells will be mitigated or monitored and requested that the Applicant shows how they are maintaining their neighbor's drawdowns within the 1.8 feet. Response 1: The Department determined the area of potential adverse effect (1-foot drawdown contour) using the following inputs: estimated aquifer properties of the east Flathead Valley basin-fill aquifer system and proposed pumping schedule for five years. For this permit application, the

Department's modeling identified 16 groundwater rights with wells completed in the bedrock aquifer that may experience at least one foot of drawdown after five years. These water rights are listed in Finding of Fact (FOF) No. 35 above. The Department's modeling determined drawdown would occur in wells with both known and unknown depths and static water levels. All water rights with wells with known depths and static water levels are modeled to have remaining water columns after 5 years of pumping. The commentor owns Groundwater Certificate 76LJ 92352-00 for domestic and lawn and garden purposes. The characteristics of the well associated with this water right (static water level, total depth, well casing diameter, etc.) are unknown as the water right filing does not include a well log. This groundwater right is located within the area of potential adverse effect for which the Department modeled greater than 1-foot of drawdown to existing wells. However, right 76LJ 92352-00 was not modeled to experience any drawdown. The commentor also expressed the need for the Applicants to maintain drawdown to the neighboring wells. The 1.8-foot drawdown figure is the maximum amount of drawdown modeled by the Department for this application. Pursuant to § 85-2-401, MCA, the commentor did not provide facts indicating they would not be able to reasonable exercise their water right after the proposed appropriation.

41. Issue 2: The commenter felt that the Applicants should show how they are preventing excess irrigation.

42. Response 2: If the Provisional Permit is approved, the Applicants will be required to install an in-line flow meter (measuring device) and submit annual water use records to the Department. If granted, the Applicant will be limited to the irrigation volume authorized by this permit.

43. The public comment received regarding this application regarding the Department's analysis of the adverse effect criterion has been addressed in FOF 39-42. The information supplied by the commentor does not demonstrate that the adverse effect criterion was inadequately addressed and the Department will not reevaluate this criterion.

44. Considering the public comment and the original analysis conducted, the Department finds that the proposed use of 99.8 GPM and 41.86 AF will not have a known adverse effect because the amount of water requested is physically and legally available and the Applicant's plan to prevent adverse effects to existing water rights is considered adequate.

45. 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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

46. The means of diversion consists of a single 6-inch, 480-foot deep well (GWIC ID 331749). The Applicant intends to install a Grundfos (SP77S100-20) 10 horsepower submersible pump with a Well Buster flowing artesian well packer to control the water pressure. A Cornell centrifuge Booser Pump (Model 2 YH) will provide increased pressure (from 55PSI to 105 PSI) for the 1,200-ft crop irrigation mainline.

47. The well will be enclosed within a pump house building. According to the Applicant's map, various infrastructure including two pressure tanks, two blowoff valves and a relief valve will be present in the pump house. A 2-inch galvanized pipe will supply water from the well to the pump house infrastructure.

48. From the pump house, two separate 1.5-inch HDPE C901 lines will supply water to the horse barn, the residential dwelling and multiple frost-free yard hydrants used for lawn and garden irrigation and stock watering. One 1.5-inch line will be 300-ft, delivering water to the hydrants for lawn and garden irrigation and stock watering. The other line will be 250 feet long, distributing water to the residential dwelling and horse barn. Drip irrigation lines for shelter belt irrigation are anticipated to be connected to the 1.5-inch mainline and irrigation distribution box(es) will divide the system into irrigation drip zones for the shelter belt perimeter. A separate 3-inch HDPE C901 water line will divert water from the pump house to nine risers for alfalfa irrigation. A valve will allow water to be shut off for irrigation purposes as needed and when the season ends.

49. The Applicant's 24-hour pump test showed that the well can sustain an average pumping rate of 109.5 GPM. The Applicant provided a pump curve for the Grundfos SP 722S100-20 pump, showing that the pump can supply the proposed flow rate of 99.8 GPM.

50. The Department's analysis of drawdown in the Applicant's well casing found that at the end of the first year of pumping at a schedule assumed from the Irrigation Water Requirements, the Applicant's well would experience drawdown of 89.2 ft, and the remaining water column would be 370.8 ft.

51. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

52. The Applicant proposes to divert groundwater from a single well at a maximum rate of 99.8 GPM up to an annual volume of 41.86 AF. Water will be diverted from January 1 to December 31 for domestic and stock uses. Irrigation use will occur from April 15 to October 15 and include 34.28 AF for crop irrigation, 5.25 AF for lawn and garden and 1.70 AF for shelter-belt drip irrigation.

53. The domestic and stock volumes described above were calculated using the standards provided in ARM 36.12.115. The volumes are reasonable for the propsed uses.

54. The lawn and garden and shelter-belt irrigation volumes described above are based on DNRC's standard of 2.5 AF/AC. This figure is reasonable and was calculated using the stardards found in ARM 36.12.115(2)(b).

55. The propsoed proposed irrigation place of use lies within USDA NRCS Climatic Area lll. The requested crop irrigation of 34.28 AF (for 14.22 acres) equals a diverted volume of 2.41 AF/AC and corresponds with the high end of the Department's standards for climatic area lll for 70% sprinkler irrigation (2.08 - 2.41 AF/AC), per ARM 36.12.115(2)(e). The irrigation periods of diversion also fall within the Department's standards for climatic area lll found in ARM 36.12.112(1)(c)(iii).

56. The Applicant states that crop irrigation will occur for 12 hours each day water is used during the irrigation season. The requested flow rate of 84.78 GPM for 14.22 acres equals 5.96 GPM per acre, which is low for sprinkler irrigation. However, the Applicant states that crop irrigation will be supplemental to irrigation from Flathead River water right 76LJ 311 00, so the respective flow rate/acre is acceptable.

57. Right 76LJ 311 00 is co-owned by the Applicants and authorizes a total of 88.10 acres from three separate points of diversion. The Applicant is requesting additional groundwater use, as their respective point of diversion (in the SENWSE Section 33, Township 28 North, Range 20

West) from 76LJ 311 00 is currently unusable due to riverbank destabilization. The Applicant states that right 76LJ 311 00 will be supplemental to the propsed use. A prior change authorization (No. 76LJ 30048725) was granted for right 76LJ 311 00 adding the third point of diversion to the right. In the analysis for the previous change, the historic place of use was verified, and it completely covers the Applicant's 20.24 acre parcel (Geocode 07-3967-33-1-01-03-0000). The Department's historic water right analysis allocated a total historical diverted volume of 178.2 AF, or 2.02 AF/AC and a total consumed volume of 108.9 AF, or 1.23 AF/AC. Based on the IWR dry year (80% chance) figures of 20.25 inches/acre and 1.68 AF/AC calculated for the subject property, the crop irrigation will require additional water. The use of water under 76LJ 311 00 in conjuction with supplemental use under this permit application is reasonable.

58. Existing groundwater certificate 76LJ 94396 00 provides domestic use for the existing home at the place of use and 0.5 acres of lawn and garden around the home. Water is provided by a 6-inch well (GWIC ID: 146215). The Applicant states that this right will be supplemental to this permit application, but the maps provided do not represent overlapping domestic or lawn and garden places of use. The actual use of water under right 76LJ 94396 00 is not supplemental to the groundwater proposed by this permit application.

59. The Department finds the proposed water use is beneficial, and that the requested flow rate of 99.8 GPM and annual volume of 41.86 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

60. The Applicant signed the application form affirming that the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. A warranty deed was also included in the Application materials, proving that the Applicants have possessory interest in the place of use and point of diversion.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

61. 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."

62. 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).

63. 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).

64. Applicants have agreed to conditions which require diversion be shut off during low flow events, and there is no evidence that sufficient water to maintain adequate fish environment is otherwise physically available, § 85-2-311(1)(a), MCA, is not met. *In the Matter of Application for Beneficial Water Use Permit No. 67324-s76D by Dean Keim and Mike Krueger* (DNRC Final Order 1990).

65. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001).

66. 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

67. 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).

68. 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.

69. Pursuant to *Montana Trout Unlimited v. DNRC*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. *E.g., Wesmont Developers v. DNRC*, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (mitigation of depletion required), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also Robert and Marlene Takle v. DNRC et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), and *Perkins v. Kramer*, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing Loyning v. Rankin* (1946), 118 Mont. 235, 165 P.2d 1006; *Granite Ditch Co. v. Anderson* (1983), 204 Mont. 10, 662 P.2d 1312; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.* (1906), 34 Mont. 135, 85 P. 880); *In*

the Matter of Beneficial Water Use Permit No. 63997-*42M by Joseph F. Crisafulli* (DNRC Final Order 1990) (since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by Applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage).

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

71. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. *Robert and Marlene Takle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007 *)*(permit granted*), affirmed*, *Montana River Action Network et al. v. DNRC*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5

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

72. 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.

73. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

74. 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 16-31).

ADVERSE EFFECT

75. 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.

76. 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).

77. 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).

78. 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).

79. 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.

80. 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).

81. 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 32-45).

ADEQUATE DIVERSION

82. 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.

83. 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.

84. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

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

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

87. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

88. 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 46-51).

BENEFICIAL USE

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

90. 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).

91. 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).

92. 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*.

93. Applicant proposes to use water for crop, lawn and garden and shelter belt irrigation and stock and domestic purposes, which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that these purposes are a beneficial use and that 48.24 AF of diverted volume and 99.8 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 52-59).

POSSESSORY INTEREST

94. 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.

95. 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.

96. 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 60).

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 30165286 should be GRANTED.

The Department determines the Applicant may divert water from the groundwater by means of a 480-foot well from January 1 through December 31 for domestic and stock uses, and from April 15 through October 15 for crop, lawn and garden and shelter-belt irrigation, at a total flow rate of 99.8 GPM up to 41.86 AF, from a point in the Gov Lot 6, SENWSE, Section 33, Township 28 North, Range 20 West, Flathead County. The Applicant may irrigate 14.22 acres of crop, 2.10 acres of lawn and garden and 0.68 acres of shelter-belt. The place of use is located in Gov Lot 6, S2N2SE, Section 33, Township 28 North, Range 20 West, Flathead County.

The application will be subject to the following conditions, limitations, or restrictions:
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 A FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES 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 public notice of this application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA

Dated this 20th day of March 2026.

Jim Nave, Manager
Missoula Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 20th day of March 2026, by first class United States mail.

DEAN WHITEHEAD AND LESLIE SVETICH
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and

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