

**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 30151446 BY MICHAEL R. & MARLO G. V. MADDY	}	PRELIMINARY DETERMINATION TO GRANT PERMIT
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Michael R. and Marlo G. V. Maddy (Applicants) submitted Application for Beneficial Water Use Permit No. 76LJ 30151446 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on February 17, 2021. Applicants propose to divert 150.0 gallons per minute (GPM) up to 67.2 acre-feet (AF) annually from Ronan Creek (Lake Mary Ronan). The proposed purposes are multiple domestic and lawn and garden irrigation. The DNRC published receipt of the Application on its website on February 22, 2021. The DNRC determined the application correct and complete as of August 5, 2021. The DNRC completed an Environmental Assessment for this application on September 10, 2021.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Supplement to Surface Water Beneficial Use Application
- Attachments:
 - Attachment 1. Pre-Application Meeting Form
 - Attachment 2. Variance Request and Approval Letters
 - Attachment 3. 4” Pipe Flow
 - Attachment 4. Proposal: End Suction Variable Speed Pump Station
 - Attachment 5. Pump Specifications and Pump Curve

- Attachment 6. Adequate Diversion Means and Operation map
- Attachment 7. Proposal: Multi-Stage Treatment System
- Attachment 8. Irrigation Water Requirements
- Attachment 9. Memorandum: Water Supply Information for Permit Applications 76LJ 30147092, 30147093, and 30148513.
- Figures:
 - Point of Diversion/Place of Use map
 - Adequate Diversion Means and Operation map

Information within the Department’s Possession/Knowledge

- Lake Mary Ronan’s volume quantified using publicly available bathymetric data from the Montana Department of Fish, Wildlife, and Parks’ (MTFWP) FishMT website.
- List of existing surface water rights on Lake Mary Ronan. This list was used to quantify physical and legal availability and to analyze adverse effect.
- The following information is routinely considered by the Department. It 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:
 - Technical Memorandum: DNRC Consumptive Use Methodology – Turf Grass, dated March 23, 2010
 - Technical Memorandum: Physical Availability of Ponds, dated April 22, 2019

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicants propose to divert water from Ronan Creek (Lake Mary Ronan) (hereafter Lake Mary Ronan) using a pump from January 1 – December 31. Applicants request a 150.0 GPM

flow rate up to an annual volume of 67.2 AF for multiple domestic use (33.5 AF to supply 86 single family residences) and lawn and garden irrigation (33.7 AF applied to 15.8 acres). Multiple domestic use will occur from January 1 – December 31 and lawn and garden irrigation will occur from April 15 – October 15. The Applicants propose to divert water using two identical pumps, a primary pump and a redundant pump. Only one pump will operate at any given time, with the redundant pump operating only if the primary pump is out of service.

2. The points of diversion (POD) are located in Lake Mary Ronan offshore of Government Lot 2, N2NE Section 15, Township 25N, Range 22W, Lake County, Montana (Figure 1). The places of use (Figure 1) are:

- i. E2SW Section 10, Township 25N, Range 22W, Lake County, Montana.
- ii. SE Section 10, Township 25N, Range 22W, Lake County, Montana.
- iii. Government Lot 5, SW Section 11, Township 25N, Range 22W, Lake County, Montana.
- iv. Government Lot 6, SW Section 11, Township 25N, Range 22W, Lake County, Montana.
- v. N2 Section 15, Township 25N, Range 22W, Lake County, Montana.
- vi. SW Section 15, Township 25N, Range 22W, Lake County, Montana.

3. The POD is in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions. This place of use is located approximately 2.5 miles north of the Flathead Indian Reservation's most northern boundary. No supplemental water rights exist.

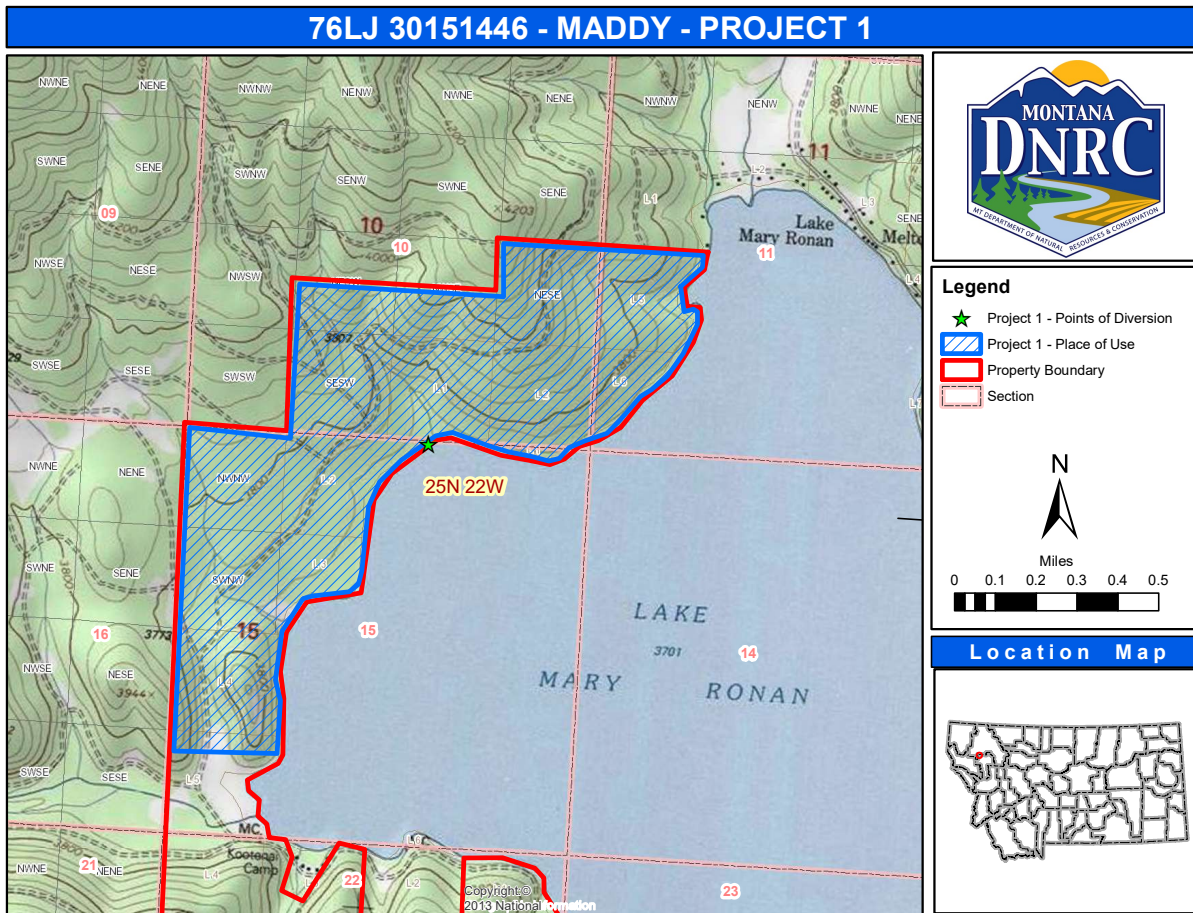


Figure 1: Map of the proposed place of use and point of diversion

4. The provisional beneficial water use permit will be subject to the following condition:
 THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT OF THE WORK COMPLETED UNDER THIS RIGHT BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL COMPLETION OF THE PROJECT. FAILURE TO SUBMIT YEARLY REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE REPORTS MUST BE SENT TO THE KALISPELL WATER RESOURCES REGIONAL OFFICE.

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

GENERAL CONCLUSIONS OF LAW

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

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

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

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

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

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

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

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

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

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

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

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

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

Physical Availability

FINDINGS OF FACT

11. The Applicants propose to divert up to 67.2 AF annually at a maximum flow rate of 150.0 GPM from Lake Mary Ronan. Three major streams supply water to Lake Mary Ronan: Donaldson, Freeland, and Hilburn Creeks. A single stream, Ronan Creek, serves as the outlet of the lake. Ronan Creek flows southeast into Dayton Creek, which flows into Flathead Lake. The applicants

requested a variance from ARM 36.12.1702(4), requiring the collection of monthly stream flow measurements. The variance was granted on March 18, 2020, given that the diversion is directly from Lake Mary Ronan. The applicants agreed to the Department's methodology for determining water availability from Lake Mary Ronan by estimating the volume of the lake.

12. The Department quantified Lake Mary Ronan's volume using publicly available bathymetric data from the Montana Department of Fish, Wildlife, and Parks' (MTFWP) FishMT website. MTFWP mapped the lake on July 18, 2011. The Department used ArcGIS to generate polygons of depth strata from this data (Figure 2), allowing the Department to quantify the total area of each depth stratum. The National Hydrography Dataset (NHD) Waterbody ArcGIS polygon area was used for the zero (0) foot contour extent. This data was used in place of the MTFWP zero (0) foot contour because it appears to provide a more accurate representation of the lake boundary when compared to the USGS topographic map and aerial imagery. Lake Mary Ronan's total surface area was calculated as 1,515.7 acres based on the surface area within the zero (0) foot contour. The end-area formula (below), used for finding the volume of prismatic forms, was used to quantify the total volume of water within each depth stratum (Table 1). The procedures for applying the end-area formula to compute lake volume are found in the DNRC Technical Memorandum: Physical Availability of Ponds, dated April 22, 2019. The Department calculated 41,564.5 AF as Lake Mary Ronan's total volume.

13. Lake Mary Ronan's total volume includes the artificial addition of a storage pool above what was the naturally occurring footprint. A dam/dike structure on private land controls the outflow of Lake Mary Ronan to Ronan Creek. On October 13, 2012, a site visit was conducted by Mark Paulson of Aquatek Consulting for water right application 76LJ 30063101. This site visit confirmed a dike with a concrete weir structure approximately 25 feet long, 12 to 14 feet wide, and approximately four feet tall, impounded lake waters and acted as an overflow structure. Additionally, 30 feet west of the overflow structure was an elliptical corrugated metal pipe (CMP) buried in the dike that extended from its upstream (lake) side to its downstream (creek) side. The CMP pipe measured 36 inches in diameter and was 56 inches long. The upstream end of the pipe was fitted with an adjustable steel slide gate embedded in a concrete headwall and secured with a

padlock. The CMP is the primary means of releasing water for irrigation Claims 76LJ 45094, 76LJ 39786, 76LJ 45090, and 76LJ 45093 downstream on Ronan Creek. The maximum water surface elevation of Lake Mary Ronan is 3,701 feet according to the US Geological Survey (USGS) topographic map (Figure 2).

14. Per a US Army Corps of Engineers Report entitled “Flood Plain Determination Lake Mary Ronan, Lake County Montana” dated September 1996, the minimum elevation of the CMP is 3,696.74 feet. Therefore, 4.26 feet (3,701.00 feet - 3,696.74 feet), or approximately 6,456.9 AF (4.26 feet × 1,515.7 acres) of water could be stored and subsequently released via the CMP.

15. To be conservative, the Department estimated Lake Mary Ronan’s physical availability by subtracting the volume of water stored (6,456.9 AF) via the dam/dike from the maximum lake volume. The Department has no way to quantify the annual amount and/or timing of water released from Lake Mary Ronan; physical availability is limited to the pre-dam/dike construction volume of Lake Mary Ronan. The volume of water physically available in Lake Mary Ronan is 35,107.6 AF (41,564.5 AF - 6,456.9 AF = 35,107.6 AF).

End-Area Formula

$$V = \frac{1}{2}H(A_1 + A_2)$$

H = difference in depth between two successive depth contours;

A₁ = area of the lake within the outer depth contour being considered;

A₂ = area of the lake within the inner contour line under consideration.

Table 1: Physical Availability Bathymetric Analysis of Lake Mary Ronan Using the End-Area Formula					
Contour Interval (ft)	H (ft)	Area (ac)	Total Area (ac)	Depth Strata (ft)	Volume (AF)
0	10	274.6	1,515.7	0-10	13,784.0
10	10	187.8	1,241.1	10-20	11,472.0
20	10	173.7	1,053.3	20-30	9,664.5
30	10	430.4	879.6	30-40	6,644.0
40	10	449.2	449.2		
---				TOTAL VOLUME (AF)	41,564.5
---				VOLUME STORED BY DAM (AF)	6,456.9
---				PHYSICALLY AVAILABLE VOLUME (AF)	35,107.6

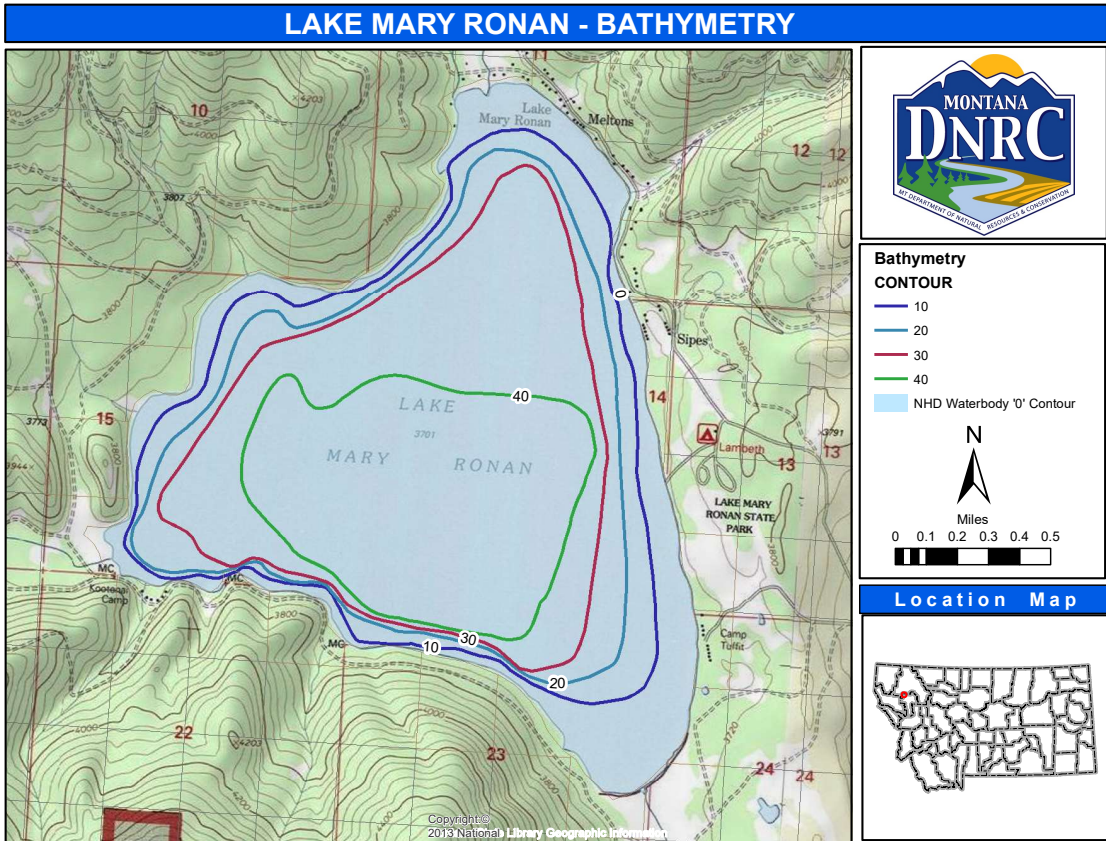


Figure 2: Map of Lake Mary Ronan bathymetric depth strata contours

16. The Department finds the requested volume of 67.2 AF annually, diverted at a flow rate of 150.0 GPM (0.33 CFS), is physically available in Lake Mary Ronan during the proposed period of diversion.

CONCLUSIONS OF LAW

17. 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.”

18. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987) (applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

19. 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).

20. The Applicants have proven that water is physically available at the proposed point of diversion in the amount the Applicants seek to appropriate. § 85-2-311(1)(a)(i), MCA. (Finding of Fact (FOF) Nos. 11-16)

Legal Availability

FINDINGS OF FACT

21. The area of potential impact is Lake Mary Ronan. The outlet of Lake Mary Ronan is controlled by a private individual and outlet structure. Existing water rights on Ronan Creek downstream of Lake Mary Ronan were not considered in the legal availability analysis because the flows in Ronan Creek are a direct result of how the outlet structure is managed. For this reason,

Department approved USGS regression equations that quantify mean monthly stream flow would not provide accurate estimates of streamflow in Ronan Creek. The DNRC used the method below to quantify legally available volumes at the POD during the proposed period of diversion.

22. Existing legal demands on the source were quantified and subtracted from physically available water. The total volume of water physically available in Lake Mary Ronan is 35,107.6 AF (Table 1). Existing legal demands on Lake Mary Ronan total 8,652.0 AF (Table 2), leaving 26,455.6 AF ($35,107.6 - 8,652.0 = 26,455.6$ AF) of water legally available for appropriation from Lake Mary Ronan (Table 3).

Table 2: Summary of Existing Legal Demands on Lake Mary Ronan			
Water Right Number	Purposes	Volume (AF)	Period of Diversion
76LJ 143853 00	COMMERCIAL	14.0	01/01 to 12/31
76LJ 32526 00	DOMESTIC	1.0	06/01 to 09/30
76LJ 99075 00	DOMESTIC	1.5	01/01 to 12/31
76LJ 99148 00	DOMESTIC	1.5	01/01 to 12/31
76LJ 110785 00	DOMESTIC	0.3	01/01 to 12/31
76LJ 110786 00	DOMESTIC	0.8	01/01 to 12/31
76LJ 110790 00	DOMESTIC	0.3	01/01 to 12/31
76LJ 110789 00	DOMESTIC	0.3	01/01 to 12/31
76LJ 664 00	DOMESTIC	1.5	01/01 to 12/31
76LJ 110787 00	DOMESTIC	1.0	01/01 to 12/31
76LJ 26581 00	IRRIGATION	10.6	05/15 to 09/15
76LJ 45094 00*	IRRIGATION	0.0	04/10 to 10/20
76LJ 45093 00*	IRRIGATION	0.0	05/10 to 09/10
76LJ 39786 00*	IRRIGATION	0.0	04/10 to 10/20
76LJ 45090 00*	IRRIGATION	8,600.0	04/10 to 10/10
76LJ 30006219	IRRIGATION; LAWN AND GARDEN	7.6	01/01 to 12/31
76LJ 30005417	LAWN AND GARDEN	2.5	04/15 to 10/15
76LJ 30008226	LAWN AND GARDEN	0.6	04/01 to 10/01
76LJ 30063101	LAWN AND GARDEN	2.6	04/15 to 10/15
76LJ 30113323	LAWN AND GARDEN	0.2	04/15 to 10/15
76LJ 30110395	LAWN AND GARDEN	2.7	04/15 to 10/15
76LJ 41392 00	LAWN AND GARDEN; STOCK	1.4	01/01 to 12/31
76LJ 39634 00	MULTIPLE DOMESTIC	1.8	01/01 to 12/31
---	TOTAL (AF)	8,652.0	---

*Claims 76LJ 45094 00, 76LJ 39786 00, 76LJ 45090 00, and 76LJ 45093 00 are associated. They share the same place of storage, head gate, and means of conveyance. One volume, equal to the claimed annual storage, is listed for all rights.

Table 3: Legal Availability of Lake Mary Ronan		
Physically Available Volume of Lake Mary Ronan (AF)	Existing Legal Demand Volume (AF)	Legally Available Volume (AF)
35,107.6	8,652.0	26,455.6

23. The Department finds that the proposed annual diverted volume of 67.2 AF, diverted at a flow rate of 150.0 GPM (0.33 CFS), that the Applicants seek to appropriate is legally available in Lake Mary Ronan.

CONCLUSIONS OF LAW

24. 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).

25. 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.

26. Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicants seek 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 21-23)

Adverse Effect

FINDINGS OF FACT

27. Applicants provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during shortages, the Applicants will turn off their pump if a senior water user makes a call. In this scenario, domestic water will be hauled in by truck.

28. The Applicants have shown that they can regulate their water use and that they have an implementation plan to protect senior water users. Potential adverse effect was analyzed for those rights appropriating water from Lake Mary Ronan (Table 2). Enough water remains in Lake Mary Ronan (Table 3) to meet existing legal demands and the requested 67.2 AF diverted at 150.0 GPM. The Department finds the proposed water use will not adversely affect senior water users.

CONCLUSIONS OF LAW

29. 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. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

30. 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).

31. 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*, (2011) Pg. 4.

32. 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 (1991), 249 Mont. 425, 816 P.2d 1054.

33. 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*, (2011) Pg. 7 (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). (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.

34. 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*, (2011) Pg. 8.

35. Applicants have 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 27-28)

Adequate Diversion

FINDINGS OF FACT

36. Applicants will divert water from Lake Mary Ronan at a maximum rate of 150.0 GPM via a Goulds model 4BF 10-HP pump, controlled by a Danfoss Aquadrive Variable Frequency Drive (VFD). Two identical pumps will be located at the proposed POD as required for redundancy by the MT Department of Environmental Quality (DEQ), but they will not operate simultaneously. This water system will be a registered Public Water Supply (PWS) under DEQ jurisdiction. The final system will be designed to meet DEQ PWS standards and DEQ must review and approve final design. The project Professional Engineer will certify to DEQ that the system has been constructed in accordance with the approved plans prior to the system entering service.

37. The system will use a floating 4-inch diameter pressurized PVC intake line extending approximately 200-feet into the lake at a sufficient depth to prevent freezing and to reduce the intake of debris. The main pump will draw water through the intake line and pass it through a DEQ-approved water treatment system. The redundant pump will be coupled with its own redundant treatment system to ensure water delivery in the event of the failure or maintenance of one of the pumps and/or treatment systems.

38. From the treatment system, a booster pump will convey water to a 50,000-gallon storage tank located at a high point on the property. The storage tank is sized to provide enough treated water to satisfy maximum day and peak hourly demand. Water from the storage tank will be distributed through 8-inch water mains and one-inch service lines connecting to each lot.

39. The total dynamic head (TDH) of the system is 103-feet, based on the End Suction Variable Speed Pump Station Proposal provided by the pump station vendor MCI Flowtronex. The TDH includes the elevation lift and friction losses to convey the water from the intake to the storage tank.

40. The pump is capable of producing 150.0 GPM and of supplying water to the storage tank at 103-feet TDH based on the applicant-provided system specifications. This flow rate will allow the Applicants to fill the storage tank which will be sized to provide enough water meet maximum day

and peak hourly demand. The Department finds the system capable of producing and distributing the requested flow rate of 150.0 GPM and annual volume of 67.2 AF.

CONCLUSIONS OF LAW

41. 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.

42. 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.

43. The Applicants have 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 36-40)

Beneficial Use

FINDINGS OF FACT

44. Applicants request 67.2 AF to fulfill the multiple domestic demand of 86 single family residences (33.5 AF) and to irrigate 15.8 acres of lawn and garden area (33.7 AF). The multiple domestic volume was calculated using the demand of 350-gallons per day (GPD) per four-bedroom single family residence found in DEQ Circular 4. The daily demand equates to an annual demand of 0.39 AF per home $((350 \text{ GPD} \times 365 \text{ days per year}) \div 325,851 \text{ gallons per AF} = 0.39 \text{ AF})$, or 33.5 AF for all 86 single family residences $(0.39 \text{ AF} \times 86 \text{ homes} = 33.5 \text{ AF})$.

45. Using the United States Department of Agriculture – Natural Resources and Conservation Service (USDA-NRCS) Irrigation Water Requirements (IWR) software, the Department’s guidelines outlined in the memo titled “DNRC Consumptive Use Methodology – Turf Grass,” the Bigfork Weather Station climate data, and assuming 70-percent sprinkler irrigation efficiency (ARM 36.12.115(2)(e)), the applicants identified an irrigation requirement of 2.13 AF per acre per year $(17.85 \text{ inches/acre} \div 0.70 = 25.5 \text{ inches/acre}; 25.5 \text{ inches/acre} \div 12 \text{ inches/ft} = 2.13 \text{ AF/acre})$.

This figure is consistent with the department standards for lawn and garden use which allows up to 2.5 AF/acre per year (ARM 36.12.115(2)(b)). With the proposed irrigated area of 15.8 acres (equivalent to a covenant restricted 0.184 acres per lot), the requested irrigation volume is 33.7 AF (2.13 AF x 15.8 acres = 33.7 AF).

46. The Applicants will divert water from Lake Mary Ronan at a maximum flow rate of 150.0 GPM to satisfy the peak hourly demand (PHD) for the system. PHD was calculated by multiplying the average day demand by a peaking factor of 5.0. The 50,000-gallon storage tank will buffer the pump cycling and pressurize the system for water delivery. This flow rate is reasonable and adequate to provide the requested volume for the purpose throughout the requested period of diversion and use.

47. The Department finds that the water uses are beneficial, and that the requested flow rate of 150.0 GPM and annual volume of 67.2 AF are reasonably justified.

CONCLUSIONS OF LAW

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, supra; 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 et al*, 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*, (2011) Pg. 3 (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. 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. Applicants propose to use water for multiple domestic and lawn and garden irrigation purposes which are recognized beneficial uses. § 85-2-102(5)(a), MCA. Applicants have proven by a preponderance of the evidence that multiple domestic and lawn and garden irrigation are beneficial uses and that 67.2 AF of diverted volume, and 150.0 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 44-47)

Possessory Interest

FINDINGS OF FACT

53. The Applicants signed the affidavit on the application form affirming the Applicants 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

54. 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.

55. 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.

56. The Applicants have proven by a preponderance of the evidence that they have 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 53)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30151446 should be GRANTED.

The Department determines the Applicants may divert water from Ronan Creek (Lake Mary Ronan) using a pump from January 1 – December 31. Applicants will pump at 150.0 GPM up to an annual volume of 67.2 AF for multiple domestic use (33.5 AF to supply 86 single family residences) and for lawn and garden irrigation (33.7 AF applied to 15.8 acres). Multiple domestic use will occur from January 1 to December 31 and lawn and garden irrigation will occur from April 15 – October 15. The Applicants will divert water using two identical pumps, a primary pump and a redundant pump. Only one pump will operate at any given time, with the redundant pump operating only if the primary pump is out of service.

The points of diversion are located in Lake Mary Ronan offshore of Government Lot 2, N2NE Section 15, Township 25N, Range 22W, Lake County, Montana. The places of use are:

- i. E2SW Section 10, Township 25N, Range 22W, Lake County, Montana.
- ii. SE Section 10, Township 25N, Range 22W, Lake County, Montana.
- iii. Government Lot 5, SW Section 11, Township 25N, Range 22W, Lake County, Montana.
- iv. Government Lot 6, SW Section 11, Township 25N, Range 22W, Lake County, Montana.
- v. N2 Section 15, Township 25N, Range 22W, Lake County, Montana.
- vi. SW Section 15, Township 25N, Range 22W, Lake County, Montana.

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

THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT OF THE WORK COMPLETED UNDER THIS RIGHT BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL COMPLETION OF THE PROJECT. FAILURE TO SUBMIT YEARLY

REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE
REPORTS MUST BE SENT TO THE KALISPELL WATER RESOURCES
REGIONAL OFFICE.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives 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 preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 13th day of September 2021.

/Original signed by Kathy Olsen/
Kathy Olsen, Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 13th day of September 2021, by first class United States mail.

MICHAEL R. & MARLO G. V. MADDY
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POLSON, MT 59860-7069

WGM GROUP
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NAME
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DATE