

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

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**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 76N 30162807)
BY THE PATRICK R WALT & JENNIFER) PRELIMINARY DETERMINATION TO
A ELLIOTT LIVING TRUST) GRANT PERMIT IN MODIFIED FORM**

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The Patrick R. Walt & Jennifer A. Elliott Living Trust (Applicant) submitted Surface Water Application for Beneficial Water Use Permit No. 76N 30162807 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation on December 31, 2023. The Applicant proposes diverting up to 0.98 acre-feet of volume annually at a flow rate of 20.0 gallons per minute from the Clark Fork River for lawn and garden irrigation. The Department published receipt of the Application on its website on January 16, 2024. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated, dated June 27, 2024. The Applicant responded with information dated October 25, 2024. The application was determined to be correct and complete as of January 23, 2025. An Environmental Assessment for this application was completed on May 8, 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 SW
- Attachments:
 - Sprinkler zone demand calculations
 - Pump performance curve
- Maps/Figures:
 - Site Vicinity Map
 - Tract map

- Salish Shores Subdivision Plat
- Three site diagrams showing pump location, conveyance lines, irrigation zones, and sprinkler emitter locations
- Five site photos showing pump power and sprinkler controller boxes, in-ground valve box, proposed pump location, and riverbank.

Information Received after Application Filed

- Deficiency Response Letter from Applicant to DNRC dated October 25, 2024. Included with this letter are pump specifications and system friction loss calculations.

Information within the Department's Possession/Knowledge

- Mean monthly stream flow data from USGS Gaging Station No. 12389000 Clark Fork River near Plains, MT. Period of record: October 1910 – October 2024.
- Mean monthly stream flow data from USGS Gaging Station No. 12389500 Thompson River near Thompson Falls, MT. Period of record: October 1956 – September 2024.
- List of existing surface water rights on the Clark Fork River from USGS Gaging Station No. 12389000 Clark Fork River near Plains, MT down to the Thompson Falls Dam.
 - This list is further divided into two reaches: the reach from USGS Gaging Station No. 12389000 down to the proposed point of diversion and the reach from the proposed point of diversion down to the Thompson Falls Dam.
- List of existing surface water rights on the Thompson River from USGS Gaging Station No. 12389500 Thompson River near Thompson Falls, MT down to the confluence of the Thompson River with the Clark Fork River.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents:
 - DNRC Administrator Memorandum: Permitting in the open Clark Fork and Flathead Basins, dated June 9, 2008.
 - DNRC Administrator Memorandum: Permitting in the open Clark Fork and Flathead Basins Follow-up to June 9, 2008 Memorandum, dated May 1, 2009.

- Technical Memorandum: DNRC Consumptive Use Methodology - Turf Grass, dated March 23, 2010

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

For the purposes of this document:

Department or DNRC means the Department of Natural Resources and Conservation	
USDA NRCS means the US Department of Agriculture's Natural Resource Conservation Service	
AF means acre-feet	ARM means Administrative Rules of Montana
CFS means cubic feet per second	GPM means gallons per minute
IWR means Irrigation Water Requirements	MCA means Montana Code Annotated
POD means point of diversion	TDH means total dynamic head

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert Clark Fork River water by means of a pump from April 1 – October 31 at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden from April 1 – October 31. The proposed POD is in the NWSESE of Section 16, Township 21N, Range 29W, Sanders County, Montana (Figure 1). The proposed place of use is in Government Lot 9, N2SESE of Section 16, Township 21N, Range 29W, Sanders County, Montana, further described as Lot 13 of Block 001 of the Salish Shores Subdivision (Figure 1). The POD is in the Clark Fork River Below Flathead River Basin (76N) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

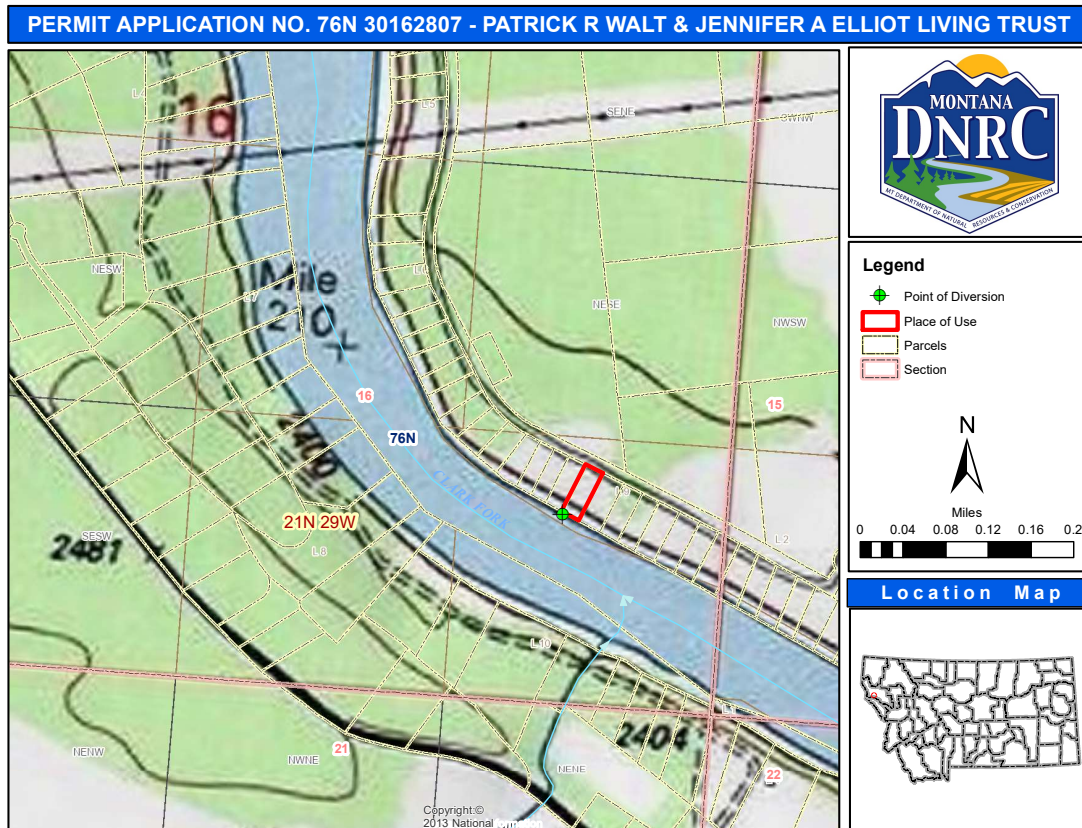


Figure 1: Map of the proposed place of use and point of diversion.

§ 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, Starnner*, 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 Clark Fork River water at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden area. The Department used the Clark Fork River near Plains, MT USGS Gaging Station No. 12389000 (period of record October 1910 – October 2024) and the Thompson River near Thompson Falls, MT USGS Gaging Station No. 12389500 (period of record October 1956 – September 2024) to quantify the physically available monthly flow rates and volumes at the POD during the period of diversion and use (April 1 – October 31).

9. USGS Gaging Station No. 12389000 is the nearest gage to the proposed POD on the Clark Fork River. This gage is approximately 31 miles upstream of the proposed POD. The date range used for the following calculations includes the entire period of record. The Thompson River flows into the Clark Fork River approximately 3.8 miles upstream of the proposed POD (between USGS Gaging Station No. 12389000 and the proposed POD). This gage is located on the Thompson River approximately 1.2 miles upstream of its confluence with the Clark Fork River. This is the nearest gaging station on the Thompson River to its confluence with the Clark Fork River. The date range used for the following calculations includes the entire period of record.

10. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Clark Fork River using USGS Gaging Station No. 12389000 records (Table 1, column B) and for the Thompson River using USGS Gaging Station No. 12389500 records (Table 1, column E) for each month of the proposed period of diversion. The Department calculated the monthly flows appropriated by existing users on the Clark Fork River between USGS Gaging Station No. 12389000 and the proposed POD (Table 1, column C) by:

- i. Generating a list of existing water rights from USGS Gaging Station No. 12389000 down to the proposed POD (list included in the application file and available upon request);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion;
- iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate (per DNRC adjudication standards); 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. The Department calculated the monthly flows appropriated by existing users on the Thompson River between USGS Gaging Station No. 12389500 and its confluence with the Clark Fork River (Table 1, column F) by:

- i. Generating a list of existing water rights from USGS Gaging Station No. 12389500 down to its confluence with the Clark Fork River (list included in the application file and available upon request);
- 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

12. The Department subtracted out the flow rates of the existing legal demands (Table 1, column C) between USGS Gaging Station No. 12389000 and the proposed POD from the median of the mean monthly gage values (Table 1, column B) to determine monthly flows in the Clark Fork River at the proposed POD (Table 1, column D). The Department subtracted out the flow rates of the existing legal demands (Table 1, column F) between USGS Gaging Station No. 12389500 and the confluence of the Thompson River with the Clark Fork River from the median of the mean

monthly gage values (Table 1, column E) to determine monthly flows of Thompson River water entering the Clark Fork River (Table 1, column G).

13. The Department then summed the flows of the Clark Fork River at the POD (Table 1, column D) with the flows of the Thompson River entering the Clark Fork River (Table 1, column G) to determine physically available monthly flows at the proposed POD (Table 1, column H). Those flows were converted to monthly volumes in AF (Table 1, column I) 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.

Table 1: Physical Availability Analysis of the Clark Fork River at the POD								
A	B	C	D	E	F	G	H	I
Month	Clark Fork River			Thompson River			Clark Fork River plus Thompson River	
	Median of the Mean Monthly Flows at Gage 12389000 (CFS)	Existing Legal Demands from Gage 12389000 to the POD (CFS)	Median of the Mean Monthly Flows at the POD (CFS)	Median of the Mean Monthly Flows at Gage 12389500 (CFS)	Existing Legal Demands from Gage 12389500 to its Confluence with the Clark Fork River (CFS)	Median of the Mean Monthly Flows Entering the Clark Fork River at the Confluence (CFS)	Physically available water at the POD (CFS)	Physically available water at the POD (AF)
April	18,060.00	19.13	18,040.87	676.80	0.27	676.53	18,717.40	1,111,813.56
May	43,105.00	28.74	43,076.26	1,159.00	0.49	1,158.51	44,234.77	2,715,130.18
June	50,325.00	28.74	50,296.26	818.65	0.49	818.16	51,114.42	3,036,196.55
July	23,155.00	28.74	23,126.26	347.50	0.49	347.01	23,473.27	1,440,789.31
August	10,390.00	28.70	10,361.30	218.80	0.49	218.31	10,579.61	649,376.46
September	9,239.00	25.04	9,213.96	181.50	0.49	181.01	9,394.97	558,061.22
October	10,160.00	15.40	10,144.60	169.15	0.49	168.66	10,313.26	633,027.90

14. The stream flow data analysis of the Clark Fork River shows physically available monthly flow rates and volumes in the source exceeding the flow rate and volume of the proposed appropriation. The Department finds that the amount of water the Applicant seeks to appropriate, 20.0 GPM (0.04 CFS) up to 0.98 AF, is physically available in the Clark Fork River at the POD.

LEGAL AVAILABILITY

FINDINGS OF FACT

15. The Applicant proposes to divert Clark Fork River water at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden area. The area of potential impact for this application is the Clark Fork River from the proposed POD downstream to Thompson Falls Dam. The Thompson Falls Dam is approximately 2.3 miles downstream of the proposed POD and is the nearest downstream point of control on the Clark Fork River. The Thompson Falls Dam is a hydroelectric run of the river dam located on the Clark Fork River near Thompson Falls, MT. The Dam is a senior water rights user in this reach of the Clark Fork River, with water rights that equate to 23,420 CFS, equal to their energy generation capacity. Diverting water from the Clark Fork River will reduce the total volume of water passing through the Thompson Falls Dam hydropower facility and/or through the Dam's bypass structures. Operations at Thompson Falls Dam have the ability to alter Clark Fork River flows downstream of the dam based on energy demands. For this reason, legal availability has been considered in the reach from the POD downstream to Thompson Falls Dam, but not further since the downstream flows are altered.

16. The Department quantified physically available monthly flows and volumes (Table 3, columns B-C) for the Clark Fork River at the POD. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 3, column D) by:

- i. Generating a list of existing water rights from the proposed POD to the Thompson Falls Dam (Table 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.

17. The Department subtracted out the flow rates of the existing legal demands (Table 3, column D) within the area of potential impact from the physically available water (Table 3, columns B-C)

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

Table 2: Existing Legal Demands on the Clark Fork River from the POD to Thompson Falls Dam			
Water Right Number	Purposes	Flow Rate (CFS)	Period of Diversion
76N 81517 00	POWER GENERATION	12,300.00*	01/01 to 12/31
76N 211939 00	POWER GENERATION	5,000.00*	01/01 to 12/31
76N 211942 00	POWER GENERATION	4,297.00*	01/01 to 12/31
76N 211940 00	POWER GENERATION	2,870.00*	01/01 to 12/31
76N 211938 00	POWER GENERATION	2,000.00*	01/01 to 12/31
76N 211941 00	POWER GENERATION	2,000.00*	01/01 to 12/31
76N 94414 00	POWER GENERATION	1,250.00*	01/01 to 12/31
76N 94415 00	POWER GENERATION	1,250.00*	01/01 to 12/31
76N 214605 00	INDUSTRIAL	6.68	01/01 to 12/31
76N 30784 00	FIRE PROTECTION	6.68	01/01 to 12/31
76N 118300 00	IRRIGATION	0.06	04/01 to 11/01
76N 34871 00	IRRIGATION	0.04	05/01 to 11/01
76N 5865 00	IRRIGATION	0.22	04/01 to 12/01
76N 214996 00	IRRIGATION	0.06	05/01 to 09/30
76N 133376 00	IRRIGATION	0.01	05/01 to 08/31
76N 35012 00	LAWN AND GARDEN	0.04	04/15 to 10/15
76N 30019453	LAWN AND GARDEN	0.04	04/01 to 09/30
76N 78633 00	LAWN AND GARDEN	0.06	05/01 to 09/30
76N 95288 00	LAWN AND GARDEN	0.04	04/15 to 10/15
76N 94416 00	DOMESTIC	0.22	01/01 to 12/31
76N 133373 00	DOMESTIC	0.05	03/01 to 09/19

*The combination of existing rights for Thompson falls Dam Permits and Claims is 23,420.0 CFS or less as they occur in the source or from storage (see remark on Provisional Permit 76N 81517-00 general abstract).

Table 3: Legal Availability Analysis of the Clark Fork River at the POD					
A	B	C	D	E	F
Month	Physically available water at the POD (CFS)	Physically available water at the POD (AF)	Existing Legal Demands from the POD to the Thompson Falls Dam (CFS)	Legally Available Water at the POD (CFS)	Legally Available Water at the POD (AF)
April	18,717.40	1,111,813.56	23,434.03	-4,716.63	-280,167.82
May	44,234.77	2,715,130.18	23,434.20	20,800.57	1,276,738.99
June	51,114.42	3,036,196.55	23,434.20	27,680.22	1,644,205.07
July	23,473.27	1,440,789.31	23,434.20	39.07	2,398.12
August	10,579.61	649,376.46	23,434.20	-12,854.59	-789,014.73
September	9,394.97	558,061.22	23,434.19	-14,039.22	-833,929.67
October	10,313.26	633,027.90	23,433.98	-13,120.72	-805,349.79

18. The Department's comparison of the median of the mean monthly flows and volumes of Clark Fork River water to the existing legal demands on the source shows that the requested flow rate of 20.0 GPM (0.04 CFS) and volume of 0.98 AF/year is only legally available from May 1 – July 31 of the requested April 1 – October 31. Based on this analysis, the Department finds the Applicant may only appropriate water from May 1 – July 31, annually.

ADVERSE EFFECT

FINDINGS OF FACT

19. The Applicant proposes to divert Clark Fork River water at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden area. 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. Upon receiving a valid call from a senior water right holder, the Applicant will turn off their pump.

20. The Applicant's proposed flow rate of 20.0 GPM adheres to the stipulations in the two DNRC Memoranda relating to permitting in the open Clark Fork and Flathead River Basins. Per those memoranda, requested appropriations of 35.0 GPM or less and 10.0 AF/year or less do not have to consider the previous Thompson River Lumber Company decision and the legal demands of the Avista Corporation's Noxon Dam water rights in the evaluation of permit criteria (these DNRC memoranda are available in the DNRC Permit Manual or upon request).

21. Per the Department's legal availability analysis, water is only legally available at the proposed POD from the Clark Fork River from May 1 – July 31. Appropriation of water at the proposed POD in April, August, September, and October would adversely affect the senior water rights associated with the Thompson Falls Dam (owned by the Northwestern Corporation).

22. The Applicant has shown that they can regulate their water use and that they have a plan to protect senior water users. The Department finds that the proposed appropriation will not adversely affect senior water users during the period of May 1 – July 31 when water is legally available. The Applicant may not appropriate water during the months of April, August, September, or October, as doing so would adversely affect senior water right owners.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

23. The Applicant proposes to divert Clark Fork River water at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden area via an FPS VersaJet PRO model FVJ1CI-P 1.0-HP jet pump. The pump will be located on the bank of the Clark Fork River approximately two feet laterally and four feet vertically from the shoreline. The pump will draw water into 1.25-inch intake line and then convey it through 57-feet of 1.5-inch plastic line to the first valve box. There are four valve boxes total, the farthest of which is 435-feet laterally and 12-feet vertically from the pump.

24. From the valve boxes, the Applicant will irrigate 12 sprinkler and drip irrigation zones equipped with a total of 58 Hunter I-20 sprinklers. The individual sprinkler-emitter outputs will be set between 3.0 and 4.0 GPM depending on the number of sprinkler emitters in each zone to ensure that each zone's demand is equal to 20.0 GPM. The 12 zones will be operated one at a time by the automated control system. The Applicant provided TDH analyses for each sprinkler/drip zone along with a pump performance specification table demonstrating that the pump is capable of diverting and conveying water at 20.0 GPM to all of the zones.

25. 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 20.0 GPM and requested annual volume of 0.98 AF.

BENEFICIAL USE

FINDINGS OF FACT

26. The Applicant proposes to divert Clark Fork River water at 20.0 GPM up to 0.98 AF/year for irrigation of 0.39 acres of lawn and garden area. The requested 0.98 AF/year volume was calculated using the ARM 36.12.115(2)(b) standard of 2.5 AF per acre per year for lawn and garden irrigation (2.5 AF/acre/year x 0.39 acres = 0.98 AF/year).

27. The Applicant's requested periods of diversion and use of April 1 – October 31 are based on the standard for USDA NRCS Climatic Area II in ARM 36.12.112(1)(c)(ii). However, the Department's legal availability analysis finds that water is only legally available for the Applicant to appropriate from May 1 – July 31 (FOF 18). To account for these shortened allowable periods

of diversion and use, the Department used the USDA NRCS IWR software program, and the procedure detailed in DNRC Technical Memorandum: DNRC Consumptive Use Methodology - Turf Grass (2010), to obtain monthly net irrigation demands for lawn and garden irrigation at the Applicant's place of use. Those monthly demands were then converted to percentages of the total annual demand. The DNRC found that 57.7 percent of the total annual net irrigation demand occurred during the period of May 1 – July 31. The Applicant's requested volume of 0.98 AF/year was then multiplied by the percentage of demand occurring during the period of legal availability and found that 0.57 AF of volume is required to satisfy the Applicant's beneficial use from May 1 – July 31 ($0.98 \text{ AF} \times 0.577 = 0.57 \text{ AF}$).

28. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 20.0 GPM is reasonably justified per ARM 36.12.1801(3)(a). The Department further finds that 0.57 AF is the volume needed to satisfy the requested beneficial use during the period of legal availability of water (May 1 – July 31).

POSSESSORY INTEREST

FINDINGS OF FACT

29. The Applicant signed the application form affirming they have possessory interest in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

30. 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.”

31. 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).

32. 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).

33. 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. (Findings of Fact (FOF) 8-14)

LEGAL AVAILABILITY

34. 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).

35. 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.

36. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period of May 1 – July 31, at 20.0 GPM up to 0.57 AF/year, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 15-18)

ADVERSE EFFECT

37. 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.

38. 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).

39. 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).

40. 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).

41. 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.

42. 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).

43. 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 during the period of legal water availability. § 85-2-311(1)(b), MCA. (FOF 19-22)

ADEQUATE DIVERSION

44. 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.

45. 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.

46. 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).

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 23-25)

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. Applicant proposes to use water for lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence

that lawn and garden irrigation is a beneficial use, and that 0.57 AF of volume diverted at 20.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 26-28)

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 29)

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. 76N 30162807 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicant may divert Clark Fork River water by means of a pump from May 1 – July 31 at 20.0 GPM up to 0.57 AF/year for irrigation of 0.39 acres of lawn and garden from May 1 – July 31. The point of diversion is in the NWSESE of Section 16, Township 21N, Range 29W, Sanders County, Montana. The place of use is in Government Lot 9, N2SESE of Section 16, Township 21N, Range 29W, Sanders County, Montana, further described as Lot 13 of Block 001 of the Salish Shores Subdivision.

NOTICE OF OPPORTUNITY FOR SHOW CAUSE HEARING

This Department has determined your application should be granted in modified form based upon findings specified in the above Preliminary Determination to Grant Permit in Modified Form. When an application is granted in modified form the Applicant may obtain a hearing pursuant to § 2-4-604, MCA, to show cause by a preponderance of the evidence as to why the permit should not be granted in modified form by filing a written request for a hearing with the Department within 30 days of service of the preliminary determination. Section 85-2-310(7), MCA.

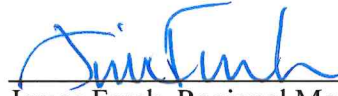
This constitutes notice of your opportunity for a hearing to show cause by a preponderance of the evidence as to why your permit should not be granted in modified form. If you want to have a hearing, you must file a written request within 30 days of service of the notice of this Preliminary Determination to Grant in Modified Form.

In order to exhaust your administrative remedies under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) on a preliminary determination to grant an application in modified form, you must proceed to the show cause hearing and complete the show cause hearing process. Only a person who has exhausted his or her administrative remedies available within the agency and is aggrieved by a final written decision of the Department is entitled to judicial review under Montana Administrative Procedure Act (§ 2-4-702, MCA). If you file a written request for a hearing, your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be granted in modified form. A hearing date will be set within 45 days of the date your written hearing request is filed with the Department and a notice of hearing and appointment of Hearing Examiner will be forwarded to you.

If you do not file a written request for a hearing within 30 days the Department will provide public notice of this Application and the Department's Preliminary Determination to Grant in Modified Form 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 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, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with

stipulated conditions and the department has preliminarily determined to grant the permit, the department will grant the permit subject to conditions necessary to satisfy applicable criteria.

DATED this 22nd day of May 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 PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 22nd day of May 2025 by first class United States mail.

PATRICK R WALT & JENNIFER A ELLIOTT LIVING TRUST

PO BOX 1921

THOMPSON FALLS MT 59873-1921



TRAVIS WILSON

Kalispell Regional Office, (406) 752-2288

05/22/2025
DATE