Water Resources Division – Kalispell Regional Office
655 Timberwolf Pkwy, Ste. 4
Kalispell, MT 59901-1215
(406) 752-2288
DNRCKalispellWater@mt.gov

06/23/2025

Lakeside County Water and Sewer District
Attn: Rodney Olson
253 Bierney Creek Road
Lakeside, MT 59922

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 76LJ 30165067

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit authorization found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no response is received by 7/15/2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.

Please let me know if you have any questions.

Best,

Joseph P. Howerton

Joseph Howerton
Water Resources Specialist
Kalispell Regional Office
655 Timberwolf Pkwy, Ste. 4
Kalispell, MT 59901-1215

CC:

Brad Bennett
Senior Hydrologist
Water & Environmental Technologies
102 Cooperative Way, Suite 100
Kalispell, MT 59901

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

* * * * * * *

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30165067 BY LAKESIDE COUNTY WATER & SEWER DISTRICT	)))	**DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT**

* * * * * * *

On April 3, 2025 the Lakeside County Water and Sewer District submitted Application for Beneficial Water Use Permit No. 76LJ 30165067 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 430 gallons per minute (GPM) and 249.42 acre-feet (AF). The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on December 23, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on December 23, 2024. The Department delivered the Technical Analysis on January 31, 2025. The application was determined to be correct and complete as of April 24, 2025. An Environmental Assessment for this application was completed on June 23, 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
- Aquifer Testing Addendum, Form 600-ATA
- Form 653 – Variance Request
- Attachments:
  - Attachment A – Signed Form 600

- Attachment B – DNRC Technical Analysis Report Parts A & B (generated by the Water Sciences and Water Resources Bureaus, respectively, based on information provided in the Preapplication Meeting Form, dated January 31, 2025)
- Attachment C – Preliminary Site Layout

- Attachment D – IWR Calculations
  - Attachment E – Preliminary Hydraulic Calculations and Pump Specifications
  - Attachment F – Well Logs

Information within the Department's Possession/Knowledge

- Letter from DNRC to Water and Environmental Technologies (consultant) approving their requested variances from ARM 36.12.121(3)(a) and (g), dated December 31, 2024.
- Mean monthly stream flow data from USGS Gaging Station No. 12372000, Flathead River near Polson, MT. Period of record: October 1938 – September 2024.
- List of existing water rights on Flathead Lake from the inlet down to USGS Gaging Station No. 12372000.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents.
  - DNRC Technical Memorandum dated March 23, 2010: Consumptive Use Methodology-Turf Grass.

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	
NRCS means the Natural Resource Conservation Service	
USDA means the United States Department of Agriculture	
DEQ means Department of Environmental Quality	
AF means acre-feet	**BGS** means below ground surface

BTC means below top of casing	**CFS** means cubic feet per second
FOF means finding(s) of fact	**GPD** means gallons per day
GPM means gallons per minute	**HDPE** means high density polyethylene
HP means horsepower	**IWR** means Irrigation Water Requirements
POD means point of diversion	**PWS** means Public Water Supply
SWL means static water level	**TDH** means total dynamic head
WSB means Water Sciences Bureau	**ZOI** means zone of influence

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF annually by means of two production wells: PWS Well 1 (GWIC ID: 237308) and PWS Well 2 (GWIC ID: 237309). The Applicant will divert water for multiple domestic, lawn and garden, and commercial uses from January 1 to December 31 and for irrigation of 51.21 acres of lawn and garden area from April 18 to October 13. The maximum proposed flow rates of PWS Well 1 and Well 2 will be 270.0 GPM and 160.0 GPM, respectively. The Applicant proposes to use a volume of 100.53 AF to supply the multiple domestic needs for 359 dwelling units, 22.83 AF to supply the commercial uses, and 126.06 AF to irrigate 51.21 acres of lawn and garden.

The points of diversion are located in the:

- SESWSE of Section 30, Township 26N, Range 20W, Flathead County (PWS Well 1)
- NESWSE of Section 30, Township 26N, Range 20W, Flathead County (PWS Well 2)

The place of use is located in the:

- S2 of Section 19 Township 26N, Range 20W, Flathead County
- Section 25 Township 26N, Range 21W, Flathead County
- Section 29 Township 26N, Range 20W, Flathead County
- Section 30 Township 26N, Range 20W, Flathead County

2. The purpose of this Application for Beneficial Water Use Permit is to serve a planned development south of the Lakeside townsite and west of US Hwy 93. The eastern flank of the development is approximately 1.06 miles from Flathead Lake. The multiple domestic use purpose will supply water to 359 dwelling units, and the commercial uses will include a real estate office, restaurant, fitness/wellness facility, spa, golf club house, comfort stations, maintenance facilities,

and bar. Lawn and garden irrigation is proposed to average 5,000 square feet (0.115 acres) per lot for 359 lots (359 x 0.115 = 41.21 acres) with an additional 10.0 acres of common area being irrigated for a total irrigated area of 51.21 acres. The total consumed volume for the proposed multiple domestic, commercial, and lawn and garden irrigation purposes is 249.41 AF per year. There are no supplemental rights to the proposed appropriation.

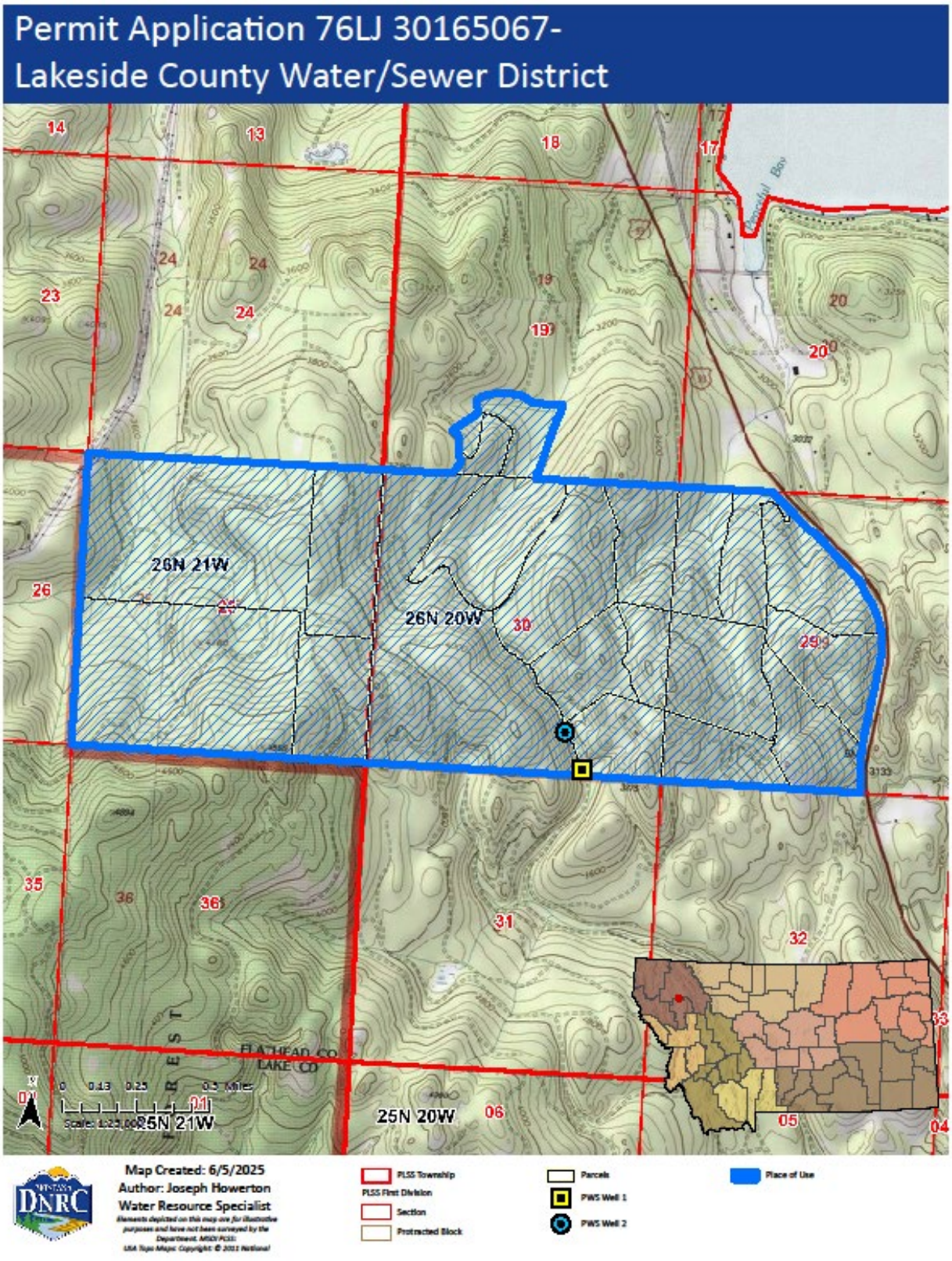

Figure 1: Map of proposed place of use and points of diversion

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

GENERAL CONCLUSIONS OF LAW

3. 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 . . .

4. 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.

5. 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.

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

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

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

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

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

7. 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.

8. 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

9. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF/year for multiple domestic, commercial, and lawn and garden uses.

10. Physically available groundwater volume within the ZOI was found to be 564,000 ft^3/day or 4,726 AF/year.

GROUNDWATER:

11. The Department evaluated the volume of water that is physically available from the source aquifer using Applicant supplied data from constant rate pumping tests on the proposed PWS-1 and PWS-2 Wells. Department Groundwater Hydrologist Evan Norman used data from said tests to produce the December 30, 2024 Groundwater Permit Report affiliated with this application. This report is in the Application file and is available upon request.

Aquifer Test & Drawdown Modelling:

12. Variances were granted by the DNRC Kalispell Regional Water Resources Office from Aquifer Testing Requirements in ARM 36.12.121(3)(g) because groundwater levels were not monitored in the observation well (PWS-2) for at least two days prior to the start of the 72-hour test on PWS-1. However, the observation well is located in the same bedrock aquifer. As such, the background trend occurring in PWS-1 is relatively consistent with the background trend occurring in PWS-2. Additionally, measurable drawdown and recovery were observed in the observation well. This allowed for estimates of hydraulic characteristics to be made from the available data.

Table 1: Assumed Monthly Pumping Schedule for PWS Wells

Month	Diverted Volume (AF)	Diverted Flow Rate (GPM)
January	10.5	76.4
February	9.5	76.4
March	10.5	76.4
April	13.1	99.0
May	25.7	187.7
June	34.2	257.7
July	45.1	329.3
August	40.9	298.5
September	25.5	192.3
October	13.9	101.4
November	10.1	76.4
December	10.5	76.4
Total	**249.4**	

Table 2: Total consumed volume and net depletion to surface water for the Production Wells.

Month	Lawn & Garden Irrigation Consumed Volume (AF)	Commercial and Multiple Domestic Consumed Volume (AF)	Total Consumed Volume (AF)	Flathead Lake Net Depletion (AF)	Flathead Lake Net Depletion (GPM)
January	0.0	10.5	10.5	18.0	131.2
February	0.0	9.5	9.5	16.2	131.2
March	0.0	10.5	10.5	18.0	131.2
April	2.1	10.1	12.2	17.4	131.2
May	10.7	10.5	21.1	18.0	131.2
June	16.8	10.1	27.0	17.4	131.2
July	24.2	10.5	34.7	18.0	131.2
August	21.3	10.5	31.8	18.0	131.2
September	10.8	10.1	20.9	17.4	131.2
October	2.4	10.5	12.9	18.0	131.2
November	0.0	10.1	10.1	17.4	131.2
December	0.0	10.5	10.5	18.0	131.2
Total	88.3	123.3	211.6	211.6	

13. The DNRC WSB evaluated physical availability for this application by calculating groundwater flux through a ZOI corresponding to the 0.01-foot drawdown contour which extends a maximum distance of approximately 34,000 feet from the Applicant's wells. The 0.01-foot drawdown contour extends along the extent of the mapped faults southeast to West Shore State Park and northwest approximately 34,000 feet. The direction of groundwater flow is to Flathead Lake, from west to east, as such the width of the ZOI that is perpendicular to groundwater flow equals approximately 47,000 feet.

$$Q = TWi$$

Equation 1: Groundwater flux through the ZOI

Where:

T (Transmissivity; derived from aquifer test data) = 1,200 ft^2/day

W (Width of ZOI) = 47,000 feet

i (Groundwater gradient; from potentiometric surface mapping in Permit No. 76LJ 30062687) = 0.01 ft/ft

The calculation for groundwater flux (Q) through the delineated area is given by Equation 1 and is 564,000 ft^3/day or 4,726 AF/year (Q = 1,200 ft2/day x 47,000 feet x 0.01 ft/ft = 564,000 ft3/day ÷ 43,560 ft3/AF = 12.95 AF/day x 365 days/year = 4,726 AF/year).

14. Based on the calculation for groundwater flux through the delineated ZOI, the Department finds that the amount of groundwater that the Applicant seeks to appropriate, 249.42 AF/year diverted at 430.0 GPM, is physically available in the aquifer.

Table 3: Remaining available water column for the Production Wells.

Drawdown Estimate	GWIC ID 237308	GWIC ID 237309
Total Depth at Bottom of Well Perforations (ft btc)	622.0	686.00
Pre-Test Static Water Level (ft btc)	340.96	364.6
Available Drawdown Above Bottom of Perforations (ft)	281.0	323.4
Observed Drawdown of Aquifer Test (ft)	24.4	225.5
Modeled Drawdown Using Mean Aquifer Test Rate (ft)	42.4	24.2
Well Efficiency (%)	100	11
Predicted Theoretical Maximum Drawdown (ft)	41.0	24.4

Predicted Drawdown with Well Loss (ft)	41.0	227.4
Interference Drawdown (ft)	7.1	12.1
Total Drawdown (ft)	48.1	239.5
Remaining Available Water Column (ft)	**232.9**	**83.9**

LEGAL AVAILABILITY

FINDINGS OF FACT

15. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF/year for multiple domestic, commercial, and lawn and garden uses. Physical groundwater availability for comparison with legal demands was evaluated by calculating groundwater flux through the ZOI corresponding to the 0.01-foot drawdown contour.

16. Physically available groundwater volume within the ZOI was found to be 564,000 ft^3/day or 4,726 AF/year. There are 500 groundwater rights (legal demands) within the ZOI, the total volume of which will be compared to the physically available groundwater volume within the ZOI. A list of these legal demands is contained in the application file and is available upon request. A breakdown of groundwater legal demands by water right type is in Table 4.

17. The Department summed the volumes of the groundwater rights within the ZOI to determine the total legal demand on the aquifer within the ZOI (Table 4. Eighty-two of the 446 groundwater certificates do not have a specified volume because they were issued at a time when the Department placed the following statement on groundwater certificates:

"This right is limited to the actual amount used up to 10 acre-feet."

The Department assumed that each of these groundwater certificates is being used to divert the maximum allowed volume of 10.0 AF per year. This is an appropriate measure of assessing existing legal demands as it leads to an overestimation of legal demands on the physical volume of water.

Table 4: Summary of Groundwater Legal Demands within the ZOI		
Water Right Type	**Number of Rights**	**Total Volume (AF)**
Groundwater Certificate	446	1,863.8
Statement of Claim	32	374.8
Provisional Permit	17	1,388.2
Exempt Rights	5	16.3
TOTAL	**500**	**3,643.1**

18. Finally, the total legal demand volume was then subtracted from the calculated groundwater flux through the delineated area. This results in a legally available groundwater volume of 1,082.9 AF/year (Table 5).

Table 5: Legal Availability Analysis of Groundwater within the ZOI		
Groundwater Flux (AF/year)	**Existing Legal Demands (AF)**	**Legally Available Water in the Delineated Area (AF)**
4,726.0	3,643.1	1,082.9

SURFACE WATER

19. The DNRC WSB performed a surface water depletion analysis. Based on geologic structural information and proximity, the DNCR WSB determined that Flathead Lake, approximately 7,800 feet east of the project location, is considered hydraulically connected to the source aquifer for this application and is the only surface water source considered for the rate and timing of depletions. The DNRC WSB evaluated the areas of potential surface water impact for this Application based on their surface water depletion analysis. The area of potential surface water impact for this Application is Flathead Lake from the inlet downstream to USGS Gaging Station No. 12372000 near Polson, MT.

20. Net depletion resulting from the proposed multiple domestic, commercial, and lawn and garden irrigation uses occurs as propagation of drawdown through the confined bedrock aquifer to the affected reach of Flathead Lake. Monthly net depletions to Flathead Lake occur year-round. The proposed use includes year-round and seasonally consumed volumes; however, due to the nature of the propagation of drawdown through the confined bedrock aquifer, the DNRC WSB determined depletions will accrete to Flathead Lake at a constant year-round net depletion rate of 131.2 GPM. For the subject application, the proposed use includes multiple domestic, commercial, and lawn and garden irrigation purposes. Following DNRC standards, the annual consumption for

turf grass (lawn and garden) is estimated to be 88.25 AF based on data derived from the Polson IWR station (Station # MT6635) while assuming 70% irrigation efficiency. Multiple domestic and commercial uses are assumed to have 100% of their volume consumed when using an evaporation basin or land application disposal/treatment method, which is the method employed by the Lakeside County Water and Sewer District. Therefore, the total consumed volume for the multiple domestic (100.53 AF), commercial (22.83 AF), and lawn and garden irrigation (88.25 AF) uses is 211.61 AF per year, which is equivalent to a constant depletion rate of 131.2 GPM, or 0.29 CFS. See equations below:

(1) 211.61 AF/year x 325,851 gallons/AF = 68,953,330.11 gallons/year

(2) 68,953,330.11 gallons/year ÷ 525,600 minutes/year = 131.19 GPM

(3) 131.19 GPM x (1 CFS/448.8 GPM) = 0.29 CFS

Table 6 identifies the monthly consumed flow rates and volumes, and Table 7 identifies the corresponding depletion flow rates and volumes to Flathead Lake.

Table 6: Consumed volume schedule for the proposed appropriation

A	B	C	D	E	F
Month	**IWR – Polson (inches)**	**Irrigation Consumed Volume (AF)**	**Commercial and Multiple Domestic Consumed Volume (AF)**	**Total Consumed Volume (AF)**	**Total Consumed Flow Rate (GPM)**
January	0.0	0.0	10.5	10.5	76.4
February	0.0	0.0	9.5	9.5	76.4
March	0.0	0.0	10.5	10.5	76.4
April	0.5	2.1	10.1	12.2	92.2
May	2.5	10.7	10.5	21.1	154.3
June	3.9	16.8	10.1	27.0	203.3
July	5.7	24.2	10.5	34.7	253.4
August	5.0	21.3	10.5	31.8	231.9
September	2.5	10.8	10.1	20.9	157.6
October	0.6	2.4	10.5	12.9	93.9
November	0.0	0.0	10.1	10.1	76.4
December	0.0	0.0	10.5	10.5	76.4
Total	20.7	88.3	123.3	211.6	

Table 7: Total consumed volume and net depletion to surface water for the Production Wells					
Month	**Irrigation Consumed Volume (AF)**	**Commercial and Multiple Domestic Consumed Volume (AF)**	**Total Consumed Volume (AF)**	**Flathead Lake Net Depletion (AF)**	**Flathead Lake Net Depletion (GPM)**
January	0.0	10.5	10.5	18.0	131.2
February	0.0	9.5	9.5	16.2	131.2
March	0.0	10.5	10.5	18.0	131.2
April	2.1	10.1	12.2	17.4	131.2
May	10.7	10.5	21.1	18.0	131.2
June	16.8	10.1	27.0	17.4	131.2
July	24.2	10.5	34.7	18.0	131.2
August	21.3	10.5	31.8	18.0	131.2
September	10.8	10.1	20.9	17.4	131.2
October	2.4	10.5	12.9	18.0	131.2
November	0.0	10.1	10.1	17.4	131.2
December	0.0	10.5	10.5	18.0	131.2
Total	88.3	123.3	211.6	211.6	---

(4) *Flathead Lake – Physical Availability (quantified for the purpose of analyzing legal availability of the depleted source)*: Physical availability of Flathead Lake from the lake inlet to USGS Gaging Station No. 12372000 was quantified monthly. The Department used the Flathead River near Polson, MT USGS Gaging Station No. 12372000 (period of record: October 1938 – September 2024) and the method below to quantify physically available monthly flows and volumes in this reach during the period of groundwater diversion and resulting surface water depletion (year-round). USGS Gaging Station No. 12372000 is approximately 0.6 miles downstream of the Sėliš Ksanka Qĺispė Dam (formerly known as Kerr Dam). This gage is representative of the amount of water leaving Flathead Lake because it is the closest gage downstream of the Sėliš Ksanka Qĺispė Dam and depletions to Flathead Lake will reduce the total volume of water leaving the lake (passing over/through the dam). The date range used includes the entire period of record for this gage.

(5) The Department calculated median of the mean monthly flow rates in CFS for the Flathead Lake using USGS Gaging Station No. 12372000 records for each month of the proposed period of depletion (Table 8, column B). Those flows were then converted to monthly

volumes in AF (Table 8, column C) using the following equation: median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.

(6) The Department calculated the monthly flows appropriated by existing users upstream of the gage on the source (Table 8, column D) by:

a. Generating a list of existing surface water rights from the Flathead Lake inlet to USGS Gaging Station No. 12372000 (list is included in the application file and available upon request);

b. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 while designating all other water uses as year-round uses;

c. 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,

d. 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 method an appropriate measure of assessing existing rights as it protects existing water users.

(7) The Department added the flow rates of the existing rights between Flathead Lake inlet and USGS Gaging Station No. 12372000 (Table 8, column D) to the median of the mean monthly gage values (Table 8, column B) to determine physical availability of Flathead Lake water (Table 8, columns E-F).

(8) The physical availability of the lake is summed as the flow and volume measured at USGS Gaging Station No. 12372000 plus all legal demands between the gage and the inlet of Flathead Lake.

Table 8: Physical Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage #12372000 near Polson, MT					
A	**B**	**C**	**D**	**E**	**F**
Month	**Median of the Mean Monthly Flow at Gage 12372000 (CFS)**	**Median of the Mean Monthly Volume at Gage 12372000 (AF)**	**Existing Rights from Flathead Lake Inlet to Gage 12372000 (CFS)**	**Physically Available Water in Depleted Reach (CFS)**	**Physically Available Water in Depleted Reach (AF)**
January	10,270.0	630,372.6	105.9	10,375.9	636,871.9
February	9,149.5	507,248.3	105.9	9,255.4	513,118.6
March	7,763.0	476,492.9	105.9	7,868.9	482,992.3
April	9,214.5	547,341.3	176.7	9,391.2	557,839.5
May	18,560.0	1,139,212.8	176.7	18,736.7	1,150,061.0
June	25,400.0	1,508,760.0	176.7	25,576.7	1,519,258.2
July	12,730.0	781,367.4	176.7	12,906.7	792,215.6
August	6,126.0	376,013.9	176.7	6,302.7	386,862.1
September	5,956.5	353,816.1	176.7	6,133.2	364,314.3
October	7,230.5	443,808.1	176.7	7,407.2	454,656.3
November	8,556.0	508,226.4	105.9	8,661.9	514,516.1
December	9,860.0	605,206.8	105.9	9,965.9	611,706.1

(9) *Flathead Lake – Legal Availability*: Sėliš Ksanka Qĺispė Dam near Polson is the control structure for Flathead Lake and depletions from groundwater pumping will reduce the total volume of water leaving the lake (passing over/through the dam). USGS Gaging Station No. 12372000 near Polson, MT is approximately 0.6 miles downstream of the dam. Legal availability of Flathead Lake was quantified monthly using the method below.

(10) The Department quantified physically available monthly flows and volumes (Table 9, columns B-C) for the depleted reach of Flathead Lake. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 9, columns D) as defined in FOF 14 and described in FOF 18.

(11) The Department subtracted out the flow rates of the existing legal demands (Table 9, column D) within the area of potential impact from the physically available water (Table 9, column B) to determine legal availability of Flathead Lake water (Table 9, columns E-F).

Table 9: Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gage # 12372000 near Polson, MT					
A	**B**	**C**	**D**	**E**	**F**
Month	**Physically Available Water in the Depleted Reach (CFS)**	**Physically Available Water in the Depleted Reach (AF)**	**Existing Legal Demands in Flathead Lake (CFS)**	**Physically Available Water Minus Existing Legal Demands (CFS)**	**Physically Available Water Minus Existing Legal Demands (AF)**
January	10,375.9	636,871.9	105.9	10,270.0	630,372.6
February	9,255.4	513,118.6	105.9	9,149.5	507,248.3
March	7,868.9	482,992.3	105.9	7,763.0	476,492.9
April	9,391.2	557,839.5	176.7	9,214.5	547,341.3
May	18,736.7	1,150,061.0	176.7	18,560.0	1,139,212.8
June	25,576.7	1,519,258.2	176.7	25,400.0	1,508,760.0
July	12,906.7	792,215.6	176.7	12,730.0	781,367.4
August	6,302.7	386,862.1	176.7	6,126.0	376,013.9
September	6,133.2	364,314.3	176.7	5,956.5	353,816.1
October	7,407.2	454,656.3	176.7	7,230.5	443,808.1
November	8,661.9	514,516.1	105.9	8,556.0	508,226.4
December	9,965.9	611,706.1	105.9	9,860.0	605,206.8

(12) The Confederated Salish & Kootenai Tribes own the hydropower water rights for Sėliš Ksanka Qĺispė Dam. Statements of Claim 76L 94408-00 and 76L 94409-00 for Sėliš Ksanka Qĺispė Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation (equivalent to 1,217,106 AF), respectively. A second foot day is the volume of water represented by a flow of one cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity. The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the combined claimed flow rate of 14,540 CFS flowing 24 hours per day, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

(13) Sėliš Ksanka Qĺispė Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These

factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Sėliš Ksanka Qĺispė Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Sėliš Ksanka Qĺispė Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

(14) Pending an adjudication of Confederated Salish & Kootenai Tribes hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in the Flathead River and Flathead Lake can reasonably be considered legally available during the period in which the Applicants seek to appropriate. This finding is based on the records of the Department and other evidence provided to the Department.

21. The Department finds:

a. That 430.0 GPM up to 249.42 AF/year is legally available in the aquifer based on the comparison of groundwater flux through the ZOI to the volume of existing legal demands within the ZOI; and,

b. The amount of water (131.2 GPM (0.3 CFS) up to 211.6 AF/year) that the proposed groundwater appropriation may deplete from the hydraulically connected reach of Flathead Lake is legally available.

ADVERSE EFFECT

FINDINGS OF FACT

22. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF/year for multiple domestic, commercial, and lawn and garden uses. The Applicant provided a plan showing they can regulate their water use. To satisfy the water rights of senior appropriators during water shortages, the Applicant will:

a. Reduce irrigation by 50-percent;

b. Cease irrigation;

c. Initiate potable water rationing to 50-percent; and

d. Upon a valid call from a senior water holder, the owner will turn off the water supply.

23. Using the Applicant's proposed pumping schedule and associated annual volume, potential impacts to existing water rights are evaluated by modeling drawdown in nearby wells and net depletions to surface water sources.

24. WSB Hydrologist Evan Norman modeled the drawdown in existing wells from the proposed wells, a grid was generated in AQTESOLV® using the Moench (1984) solution, fracture hydraulic conductivity (K) of 40 feet/day, fracture specific storage (Ss) of 1.3 x 10^{-6}, matrix hydraulic conductivity (K') of 0.004 feet/day, matrix specific storage (Ss') of 2.1 x 10^{-4}, and fracture skin factor (Sf) and wellbore skin factor (Sw) of -2.0 and 0.46, respectively, and the assumed monthly pumping schedule for a period of five years as shown in Table 10. The drawdown is the largest at the end of July of the 5th year using the assumed monthly pumping schedule. The two proposed wells were modeled as one well using one diverted volume and flow rate schedule shown in column C of Table 10.

Table 10: Assumed monthly pumping schedule for proposed wells

A	B	C
Month	**Diverted Volume (AF)**	**Diverted Flow Rate (GPM)**
January	10.5	76.4
February	9.5	76.4
March	10.5	76.4
April	13.1	99
May	25.7	187.7
June	34.2	257.7
July	45.1	329.3
August	40.9	298.5
September	25.5	192.3
October	13.9	101.4
November	10.1	76.4
December	10.5	76.4
Total	249.4	

25. The maximum modeled drawdown at the centroid of the proposed wells is approximately 80.0 feet at the end of the fifth July of pumping. Assuming a constant-head-boundary at the Flathead Lake and a no-flow boundary representing the series of faults west of the project location mapped by Harrison et al. (1986) and Harrison et al. (2000), 341 water rights are predicted to

experience drawdown equal to or greater than one foot, 243 of which have well depths and static water level values available. At the end of the fifth July of pumping, all of the 243 water rights with known well depths and static water levels will have positive water column from which to appropriate. A list of these water rights is included in the application file and available upon request.

26. The Department finds there will be no adverse effect to senior appropriators in the groundwater ZOI or on the potentially affected surface water source resulting from the Applicant's proposed use of water based on:

i. The Applicant's proposal to regulate their water use to satisfy the water rights of senior appropriators;
ii. The analysis of potential drawdown in neighboring wells demonstrating that all wells with known depths and static water levels will have remaining water column;
iii. The Department's findings that water is legally available in the aquifer; and,
iv. The Department's finding that water is legally available in the hydraulically connected reach of Flathead Lake.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

27. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF/year for multiple domestic, commercial, and lawn and garden uses. A 72-hour aquifer test was conducted on the Production Well (PWS Well 1; GWIC ID: 237308). Water levels during the aquifer test were collected using In-Situ Level Troll Model 700 dataloggers in the Production Well (PWS Well 1) and Observation Well (PWS Well 2; GWIC ID 237309). The Observation Well is approximately 600 feet north of the Production Well and completed in the same source aquifer as the Production Well. The discharge was measured with a 3-inch totalizing and rate indicator inline flow meter.

28. A constant discharge rate of 270.0 GPM was maintained throughout the duration of the 72-hour aquifer test on the Production Well. The maximum drawdown in the Production Well was 24.40 feet below the SWL of 340.96 feet BTC leaving 256.64 feet of available water column above the bottom of the well perforations. The Observation Well experienced a maximum drawdown of

5.06 feet below the SWL of 365.40 feet BTC leaving approximately 317.54 feet of available water column above the bottom of the well perforations.

29. The Applicant provided additional aquifer testing data for Production Well (PWS Well 2; GWIC ID: 237309) and Observation Well (PWS Well 1; GWIC ID: 237308). The 24-hour constant rate test was performed at an average flow rate of 164.7 GPM. The Production Well (PWS Well 2; GWIC ID: 237309) and Observation Well (PWS Well 1; GWIC ID: 237308), experienced 225.50 ft and 2.22 ft of drawdown, respectively.

30. An evaluation of the available water column remaining in the Production Wells (GWIC IDs: 237308 and 237309) is modeled using the Moench (1984) solution, K of 40 feet/day, Ss of 1.3 x 10^{-6}, K' of 0.004 feet/day, Ss' of 2.1 x 10^{-4}, and Sf and Sw of -2.0 and 0.46, respectively. Predicted theoretical drawdown for the proposed wells is modeled for the period of diversion by apportioning the total monthly pumping rates to each well based on the contribution of each well to the total requested flow rate of 430.0 GPM.

31. As identified in Table 11, total drawdown is the sum of interference drawdown and predicted drawdown with well loss. Well loss is calculated by dividing the predicted theoretical maximum drawdown by a well efficiency value. Well efficiency is calculated by dividing the modeled maximum drawdown for the aquifer test by the maximum observed drawdown of the aquifer test. The aquifer adjacent to the proposed wells would experience a predicted theoretical maximum drawdown of 41.0 and 24.4 feet at the end of July of the first year of pumping. Interference drawdown was added to the modeled drawdown in the non-pumping well, at the end of July of the first year of pumping both Production Wells (GWIC IDs: 237308 and 237309). The remaining available water column for the Production Wells (GWIC IDs: 237308 and 237309) are equal to the available drawdown above the bottom of the perforations minus total drawdown.

Table 11: Remaining available water column for the Production Wells.		
Drawdown Estimate	**PWS Well 1 (GWIC ID: 237308)**	**PWS Well 2 (GWIC ID: 237309)**
Total Depth at Bottom of Well Perforations (feet BTC)	622.0	686.0
Pre-Test Static Water Level (feet BTC)	341.0	364.6
Available Drawdown Above Bottom of Perforations (feet)	281.0	323.4
Observed Drawdown of Aquifer Test (feet)	24.4	225.5
Modeled Drawdown Using Mean Aquifer Test Rate (feet)	42.4	24.2
Well Efficiency (%)	100.0	11
Predicted Theoretical Maximum Drawdown (feet)	41.0	24.4
Predicted Drawdown with Well Loss (feet)	41.0	227.4
Interference Drawdown (feet)	7.1	12.1
Total Drawdown (feet)	48.1	239.5
Remaining Available Water Column (feet)	**232.9**	**83.9**

32. The Applicant's proposed Lake View Subdivision PWS system consists of:
    i. PWS Well 1 (GWIC ID: 237308; completed to a depth of 620.0 feet BGS by Sudan Drilling (WWC-450) on June 27, 2007 in the confined bedrock aquifer. The well was perforated between 602.0 and 620.0 feet BGS);
        i. Equipped with a 60-HP Goulds model 250L60 submersible pump rated to produce up to 270.0 GPM at 619 feet TDH.
    ii. PWS Well 2 (GWIC ID: 237309; completed to a total depth of 686.0 feet BGS by Sudan Driling (WWC-450) on July 14, 2007 in the confined bedrock aquifer. The well was perforated between 668.0 and 686.0 feet BGS);
        i. Equipped with a 30-HP Goulds model 160L50 submersible pump rated to produce over 160.0 GPM at 812 feet TDH. This pump/well will be equipped with a flow control valve to ensure the diverted flow rate does not exceed 160.0 GPM.
    iii. An approximately 340,000-gallon bolted-steel storage tank equipped with a pressure transducer;
    iv. Booster pump station;
    v. 25,000 lineal feet of 8-, 10-, and 12-inch HDPE water mains and service line piping, appurtenant valving, hydrants, curb stops, meter boxes, and controls.

33. The system is being designed by licensed Professional Engineers from Kimley-Horn and shall be approved by DEQ prior to installation. The system shall be pressure tested prior to full operation. All conveyance shall occur via buried water mains and concrete storage tanks.

34. The PWS system will be operated based on the demands of the water users. The well pumps are controlled by the water level in the storage tank. The well pumps operate on an alternating lead-lag schedule. When the water level in the tank reaches a set level, the pressure transducer in the tank will trigger one of the wells to pump until the water level is replenished. If the demand in the system continues to draw the water level down in the tank to a second set level, the second well starts pumping. Both wells can pump simultaneously at the combined maximum diversion rate of 430.0 GPM (PWS Well 1 at 270.0 GPM and PWS Well 2 at 160.0 GPM) to replenish the tank. The flow rates of 270.0 GPM and 160.0 GPM for PWS Wells 1 and 2, respectively, are the maximum flow rates that these wells will divert in service of the system. The well pumps are incapable of providing the full peak instantaneous demand, thus the need for the storage tank and booster pump station.

35. Discharge from the system occurs as lawn and garden irrigation water infiltrating back to shallow groundwater, and as wastewater from the multiple domestic and commercial uses which will be conveyed to the Lakeside County Water and Sewer District's wastewater treatment facility, where it will ultimately be land applied.

36. Based on the results of the 72-hour constant-rate aquifer test on PWS Well 1 and the 24-hour constant-rate aquifer test on PWS Well 2 and the system specifications, the Department finds that the diversion and conveyance system is adequate to supply the requested flow rate of 430.0 GPM and annual volume of 249.42 AF.

BENEFICIAL USE

FINDINGS OF FACT

37. The Applicant proposes to divert groundwater at 430.0 GPM up to 249.42 AF/year for multiple domestic, commercial, and lawn and garden uses. The flow rate requested will allow Lakeside County Water and Sewer District to manage the volume of water in their storage tank. A maximum day demand of 273.0 GPM is the minimum source capacity allowable by DEQ for this project, however, a flow rate of 430.0 GPM will allow Lakeside County Water and Sewer District

the ability to supply water to their on-site storage tank more readily. The volume requested for multiple domestic purposes is based on 250 GPD per dwelling unit (359 dwelling units x 250 GPD x 365 days/year ÷ 325,851 gallons/AF = 100.53 AF/year). The 250 GPD value is derived from a DEQ standard of 0.28 AF per household, which equates to 250 GPD. Commercial use was calculated based on an estimated average day demand of 20,384 GPD for an annual volume of 22.83 AF (20,348 GPD x 365 days/year ÷ 325,851 gallons/AF = 22.83 AF/year). The 20,348 GPD is a reasonable value given the size of the project and extent of prescribed activities.

38. Lawn and garden irrigation was calculated based on an average lawn and garden size of 5,000 square feet (0.115 acres) per dwelling unit plus 10.0 acres of irrigated common areas for a total lawn and garden irrigation area of 51.21 acres (0.115 acres x 359 dwelling units + 10.0 acres of common areas = 51.21 acres). The Applicant requests 126.06 AF to irrigate 51.21 acres of lawn and garden based on Department guidelines from the 2010 technical memorandum: DNRC Consumptive Use Methodology – Turf Grass. Using the USDA-NRCS IWR software and the Polson Weather Station climate data, the Applicants identified a net irrigation requirement of 20.68 inches/acre per year. Assuming an application efficiency for sprinkler irrigation of 70-percent, a total of 29.54 inches/acre per year, or 2.46 AF/acre per year is required (20.68 inches/acre ÷ 0.70 efficiency factor = 29.54 inches ÷ 12 inches/foot = 2.46 AF/acre). Thus, the requested annual irrigation volume is 126.06 AF for 51.21 acres of lawn and garden area (2.46 AF/acre x 51.21 acres = 126.06 AF).

39. Based on the Applicant-provided information and comparison to DNRC water use standards and requirements, the Department finds the proposed appropriation is a beneficial use of water as recognized under 85-2-102(5), MCA. Thus, the requested flow rate of 430.0 GPM and volume of 249.42 AF are reasonably justified.

POSSESSORY INTEREST

FINDINGS OF FACT

40. This application is for distribution in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant will obtain 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 upon completion of the project in

which the developer, who currently owns the property, will deed it out to Lakeside County Water & Sewer District for ownership and operation.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

41. 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."

42. 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).

43. 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).

44. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-14)

LEGAL AVAILABILITY

45. 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).

46. 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.

47. Pursuant to *Montana Trout Unlimited v. DNRC*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. *E.g., Wesmont Developers v. DNRC*, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (mitigation of depletion required), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also Robert and Marlene Takle v. DNRC et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), and *Perkins v. Kramer*, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of*

Beneficial Water Use Permit No. 80175-s76H by Tintzman (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing Loyning v. Rankin* (1946), 118 Mont. 235, 165 P.2d 1006; *Granite Ditch Co. v. Anderson* (1983), 204 Mont. 10, 662 P.2d 1312; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.* (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.* 63997-*42M by Joseph F. Crisafulli* (DNRC Final Order 1990) (since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by Applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage).

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

49. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. *Robert and Marlene Takle v. DNRC*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted), *affirmed*, *Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007 *)*(permit granted*), affirmed*, *Montana River Action Network et al. v. DNRC*,

Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; Applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, Applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. *Royston, supra*.

50. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 15-21)

ADVERSE EFFECT

51. 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.

52. 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).

53. 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).

54. 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).

55. 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.

56. 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).

57. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 22-26)

ADEQUATE DIVERSION

58. 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.

59. 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.

60. 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 27-36)

BENEFICIAL USE

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

62. 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).

63. 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).

64. 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*.

65. Applicant proposes to use water for multiple domestic, commercial, and lawn and garden irrigation uses which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that multiple domestic, commercial, and lawn and garden irrigation are beneficial uses and that 249.42 AF of diverted volume and 430.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 37-39)

POSSESSORY INTEREST

66. 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.

67. 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.

68. 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 40)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30165067 should be GRANTED.

The Department determines the Applicant may divert groundwater at 430.0 GPM up to 249.42 AF annually by means of two production wells: PWS Well 1 (GWIC ID: 237308) and PWS Well 2 (GWIC ID: 237309) from January 1 to December 31 for multiple domestic and commercial uses and from April 18 to October 13 for lawn and garden irrigation. The maximum proposed flow rates of PWS Well 1 and Well 2 will be 270.0 GPM and 160.0 GPM, respectively. The Applicant may divert a volume of 100.53 AF to supply the multiple domestic needs for 359 dwelling units, 22.83 AF to supply the commercial uses, and 126.06 AF to irrigate 51.21 acres of lawn and garden.

The points of diversion are located in the:

- SESWSE of Section 30, Township 26N, Range 20W, Flathead County (PWS Well 1)
- NESWSE of Section 30, Township 26N, Range 20W, Flathead County (PWS Well 2)

The place of use is located in the:

- S2 of Section 19 Township 26N, Range 21W, Flathead County
- Section 25 Township 26N, Range 21W, Flathead County
- Section 29 Township 26N, Range 21W, Flathead County
- Section 30 Township 26N, Range 21W, Flathead County

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 23 of June, 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 was served upon all parties listed below on this XXth day of MONTH 2025, by first class United States mail.

LAKESIDE COUNTY WATER AND SEWER DISTRICT
ATTN: MARC LIECHTI / RODNEY OLSON
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LAKESIDE MT 59922-9614

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