

**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 30171486 BY PAUL AND DENA SZYMAREK)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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Paul and Dena Szymarek (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30171486 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation on September 16, 2025. The Applicant proposes diverting up to 1.08 acre-feet of volume annually at a flow rate of 30.0 gallons per minute from the Flathead River for domestic use and lawn and garden irrigation. The Department published receipt of the Application on its website on September 22, 2025. A preapplication meeting was held between the Department, the Applicant, and their consultant, Clinton Post, on July 30, 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 8, 2025. The Department delivered the completed Technical Analyses Report on September 12, 2025. The application was determined to be correct and complete as of October 7, 2025. An Environmental Assessment for this application was completed on November 26, 2025.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600.
- Attachments:
 - “POD – Size and Configuration of Infrastructure”
 - “POD – Pump System Details”

- “POD – Friction Loss Charts”
- Maps/Figures:
 - “POD – 1”
 - Project vicinity map
 - Detail project map
 - “POD – Operation Diagram”

Information within the Department’s Possession/Knowledge

- Mean monthly stream flow data from USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT. Period of record: October 1951 – November 2024.
- Mean monthly stream flow data from USGS Gaging Station No. 12362500 South Fork Flathead River near Columbia Falls, MT. Period of record: February 1911 – August 2024.
- List of existing surface water rights on the Flathead River from the proposed point of diversion (POD) down to USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT.
 - This list is further divided into two reaches:
 - The reach from the proposed POD down to the confluence of the South Fork Flathead River with the Flathead River; and,
 - The reach from the confluence of the South Fork Flathead River down to USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT.

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 Montana Department of Natural Resources and Conservation	
FWP means the Montana Department of Fish, Wildlife, and Parks	
AF means acre-feet	AOPI means the Area of Potential Impact
CFS means cubic feet per second	DEQ means the Department of Environmental Quality
GPD means gallons per day	GPM means gallons per minute
HDPE means high density polyethylene	POD means point of diversion
PSI means pounds per square inch	TDH means total dynamic head

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert Flathead River water by means of a pump at 30.0 GPM up to 0.45 AF/year for domestic use from January 1 – December 31 and 0.63 AF/year for irrigation of 0.25 acres of lawn and garden from April 25 – October 5 (1.08 AF/year total). The proposed POD is in the SENESE of Section 32, Township 31N, Range 19W, Flathead County, Montana (Figure 1). The proposed place of use is in Government Lot 6 in the SENESE of Section 32, Township 31N, Range 19W, Flathead County, Montana (Figure 1). 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.

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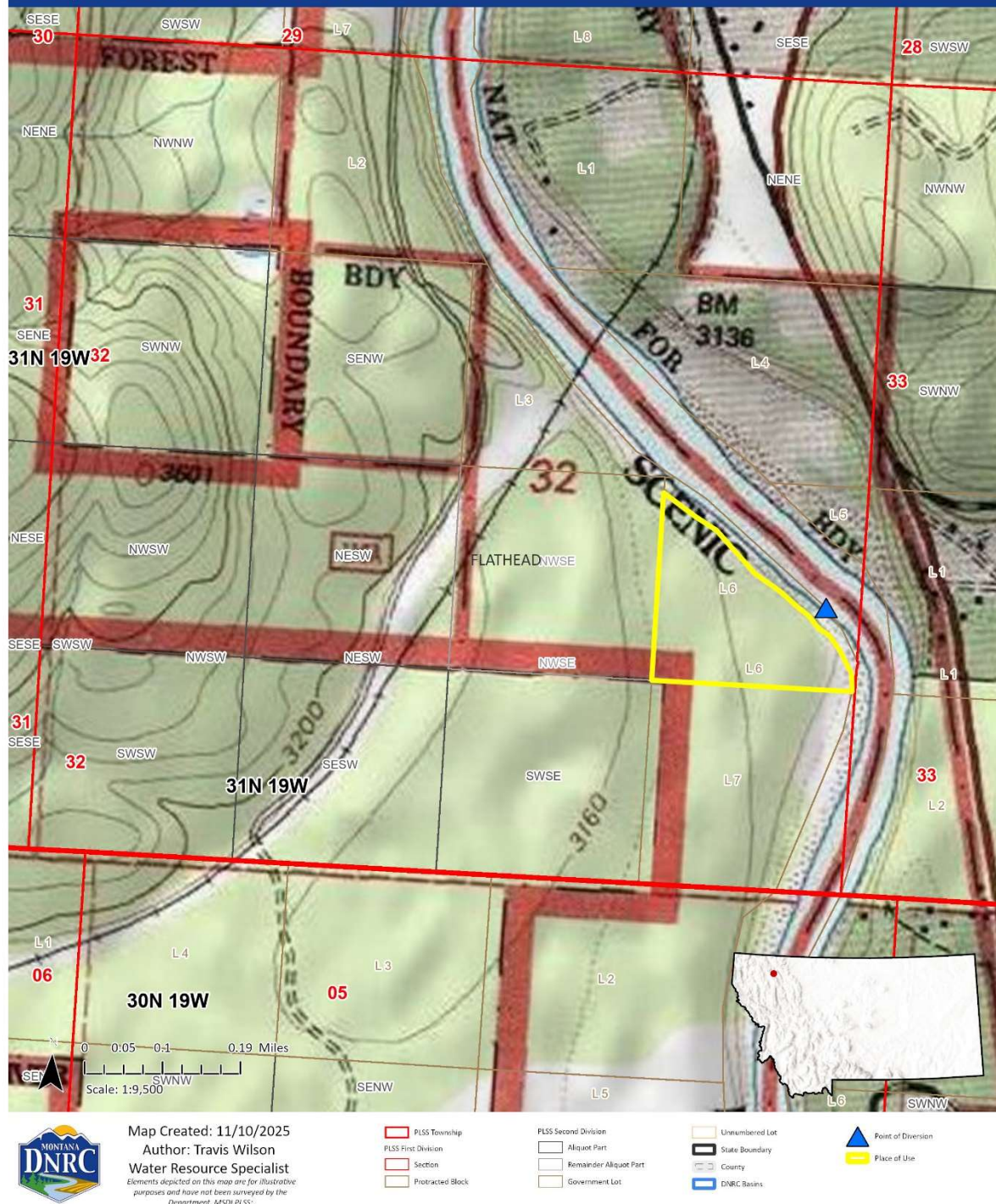


Figure 1: Map of the proposed place of use and point of diversion.

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

GENERAL CONCLUSIONS OF LAW

2. 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 . . .

3. 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.

4. 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.

5. 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).

6. 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.

7. 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

8. The Applicant proposes to divert Flathead River water at 30.0 GPM up to 0.45 AF/year for domestic use and up to 0.63 AF/year for irrigation of 0.25 acres of lawn and garden area (1.08 AF/year total). The Department used the Flathead River at Columbia Falls, MT USGS Gaging Station No. 12363000 (period of record: October 1951 – November 2024) and the South Fork Flathead River near Columbia Falls, MT USGS Gaging Station No. 12362500 (period of record: February 1911 – August 2024) to quantify the physically available monthly flow rates and volumes at the POD during the period of diversion and use (January 1 – December 31). USGS Gaging Station No. 12363000 is approximately 9.1 miles downstream of the proposed POD and is the nearest gaging station to the proposed POD on the Flathead River. The date range used includes the entire period of record for this gage. The South Fork Flathead River contributes flow and volume to the Flathead River between the proposed POD and USGS Gaging Station No. 12363000. The South Fork Flathead River flows into the Flathead River approximately 3.4 miles downstream of the proposed POD and 5.7 miles upstream of USGS Gaging Station No. 12363000. USGS Gaging Station No. 12362500 is the nearest gaging station on the South Fork Flathead River to its confluence with the Flathead River and is located approximately 3.6 miles upstream of this confluence. The date range used includes the entire period of record for this gage.

9. The Department calculated median of the mean monthly flow rates in CFS for the Flathead and the South Fork Flathead Rivers using records from USGS Gaging Station Nos. 12363000 and 12362500, respectively, for each month of the proposed period of diversion (Table 1, columns B and D, respectively). Those flows were converted to monthly volumes in AF (Table 1, columns C and E, respectively) using the following equation found in the DNRC Water Calculation Guide: median of the mean monthly flow (CFS) \times 1.98 (AF/day/1 CFS) \times days per month = AF/month. There are no existing water rights filed on the South Fork Flathead River between USGS Gaging Station No. 12362500 and the confluence with the Flathead River, so the monthly flows and volumes at the gaging station are representative of the monthly flows and volumes contributed to the Flathead River by the South Fork Flathead River (Table 1, columns D-E).

10. The Department calculated the monthly flows appropriated by existing users on the Flathead River between the proposed POD and USGS Gaging Station No. 12363000 (Table 1, column F) by:

- i. Generating a list of existing surface water rights (legal demands) from the proposed POD down to USGS Gaging Station No. 12363000 (Tables 2.1 and 2.2);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion;
- iii. Differentiating between diversionary uses and non-diversionary instream uses; and,
- iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

11. Since USGS Gaging Station No. 12363000 is downstream of the proposed POD, any diversions of water from the Flathead River between the proposed POD and USGS Gaging Station No. 12363000 must be added to the monthly gaging station values, while any additions of water between the proposed POD and USGS Gaging Station No. 12363000 must be subtracted from the monthly gaging station values in order to calculate the water physically available at the proposed POD. Since instream flow water rights are not diverted from the physical volume of water, they are not considered the calculations for physical availability.

12. The Department subtracted out the monthly flows of the South Fork Flathead River (Table 1, column D) from the monthly flows of the Flathead River at USGS Gaging Station No. 12363000 (Table 1, column B) and added in the monthly flows and volumes of the existing diverted water rights between the proposed POD and USGS Gaging Station No. 12363000 (Table 1, column F) to determine the physically available monthly flows at the proposed POD (Table 1, column G). Physically available monthly flows were then converted to monthly volumes (Table 1, column H).

Table 1: Physical Availability Analysis of the Flathead River at the Proposed POD							
A	B	C	D	E	F	G	H
	Flathead River		South Fork Flathead River				
Month	Median of the Mean Monthly Flow at USGS Gage No. 12363000 (CFS)	Median of the Mean Monthly Volume at USGS Gage No. 12363000 (AF)	Median of the Mean Monthly Flow at USGS Gage No. 12362500 (CFS)	Median of the Mean Monthly Volume at USGS Gage No. 12362500 (AF)	Existing Diverted Legal Demands between the Proposed POD and USGS Gage No. 12363000 (CFS)	Physically Available Water at the POD (CFS)	Physically Available Water at the POD (AF)
January	5,111.5	313,743.9	2,742.5	168,334.7	0.0	2,369.0	145,409.2
February	4,800.5	266,139.7	2,545.0	141,094.8	0.0	2,255.5	125,044.9
March	4,772.0	292,905.4	2,184.0	134,053.9	0.7	2,588.7	158,892.0
April	10,535.0	625,779.0	4,079.0	242,292.6	0.7	6,456.7	383,525.6
May	22,645.0	1,389,950.1	4,468.0	274,245.8	1.6	18,178.6	1,115,799.4
June	24,615.0	1,462,131.0	5,097.0	302,761.8	1.6	19,519.6	1,159,461.3
July	11,280.0	692,366.4	3,150.5	193,377.7	1.6	8,131.1	499,083.8
August	5,403.5	331,666.8	1,660.5	101,921.5	1.6	3,744.6	229,840.5
September	4,423.5	262,755.9	2,065.0	122,661.0	1.6	2,360.1	140,187.0
October	4,903.0	300,946.1	2,030.5	124,632.1	0.0	2,872.5	176,314.1
November	4,527.0	268,903.8	1,912.0	113,572.8	0.0	2,615.0	155,331.0
December	5,498.5	337,497.9	2,444.0	150,012.7	0.0	3,054.5	187,485.2

Table 2.1: Water rights between the proposed POD and the confluence of the South Fork Flathead River			
Water Right Number	Purpose	Flow Rate (CFS)	Period of Diversion
76LJ 147029 00*	FISH AND WILDLIFE	1,950.0	10/01 to 03/31
76LJ 147030 00*	FISH AND WILDLIFE	2,100.0	08/01 to 09/30
76LJ 147031 00*	FISH AND WILDLIFE	5,000.0	05/01 to 07/15
76LJ 147032 00*	FISH AND WILDLIFE	3,597.0	04/16 to 04/30
76LJ 147033 00*	FISH AND WILDLIFE	3,945.0	07/16 to 07/31
76LJ 147034 00*	FISH AND WILDLIFE	2,100.0	04/01 to 04/15
76LJ 148778 00**	FISH AND WILDLIFE	<Null>	01/01 to 12/31
76LJ 148779 00**	FISH AND WILDLIFE	<Null>	01/01 to 12/31

* State of Montana Department of Fish, Wildlife, and Parks instream flow water rights.

**These water rights' flow rates/volumes will be excluded from calculations of physical/legal availability because no quantified flow rate was claimed, and the claimed volume cannot currently be confirmed due to lack of data. These issues will need to be resolved by the Water Court during the Basin 76LJ decree process. Until that time, the DNRC does not have enough information to include these water rights in the physical/legal availability analysis calculations.

Table 2.2: Water rights between the confluence of the South Fork Flathead River and USGS Gaging Station No. 12363000			
Water Right Number	Purpose	Flow Rate (CFS)	Period of Diversion
76LJ 147036 00*	FISH AND WILDLIFE	6,650.0	04/16 to 04/30
76LJ 147037 00*	FISH AND WILDLIFE	3,500.0	08/01 to 04/15
76LJ 147038 00*	FISH AND WILDLIFE	5,402.0	07/16 to 07/31
76LJ 147039 00*	FISH AND WILDLIFE	8,125.0	05/01 to 07/15
76LJ 30104140	OTHER PURPOSE	0.7	03/01 to 09/30
76LJ 30002541	INDUSTRIAL	0.9	05/01 to 10/01

* State of Montana Department of Fish, Wildlife, and Parks instream flow water rights.

13. The stream flow data analysis of the Flathead River shows physically available monthly flow rates and volumes in the source exceeding the flow rate and volume of the proposed appropriation (Table 1, columns G-H). The Department finds that the amount of water the Applicant seeks to appropriate, 30.0 GPM (0.07 CFS) up to 1.08 AF, is physically available in the Flathead River at the POD.

LEGAL AVAILABILITY

FINDINGS OF FACT

14. The Applicant proposes to divert Flathead River water at 30.0 GPM up to 0.45 AF/year for domestic use and up to 0.63 AF/year for irrigation of 0.25 acres of lawn and garden area (1.08 AF/year total). The AOPI for this application is the Flathead River from the Applicant's proposed POD downstream to USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT.

15. The AOPI was determined to be appropriate because diversion of water at the proposed POD on the Flathead River would reduce the flow and volume of water in the Flathead River downstream of the POD. The Department recently analyzed the legal availability of water in the reach of the Flathead River downstream of USGS Gaging Station No. 12363000 in permit application no. 76LJ 30161301 (issued December 23, 2024). In that analysis, the Department found legally available monthly flows and volumes in the reach of the Flathead River downstream of USGS Gaging Station No. 12363000 multiple orders of magnitude in excess of this proposed appropriation. For this reason, the Department did not extend the AOPI into the reach of the

Flathead River downstream of USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT.

16. The overall AOPI was divided into two distinct reaches at the South Fork Flathead River confluence because the flows associated with instream flow fish and wildlife water rights held by Montana FWP change at this point due to the large inflow of water from the South Fork Flathead River:

- i. Reach 1: from the proposed POD to the confluence of the South Fork Flathead River; and,
- ii. Reach 2: from the confluence of the South Fork Flathead River to USGS Gaging Station No. 12363000 Flathead River at Columbia Falls, MT.

A total of 14 surface water rights exist within the AOPI, 10 of which are instream flow fish and wildlife water rights owned by Montana FWP. Of those 10 instream flow water rights, six have their place of use in Reach 1 and four have their place of use in Reach 2.

17. To quantify the legal availability of Flathead River water within AOPI Reach 1, the Department first quantified physically available monthly flows and volumes (**Table 3**, columns B-C) for the Flathead River at the proposed POD. The Department then calculated the monthly flows appropriated by existing users (legal demands) on the source within AOPI Reach 1 (**Table 3**, column D) by:

- i. Generating a list of existing surface water rights within AOPI Reach 1 (**Table 2.1**);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion; and,
- iii. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

18. The Department subtracted out the flow rates of the existing legal demands (**Table 3**, column D) within AOPI Reach 1 from the physically available water (**Table 3**, column B) to

determine legally available monthly flows at the POD (**Table 3**, column E). Legally available monthly flows were then converted to monthly volumes (**Table 3**, column F).

Table 3: Legal Availability Analysis of AOPI Reach 1					
A	B	C	D	E	F
Month	Physically Available Water at the POD (CFS)	Physically Available Water at the POD (AF)	Existing Legal Demands within AOPI Reach 1 (CFS)	Legally Available Water at the POD (CFS)	Legally Available Water at the POD (AF)
January	2,369.0	145,409.2	1,950.0	419.0	25,718.2
February	2,255.5	125,044.9	1,950.0	305.5	16,936.9
March	2,588.7	158,892.0	1,950.0	638.7	39,201.0
April 1-15	6,456.7	383,525.6	2,100.0	4,356.7	258,785.6
April 16-30	6,456.7	383,525.6	3,597.0	2,859.7	169,863.8
May	18,178.6	1,115,799.4	5,000.0	13,178.6	808,899.4
June	19,519.6	1,159,461.3	5,000.0	14,519.6	862,461.3
July 1-15	8,131.1	499,083.8	5,000.0	3,131.1	192,183.8
July 16-31	8,131.1	499,083.8	3,945.0	4,186.1	256,939.7
August	3,744.6	229,840.5	2,100.0	1,644.6	100,942.5
September	2,360.1	140,187.0	2,100.0	260.1	15,447.0
October	2,872.5	176,314.1	1,950.0	922.5	56,623.1
November	2,615.0	155,331.0	1,950.0	665.0	39,501.0
December	3,054.5	187,485.2	1,950.0	1,104.5	67,794.2

19. To quantify the legal availability of Flathead River water within AOPI Reach 2, the Department quantified physically available monthly flows and volumes (**Table 4**, columns B-C) for the Flathead River at the proposed POD, and the monthly flows and volumes contributed to the Flathead River by the South Fork Flathead River (**Table 4**, columns D-E). The Department then calculated the monthly flows appropriated by existing users (legal demands) on the source within AOPI Reach 2 (**Table 4**, column F) by:

- i. Generating a list of existing surface water rights within AOPI Reach 2 (**Table 2.2**);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion; and,
- iii. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion.

This leads to an overestimation of legal demands on the physical volume of water. The

Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

20. The Department added in the flow rates of the monthly flows contributed to the Flathead River by the South Fork Flathead River (**Table 4**, column D) and subtracted out the flow rates of the existing legal demands (**Table 4**, column F) within AOPI Reach 2 from the physically available water (**Table 4**, column B) to determine legally available monthly flows at the POD (**Table 4**, column G). Legally available monthly flows were then converted to monthly volumes (**Table 4**, column H).

Table 4: Legal Availability Analysis of AOPI Reach 2							
A	B	C	D	E	F	G	H
	Flathead River		South Fork Flathead River				
Month	Physically Available Water at the POD (CFS)	Physically Available Water at the POD (AF)	Flow contributed to the Flathead River by the South Fork Flathead River) (CFS)	Volume contributed to the Flathead River by the South Fork Flathead River) (AF)	Existing Legal Demands within AOPI Reach 2 (CFS)	Legally Available Water at the POD (CFS)	Legally Available Water at the POD (AF)
January	2,369.0	145,409.2	2,742.5	168,334.7	3,500.0	1,611.5	98,913.9
February	2,255.5	125,044.9	2,545.0	141,094.8	3,500.0	1,300.5	72,099.7
March	2,588.7	158,892.0	2,184.0	134,053.9	3,500.7	1,272.0	78,075.4
April 1-15	6,456.7	383,525.6	4,079.0	242,292.6	3,500.7	7,035.0	417,879.0
April 16-30	6,456.7	383,525.6	4,079.0	242,292.6	6,650.7	3,885.0	230,769.0
May	18,178.6	1,115,799.4	4,468.0	274,245.8	8,126.6	14,520.0	891,237.6
June	19,519.6	1,159,461.3	5,097.0	302,761.8	8,126.6	16,490.0	979,506.0
July 1-15	8,131.1	499,083.8	3,150.5	193,377.7	8,126.6	3,155.0	193,653.9
July 16-31	8,131.1	499,083.8	3,150.5	193,377.7	5,403.6	5,878.0	360,791.6
August	3,744.6	229,840.5	1,660.5	101,921.5	3,501.6	1,903.5	116,836.8
September	2,360.1	140,187.0	2,065.0	122,661.0	3,501.6	923.5	54,855.9
October	2,872.5	176,314.1	2,030.5	124,632.1	3,500.0	1,403.0	86,116.1
November	2,615.0	155,331.0	1,912.0	113,572.8	3,500.0	1,027.0	61,003.8
December	3,054.5	187,485.2	2,444.0	150,012.7	3,500.0	1,998.5	122,667.9

21. The Department's comparison of the median of the mean monthly flows and volumes of water to existing legal demands within the AOPI on the source of supply demonstrates that the

proposed appropriation of 30.0 GPM (0.07 CFS) up to an annual volume of 1.08 AF is legally available during the proposed period of diversion.

ADVERSE EFFECT

FINDINGS OF FACT

22. The Applicant proposes to divert Flathead River water at 30.0 GPM up to 0.45 AF/year for domestic use and up to 0.63 AF/year for irrigation of 0.25 acres of lawn and garden area (1.08 AF/year total). 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. In response to a call being made, the Applicant has the ability to turn off their pump.

23. The Applicant has proven both the physical and legal availability of Flathead River water at the POD. Enough water remains in the source to meet existing legal demands and the requested 30.0 GPM (0.07 CFS) up to an annual volume of 1.08 AF. The Applicant has demonstrated that they can regulate their water use and that they have a plan to protect senior water users during times of water shortage. The Department finds that the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

24. The Applicant proposes to divert Flathead River water at 30.0 GPM up to 0.45 AF/year for domestic use and up to 0.63 AF/year for irrigation of 0.25 acres of lawn and garden area (1.08 AF/year total) using a Franklin Electric model MF5060 submersible pump with a 3.0-horsepower motor. A pump housing cylinder comprised of a 10-foot-length of six-inch steel pipe with a capped bottom will be buried vertically to 8-feet below ground surface 20 feet from the river's edge in which the submersible pump will be installed.

25. A foot valve-equipped buried two-inch poly pipe connected at the base of the pump housing cylinder will extend into Flathead River below the frost line. Water will be drawn by the pump into the pump housing cylinder through the intake line. The pump will be installed on a

pitless adapter below the frost line and will convey water through a 2-inch poly main supply line 495-feet from the pump housing cylinder to a buried 3,700-gallon storage tank. The pump will be controlled by a float switch in the storage tank. There will be two curb-stop shut off valves installed in the system, one between the intake and the pump housing cylinder and one between the pump housing cylinder and the storage tank. A Dole Valve will be installed in the main line prior to the storage tank to limit the flow to the requested 30.0 GPM flow rate. A flow meter will be installed between the Dole Valve and the storage tank. Water will be pumped from the storage tank to the domestic fixtures and hose-bib connections through a one-inch pipe by a Dab Diver variable frequency drive cistern pump.

26. The Applicant calculated a maximum TDH for their system of 330.65 feet based on:

- i. An elevation head of 55 feet;
- ii. An outlet pressure set at 60 PSI, which is equivalent to 138.6-feet of head; and,
- iii. Friction and fitting losses associated with the 495-feet of two-inch poly pipe, elbows, adapters, the flow meter, Dole Valve, etc. These head losses sum to 137.05 feet.

The Applicant provided the pump performance curve. At the maximum TDH of 330.65-feet, the pump performance curve demonstrates that the pump is capable of producing the requested 30.0 GPM.

27. 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 30.0 GPM (0.07 CFS) up to an annual volume of 1.08 AF.

BENEFICIAL USE

FINDINGS OF FACT

28. The Applicant proposes to divert Flathead River water at 30.0 GPM up to 0.45 AF/year for domestic use and up to 0.63 AF/year for irrigation of 0.25 acres of lawn and garden area (1.08 AF/year total). The Applicant's request of 0.45 AF for their domestic water needs was calculated using an estimated demand 400.0 GPD, which is congruous with Montana DEQ wastewater design flow rate standards. At 400.0 GPD, the annual domestic demand for a single family

residence is 0.45 AF ($400.0 \text{ GPD} \times 365 \text{ days/year} \div 325,851 \text{ gallons/AF} = 0.45 \text{ AF/year}$). The Applicant's property is not subject to a Certificate of Subdivision Approval and there are no restrictions limiting the use of surface water for in-house domestic use. The Applicant's request of 0.63 AF for irrigation of 0.25 acres of lawn and garden area is based on the Department's lawn and garden standard of 2.5 AF/acre per year ($2.5 \text{ AF/acre/year} \times 0.25 \text{ acres} = 0.63 \text{ AF}$). The requested flow rate of 30.0 GPM can divert 48.39 AF over the requested year-round period of diversion ($30.0 \text{ GPM} \times 1,440 \text{ minutes/day} \times 365 \text{ days} \div 325,851 \text{ gallons/AF} = 48.39 \text{ AF}$); therefore, the requested flow rate is adequate to satisfy the requested volume of 1.08 AF/year.

29. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 30.0 GPM (0.07 CFS) up to an annual volume of 1.08 AF are reasonably justified per ARM 36.12.1801(3).

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 8-13)

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 14-21)

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 22-23)

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 24-27)

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 domestic use (which includes garden and landscaping irrigation, also commonly referred to as 'lawn and garden irrigation') which is a recognized beneficial use. § 85-2-102(5), MCA. "Domestic use" by DNRC rule means those water uses common to a household including: ... (g) garden and landscaping irrigation up to five acres." ARM 36.12.101(20). Applicant has proven by a preponderance of the evidence that domestic use and lawn and garden irrigation are beneficial uses and that 1.08 AF of volume diverted at 30.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 28-29)

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)

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 30171486 should be GRANTED.

The Department determines the Applicant may divert Flathead River water by means of a pump at 30.0 GPM up to 0.45 AF/year for domestic use from January 1 – December 31 and 0.63 AF/year for irrigation of 0.25 acres of lawn and garden from April 25 – October 5 (1.08 AF/year total). The point of diversion is in the SENESE of Section 32, Township 31N, Range 19W, Flathead County, Montana. The places of use is in Government Lot 6 in the SENESE of Section 32, Township 31N, Range 19W, Flathead County, Montana.

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 26th day of November, 2025.



James Ferch, Regional Manager
Kalispell Regional Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 26th day of November, 2025, by first class United States mail.

PAUL AND DENA SZYMAREK
184 STONES THROW LN
COLUMBIA FALLS MT 59912-8677

Via email:

CLINTON POST
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