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

*** * * * * * ***

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30175577 BY BRENT & THERESA ZUBOT	**)** **)** **)**	**DRAFT PRELIMINARY DETERMINATION TO GRANT**

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On July 23, 2026, Brent & Theresa Zubot (Applicants) submitted Application for Beneficial Water Use Permit No. 76LJ 30175577 to the Bozeman Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Applicant proposes to divert water from Flathead River (Flathead Lake) at a rate of 25.0 gallons per minute (GPM) up to 0.50 acre-feet (AF) for a five-bedroom dwelling from January 1 through December 31 and irrigate 0.02 acres of lawn and garden from April 1 to October 31 annually. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on June 11, 2026, 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 June 17, 2026. The Department delivered the Technical Analyses on July 13, 2026. The application was determined to be correct and complete as of August 13, 2026. An Environmental Assessment for this application was completed on October 8, 2026.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments:
    - System diagram drawing
    - Pressure tank specs
    - Pump specs

- Maps:
    - Question No. 2: 76LJ 30175577- Lake County GIS Department proposed POD Map dated May 12, 2026
- Department completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated July 13, 2026.

Information within the Department's Possession/Knowledge

- Mean monthly stream flow data from United States Geological Survey (USGS) Gaging Station No. 12372000, Flathead River near Polson, MT. Period of record: October 1938 to April 2025.
- List of existing water rights on the Flathead River from the Inlet of Flathead Lake downstream to the USGS Gaging Station No. 12372000. This list has further been divided into two reaches:
    - From the inlet of Flathead Lake to the Sėliš Ksanka Qĺispe Dam (SKQ Dam); and,
    - From the SKQ Dam on Flathead Lake to USGS Gaging Station No. 12372000, Flathead River near Polson, MT.
- The following information is not included in the administrative file for this application but is available upon request. Please contact the Bozeman Regional Office at 406-586-3136 to request copies of the following documents.
    - DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, Dated November 1, 2019
    - Department Standard Practice for Determining Physical Availability of Surface Water
    - Department Standard Practice for Determining Area of Potential Impact

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

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert Flathead Lake water from January 1 to December 31 at a rate of 25.0 GPM from a pump in Government Lot 2, NENWNE of Section 29, T25N, R20W, Lake County. Water will be diverted at a volume of 0.5 AF per year for year-round domestic use (0.45 AF) and for irrigation of 0.02 acres of lawn and garden (0.05 AF) from April 1 to October 31. The proposed place of use is in Government Lot 2, NENWNE of Section 29, T25N, R20W, Lake County, as seen in **Figure 1**. The proposed use can be seen in **Table 1** below.

Table 1. Summary of Proposed Use

Source	Flow Rate (GPM)	Diverted Volume (AF)	Purpose	Period of Diversion	Period of Use	Point of Diversion	Place of Use
Flathead Lake	25.0	0.45	Domestic (one five-bedroom dwelling)	01/01 to 12/31	01/01 to 12/31	Gov't Lot 2, NENWNE Section 29, T25N, R20W, Lake County	Gov't Lot 2, NENWNE Section 29, T25N, R20W, Lake County
		0.05	Lawn and Garden (0.02 Acres)	01/01 to 12/31	04/01 to 10/31		
Total		0.50					

2. The POD is located in Water Right Basin 76LJ (Flathead Lake) in an area that is not subject to water right basin clasures or controlled groundwater area restrictions.

3. No other water rights will be used in the proposed place of use.

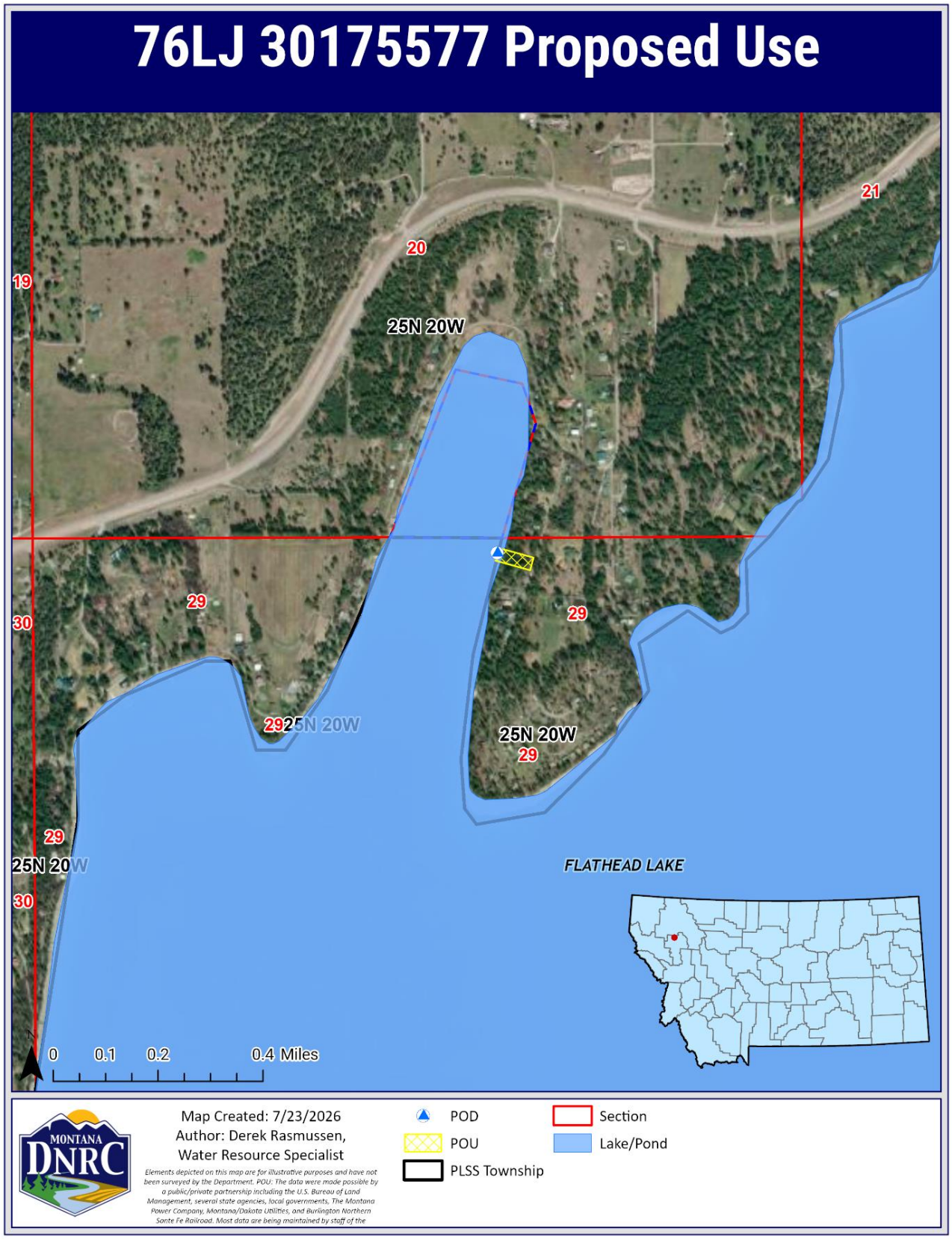


Figure 1. Map of the Applicant's proposed POD on the source and proposed POU

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

GENERAL CONCLUSIONS OF LAW

4. 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 . . .

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

> … the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
> (a) (I) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
(A) identification of physical water availability;
(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial use;
(e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;
(f) the water quality of a prior appropriator will not be adversely affected;
(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
(2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, "the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or

the U.S. natural resources conservation service and other specific field studies." Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. Id. A preponderance of evidence is "more probably than not." *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

6. 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.

7. 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).

8. 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.

9. 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

10. The Applicant proposes to divert Flathead Lake water from January 1 to December 31 at a rate of 25.0 GPM. Water will be diverted at a volume of 0.5 AF per year for year-round domestic use (0.45 AF) and for irrigation of 0.02 acres of lawn and garden (0.05 AF) from April 1 to October 31.

11. Physical availability of Flathead Lake was calculated using data from USGS Gaging Station No. 12372000 on the Flathead River near Polson, MT. This gage was selcted as it is the nearest gage to the proposed POD and is located approximately 15 miles downstream of the proposed POD. The entire period of record for USGS Gaging Station No. 12372000, that ranges from October 1938 to April 2025, was used. The Department calculated the physical availability using the following method:

a. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for Flathead Lake, using USGS Gaging Station No. 12372000 records for each month of the proposed period of diversion (Table 2, column B). Those flows were converted to monthly volumes in AF (Table 2, column C) using the following conversion found in the DNRC Water Calculation Guide: median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.

The Department calculated the monthly flows appropriated by existing users upstream of USGS Gaging Station No. 12372000 (Table 2, column D) by:

i. Generating a list of existing water rights from the Flathead Lake inlet down to USGS Gaging Station No. 12372000 (this list is contained in the administrative file and is available upon request);
ii. Designating uses as occurring during their claimed or permitted periods of diversion;
iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate (per DNRC adjudication standards); and,
iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the 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 existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

b. Since the gage used is downstream of the POD, the Department added in the flow rates of the existing diversionary water rights between USGS Gaging Station No. 12372000 and the Flathead Lake inlet (Table 2, column D) to the median of the mean monthly gage values (Table 2, column B) to determine physical availability at the POD from Flathead Lake (Table 2, column E). Physically available monthly flows were then converted to monthly volumes (Table 2, column F).

Table 2. Physical Availability at the Point of Diversion on Flathead Lake

A	B	C	D	E	F
Month	Median of the Mean Monthly Flows at USGS Gaging Station 12372000 (CFS)	Median of the Mean Monthly Volume at USGS Gaging Station 12372000 (AF)	Existing Water Rights from the Flathead Lake Inlet to USGS Gaging Station 12372000 (CFS)	Physically Available Flow in Flathead Lake at the POD (CFS)	Physically Available Volume in Flathead Lake at the POD (AF)
January	10,380.0	637,124.4	78.7	10,458.7	641,956.8
February	9,133.0	506,333.5	81.3	9,214.3	510,841.3
March	7,748.0	475,572.2	86.5	7,834.5	480,881.6
April	9,214.5	547,341.3	5,378.8	14,593.3	866,842.6
May	18,560.0	1,139,212.8	5,429.5	23,989.5	1,472,474.9
June	25,400.0	1,508,760.0	5,437.6	30,837.6	1,831,751.7
July	12,730.0	781,367.4	5,438.1	18,168.1	1,115,159.2
August	6,126.0	376,013.9	5,438.1	11,564.1	709,805.7
September	5,956.5	353,816.1	5,413.5	11,370.0	675,375.6
October	7,184.0	440,953.9	5,385.7	12,569.7	771,525.1
November	8,556.0	508,226.4	90.6	8,646.6	513,610.4
December	9,837.0	603,795.1	81.7	9,918.7	608,812.3

12. Based on the physical availability analysis of Flathead Lake at the Applicant's proposed POD, the Department finds that the requested flow rate of 25.0 GPM and 0.50 AF of volume annually is physically available in Flathead Lake during the proposed period of diversion from January 1 to December 31.

LEGAL AVAILABILITY

FINDINGS OF FACT

13. The Applicant proposes to divert up to 0.5 AF from Flathead Lake at a maximum flow rate of 25 GPM for year-round domestic and lawn and garden use from April 1 to October 31. The Department determined the Area of potential impact (AOPI) for this application to be

Flathead Lake from the inlet of the lake downstream to the SKQ Dam (Figure 2). This AOPI is appropriate as diversion of water at the proposed POD would reduce flow and volume in the lake and the outflow of which is controlled by the SKQ Dam. The Department found 1,796 water rights within the AOPI to evaluate for legal availability. This list is in the administrative file and is available upon request.

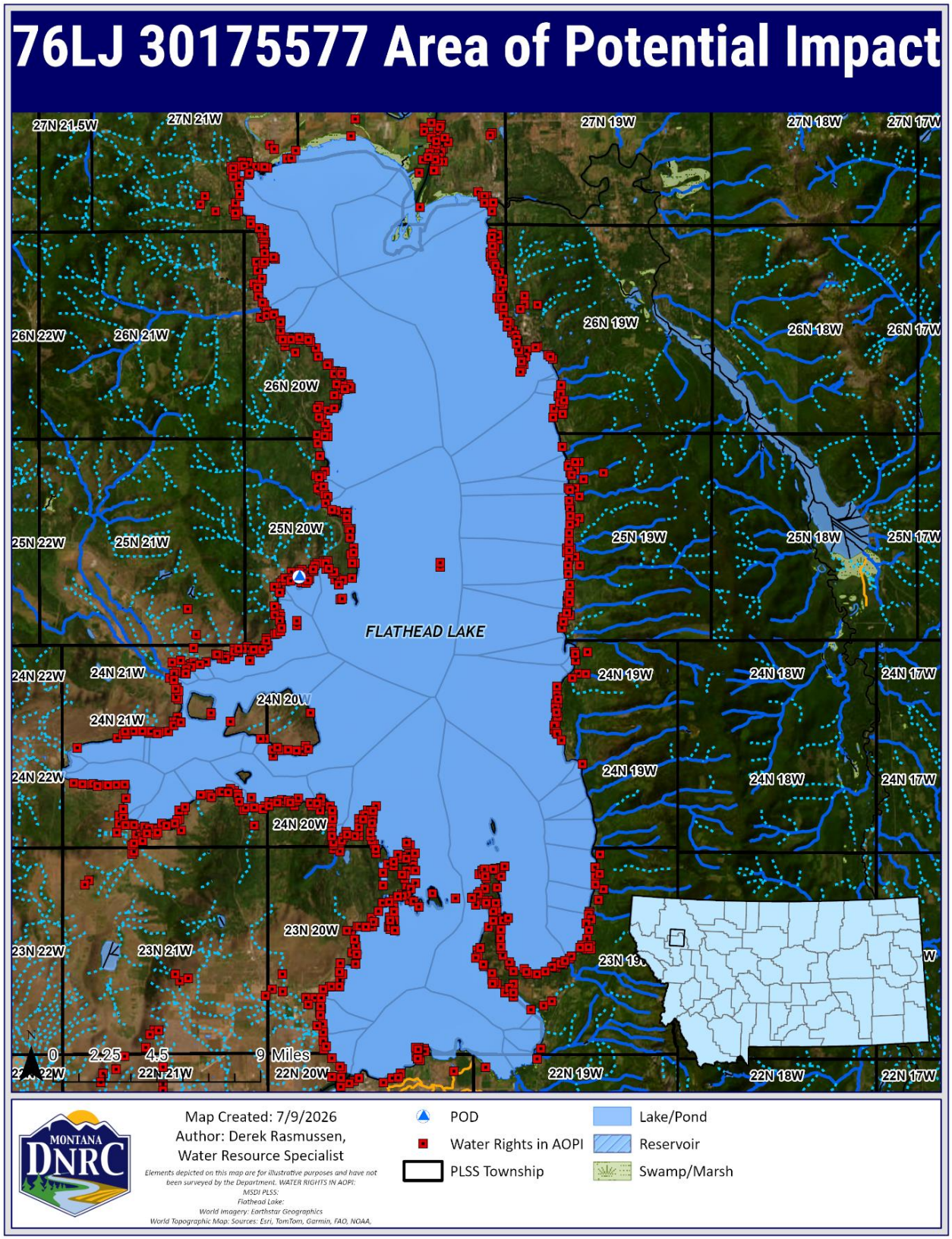


Figure 2. Area of potential impact for Permit Application No. 76LJ 30175577

14. The Department calculated physically available flows and volumes at the proposed point of diversion (Table 3, Columns B-C). The DNRC used the method below to quantify legal demand in the depleted reach during the period of diversion:

a. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Flathead Lake using USGS Gaging Station No. 12372000 records for each month of the proposed period of diversion (Table 3, column B). Those flows were converted to monthly volumes in AF (Table 3, column C) using the following conversion found in the DNRC Water Calculation Guide: median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.

b. The Department calculated the monthly flows appropriated by existing users (Table 2, Column D) between the proposed point of diversion and the SKQ Dam by:

    i. Generating a list of existing water rights from the Flathead Lake inlet to the SKQ Dam (this list is included in the application file and is available upon request);

    ii. Designating the uses as occurring during their periods of diversion;

    iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate (per DNRC adjudication standards); and,

    iv. Assuming the flow rate of each existing water right is continuously diverted throughout each month of the 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 Is an appropriate measure of assessing existing water rights as it protects existing water users.

15. The Department subtracted the flow rates of the existing legal demands (Table 3, Column D) within the AOPI from the physically available water (Table 3, Column B) to get the

legally available flow rates at the POD (Table 3, Column E). Legally available monthly flow rates were then converted into monthly volumes (Table 3, Column F).

Table 3. Legal Availability from the proposed POD to the SKQ Dam

A	B	C	D	E	F
Month	**Physically Available Water (CFS)**	**Physically Available Water (AF)**	**Existing Legal Demands within the AOPI (CFS)**	**Legally Available Water (CFS)**	**Legally Available Water (AF)**
January	10,458.7	641,956.8	78.6	10,380.1	637,132.4
February	9,214.3	510,841.3	81.2	9,133.1	506,339.6
March	7,834.5	480,881.6	86.4	7,748.1	475,578.4
April	14,601.8	867,347.5	5,378.7	9,223.1	547,852.7
May	23,989.5	1,472,474.9	5,428.7	18,560.8	1,139,261.3
June	30,837.6	1,831,751.7	5,436.8	25,400.8	1,508,805.7
July	18,168.1	1,115,159.2	5,437.4	12,730.7	781,411.6
August	11,564.1	709,805.7	5,437.4	6,126.7	376,058.1
September	11,370.0	675,375.6	5,412.7	5,957.3	353,861.2
October	12,569.7	771,525.1	5,385.6	7,184.1	440,957.0
November	8,646.6	513,610.4	90.6	8,556.0	508,228.8
December	9,918.7	608,812.3	81.7	9,837.0	603,797.5

16. Based on the evaluation of legally available water, the Department finds that the requested flow rate of 25.0 GPM up to 0.50 AF of volume is legally available in Flathead Lake during the proposed period of diversion from January 1 to December 31.

ADVERSE EFFECT

FINDINGS OF FACT

17. The Applicant proposes to divert Flathead Lake water from January 1 to December 31 at a rate of 25.0 GPM for domestic and lawn and garden use. The Applicant provided a plan showing they can regulate water during times of shortage to ensure senior appropriators' water rights are met. The Applicant's plan during times of a water shortage is to turn the pump off and use bottled water.

18. The Applicant has shown that they can regulate their water usage and that a plan is in place to protect existing water users. The Department finds that water is both physically and legally available during the proposed period of diversion . The Department finds that the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

19. The Applicant proposes to divert water from Flathead Lake at a rate of 25.0 GPM up to 0.50 AF to irrigate 0.02 acres of lawn and garden & a 5-bedroom domestic dwelling from January 1 to December 31 by means of a Red Lion RS 22G15-3W2V submersible motor. The pump will sit approximately 70 feet from the shoreline and 24 inches off the lake bottom. The pump outlet is connected to a 160 foot long 1 ¼- inch HDPE blue schedule 40 drinking water pipe that runs from the lake to the basement of the main home. Once in the basement the pressure in the system is maintained by a RL44A pressure tank set to a target pressure of 40-60 PSI. The proposed pump capacity at a pressure of 40 to 60 PSI is approximately 25 GPM, equal to the requested flow rate of the permit.

20. From the pressure tank, water will be conveyed to domestic fixtures and to a sprinkler system. The lawn and garden irrigation zone will consist of four sprinkler heads requiring 10.4 GPM total, which will leave 14.6 GPM available for use by domestic fixtures during times of overlapping use. The applicant calculated that even with all domestic fixtures running and the sprinkler system active, 25 GPM will be sufficient to supply all possible needs at the same time.

21. The Applicant calculated a total dynamic head (TDH) of 47.4 feet for the system and will utilize a RL44A pressure tank with an output pressure of 40-60 PSI and flow rate of 25.0 GPM. The Applicant provided the pump curve for the Red Lion RS 22G15-3W2V submersible motor demonstrating that the pump is capable of producing 25.0 GPM at the TDH calculated.

22. Based on the system design and specifications, the Department finds that the diversion and conveyance system is adequate to supply the requested flow rate of 25.0 GPM up to an annual volume of 0.50 AF.

BENEFICIAL USE

FINDINGS OF FACT

23. The Applicant requests to divert Flathead Lake water from January 1 to December 31 at a rate of 25.0 GPM. Water will be diverted at a volume of 0.5 AF per year for year-round

domestic use (0.45 AF) and for irrigation of 0.02 acres of lawn and garden (0.05 AF) from April 1 to October 31.

24. The requested volume of 0.50 AF/year was calculated using ARM 36.12.115 standard of 2.5 AF per acre for lawn and garden irrigation (0.02 acres X 2.5 AF/acre/year) = 0.05 AF/year and a 5-bedroom dwelling (400 GPD X 365)/325,851 = 0.45 AF/year.

25. The Applicant requested a period of diversion for domestic use from January 1 to December 31 and lawn and garden use from April 1 to October 31 from Flathead Lake. The requested period of diversion and use falls within the standards of ARM 36.12.112.

26. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 25.0 GPM is justified per ARM 36.12.1801(3)(a). Additionally, the Department finds that the 0.50 AF is reasonable to satisfy the beneficial use requested during the period of diversion and use of January 1 to December 31.

27. The Department finds the proposed flow rate of 25 GPM and diverted volume of 0.5 AF for domestic and lawn and garden use a beneficial use of water.

POSSESSORY INTEREST

FINDINGS OF FACT

28. The Applicant owns the property where water is to be put to beneficial use, which demonstrates possessory interest. The Department finds the possessory interest criterion to be met.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

29. 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."

30. 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).

31. 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).

32. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 10-12)

LEGAL AVAILABILITY

33. 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).

34. 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.

35. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 13-16)

ADVERSE EFFECT

36. 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.

37. 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).

38. 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).

39. 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).

40. 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.

41. 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).

42. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF 17-18)

ADEQUATE DIVERSION

43. 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.

44. 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.

45. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 19-22).

BENEFICIAL USE

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

47. 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).

48. 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).

49. 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*.

50. Applicant proposes to use water for domestic & lawn and garden which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence domestic and lawn and garden are a beneficial use and that 0.50 AF of diverted volume and 25 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 23-27)

POSSESSORY INTEREST

51. 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.

52. 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.

53. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 28)

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 30175577 should be GRANTED.

The Applicant may divert Flathead Lake water from a pump located in Government Lot 2, NENWNE of Section 29, T25N, R20W, Lake County. The Applicant is authorized to divert at a total flow rate of 25 GPM up to 0.5 AF per year for year-round domestic use (0.45 AF) and for irrigation of 0.02 acres of lawn and garden (0.05 AF) from April 1 to October 31. The authorized place of use is in Government Lot 2, NENWNE of Section 29, T25N, R20W, Lake County. The maximum flow rate and volume that will be diverted from Flathead Lake under the new appropriation cannot exceed 25 GPM and 0.5 AF.

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 8 day of October, 2026.

Kerri Strasheim, Manager
Bozeman Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 8 day of October, 2026, by first class United States mail.

BRENT & THERESA ZUBOT

292229 BUTTE HILLS LN

ROCKVIEW COUNTY, AB T4A0N8

Kenneth A Ell

BOZEMAN Regional Office, (406) 586-3136