

Information within the Department's Possession/Knowledge

- DNRC's Gridded Net Evaporation Dataset, as described in the Department's June 7, 2023 Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration
- Montana Department of Fish, Wildlife, and Parks (MTFWP) bathymetric (contour interval line) data for McGregor Lake (lake surveyed July 18, 2011). This data was used to quantify legal availability.
- List of existing surface water rights on McGregor Lake and McGregor Creek. This data was used to quantify legal availability and is included in the Technical Report Legal Availability section.
- Montana Bureau of Mines and Geology (MBMG). (2018). "Geologic Map." Montana Technical University, <http://mbmg.mtech.edu/information/geologicmap.asp>. Accessed June 23, 2023.
- Natural Resources Conservation Service (NRCS). (2019). "Web Soil Survey." United States Department of Agriculture, <https://websoilsurvey.nrcs.usda.gov/app/WebSoilSurvey.aspx>. Accessed June 23, 2023.

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: Physical Availability of Ponds, authored by DNRC Hydrologists Melissa Brickl, Mike Roberts, Dave Amman, and Aaron Fiaschetti, dated April 22, 2019. This Memorandum is not included in the administrative file for this Application but is available upon request from the Kalispell Regional Office.

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 of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; GPD means gallons per day; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; COS means certificate of survey; NRCS means Natural Resource and Conservation Service; MBMG means the Montana Bureau of Mines and Geology; MTFWP means Montana Fish Wildlife and Parks; DEQ means the Department of Environmental Quality; MCA means Montana Code Annotated; ARM means Administrative Rules of

Montana; FOF means finding of fact; HDPE means high-density polyethylene; VFD means variable frequency drive; and TDH means total dynamic head.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from McGregor Creek (McGregor Lake), hereafter McGregor Lake, by means of a pump, from January 1st through December 31st at 22 gallons per minute (GPM) up to 1.05 acre feet (AF), from a point in the NE ¼ of NE ¼ of NE ¼ of Section 16, Township 26N, Range 25W, Flathead County, Montana, for multiple domestic use from January 1st to December 31st, and lawn & garden irrigation from April 25 to October 5. The Applicant proposes to supply water to two households and irrigate 0.25 acres of lawn & garden. The place of use is generally located in Government Lot 1, McGregor Lake Cabin Site Lots, Certificate of Survey (COS) 19909, Lot 4, NE ¼ of NE ¼ of NE ¼ of Section 16, Township 26N, Range 25W, Flathead County, Montana. McGregor Lake is in the Thompson River drainage which flows into the Clark Fork River just east of Thompson Falls. The POD and POU are shown in Figure 1.

2. There are no existing water rights appurtenant to this property. Therefore, this permit will not be supplemental to any other water rights or share a place of use.

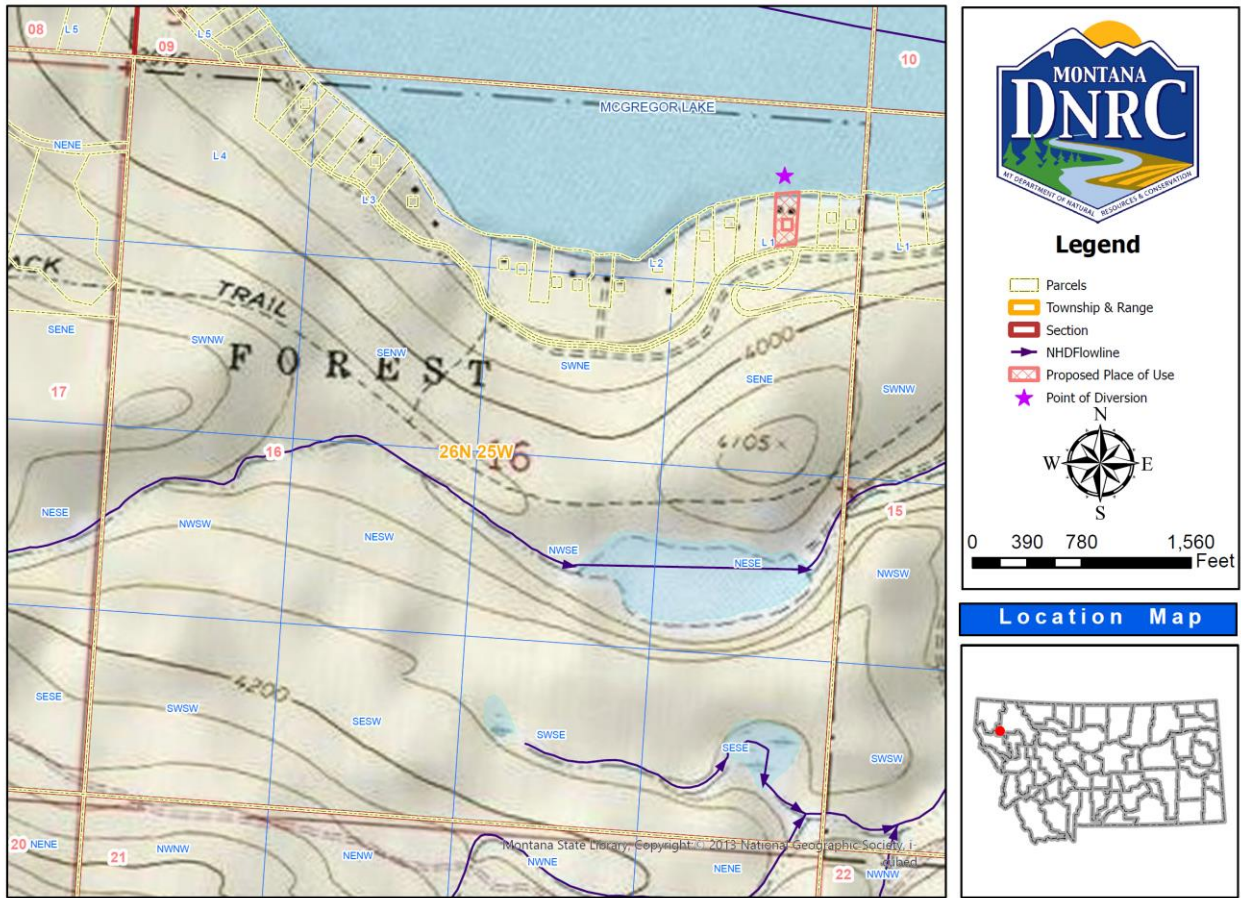


Figure 1- Map of Proposed Place of Use and Point of Diversion

§ 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:

Preliminary Determination to GRANT
 Application for Beneficial Water Use Permit No. 76N 30162478

(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.” 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.

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, Starnier*, 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 source of water for the proposed project is McGregor Lake. Bathymetry data from the Montana Department of Fish, Wildlife and Parks shows the volume of McGregor Lake as 156,773 AF (methodology described in FOF 13 below).

10. The Applicants requested a variance from the physical surface water availability measurement requirements in ARM 36.2.1702(3). This request stated the Applicants would accept the DNRC calculations of lake volume as physical availability. The Department granted the variance request on March 26, 2024. The Department quantified the physical availability of McGregor Lake as the volume of the lake using a methodology discussed in the 2019 DNRC Technical Memorandum: Physical Availability of Ponds.

11. The Applicant proposes to divert up to 1.05 AF annually at a maximum flow rate of 22 GPM (0.05 cubic feet per second (CFS)) from McGregor Lake for multiple domestic and lawn & garden irrigation.

12. The surficial geology around McGregor Lake consists of soils derived primarily from volcanic ash over glacial till/outwash, alluvial, and colluvial deposits (NRCS, 2019) formed from the Ravalli Group of the Precambrian Belt Supergroup (MBMG, 2018). McGregor Lake receives surface water recharge from numerous un-gaged perennial and intermittent streams and subsurface recharge from hydraulically connected fractured bedrock aquifers.

13. The outlet of McGregor Lake is regulated at Palm Dam by a single downstream appropriator. Palm Dam is a concrete structure with sliding checkboards that control the outflow of water through their removal or insertion. Based on information found in historic water right filings, the dam was constructed to supply downstream irrigation uses. A study was done in March 2000 by Land and Water Consulting Inc. of Kalispell. A measurement was documented at Palm Dam, which is the outlet for the lake, showing a discharge of 0.44 CFS and another measurement was taken downstream 2.1 miles on McGregor Creek documented at 4.5 CFS. The measurement at the dam was noted as being flow between the checkboards of the dam and flow from beneath the dam. The second measurement on McGregor Creek 2.1 miles downstream was taken noting that there are no tributaries in-between contributing to the second measurement. This is a significant recharge of 4.06 CFS during what would be considered a low recharge period. The study also noted riparian vegetation, the presence of obligate wetland species and wet meadows throughout supporting a hydrologically “gaining” reach. McGregor Creek is a gaining stream downstream of the outlet due to tributary inflow and upwelling groundwater as evidenced by DNRC 2015-2016

streamflow data (Figure 2) collected at the Thompson River Road bridge (approximately 4.9 river miles downstream of Palm Dam).

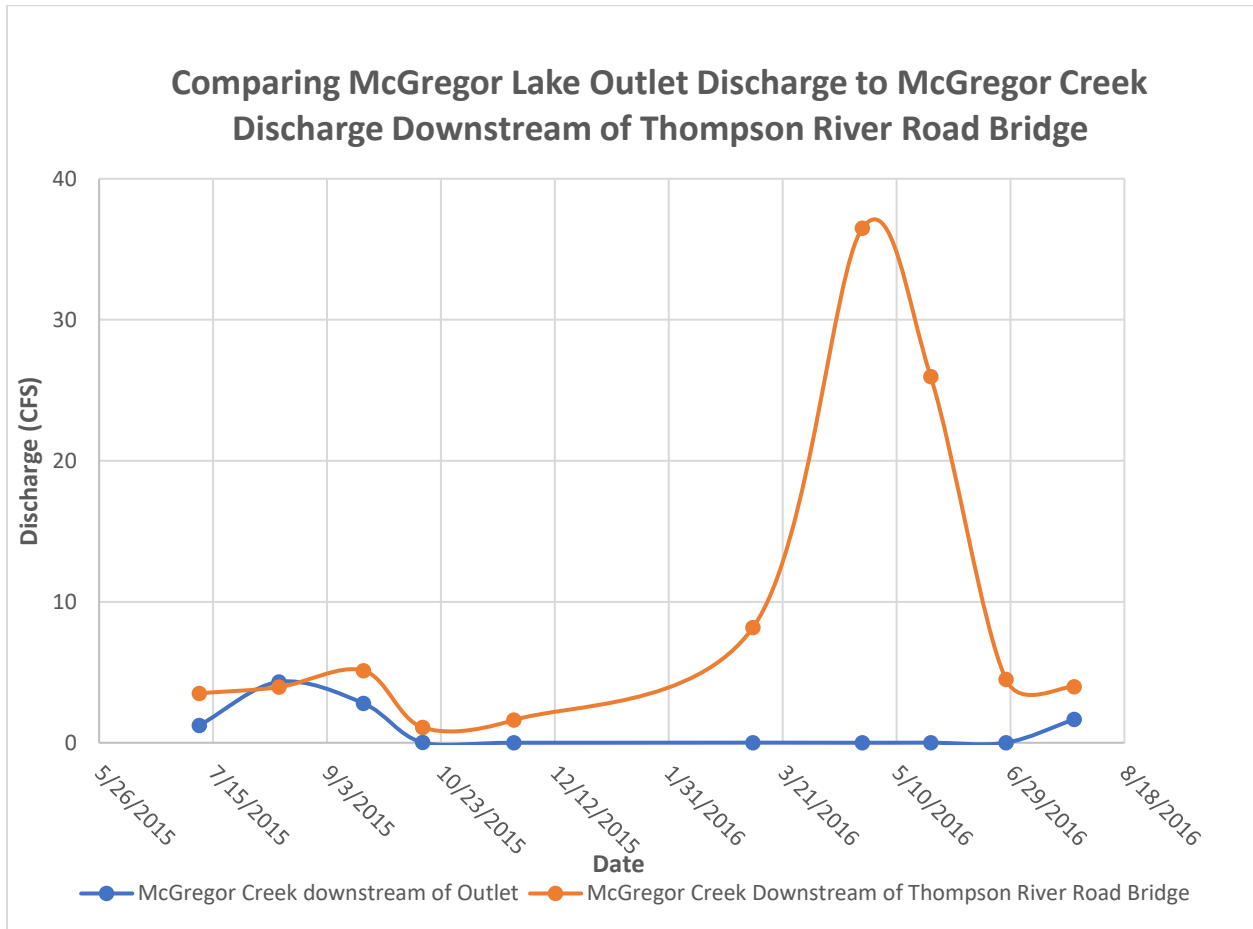


Figure 2-Comparison of McGregor Creek Discharge Data

14. Considering the hydrologic information above, the Department quantified the volume (physical availability) of water in McGregor Lake during the proposed period of diversion using the following methodology:

15. The Department quantified McGregor Lake’s volume using publicly available bathymetric data from the MTFWP FishMT website. The Department used ArcGIS to generate polygons of depth strata from this data (Figure 3), allowing the Department to quantify the total area of each depth stratum. McGregor Lake’s total surface area was calculated as 1,470 acres based on the area of the outermost depth strata (0 ft). The end-area formula (below), for finding the volume of prismatic forms, was used to quantify the total volume of water within each depth stratum (Table 1). The Department calculates the full pool of McGregor Lake, 156,773.0 AF, as a reasonable estimate of the lake’s physical availability.

End Area Formula:

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

Where;

H = the difference in depth between two successive depth contours;

A_1 = the area of the lake within the outer depth contour being considered;

A_2 = the area of the lake within the inner depth contour under consideration.

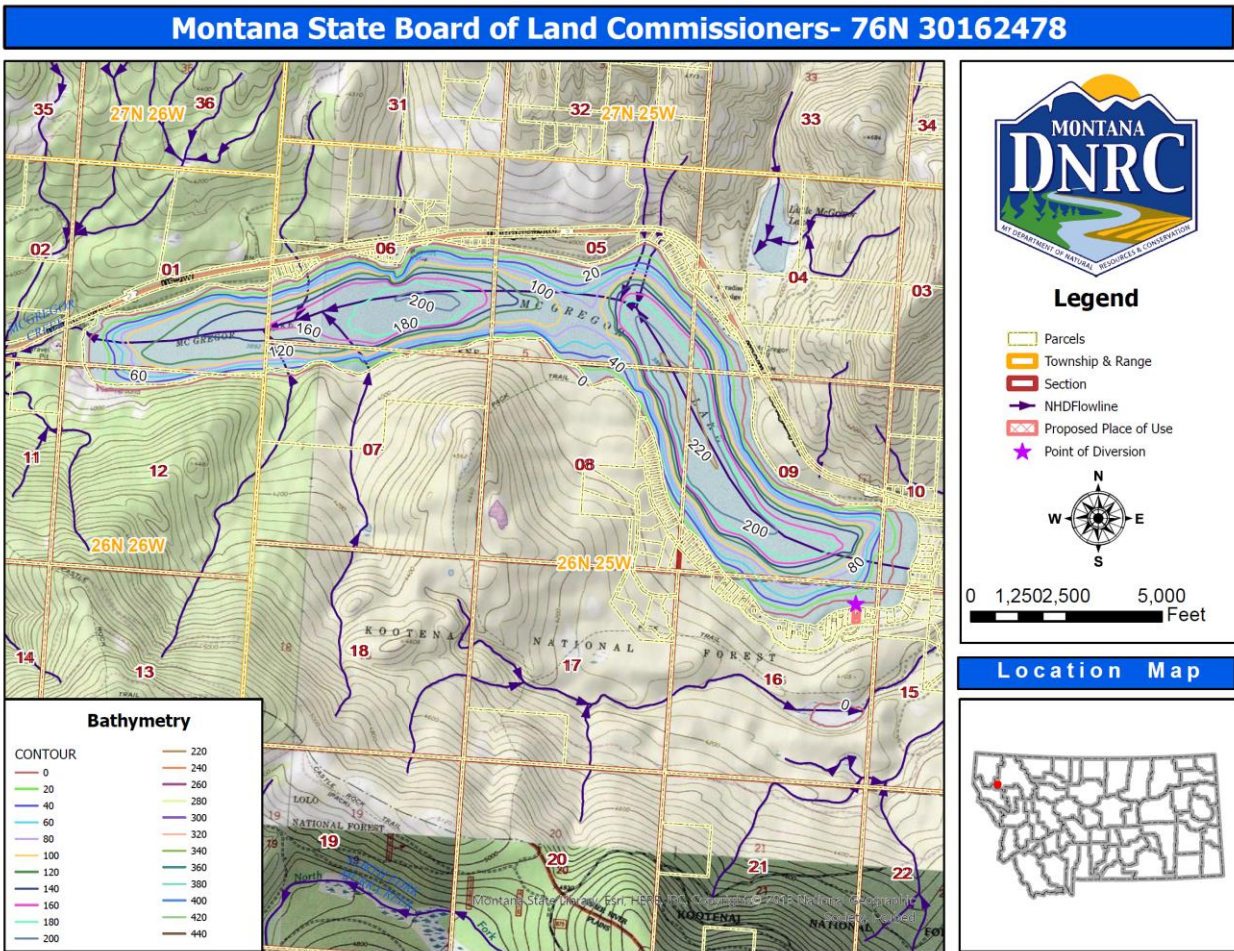


Figure 3- Map of McGregor Lake Bathymetric Depth Strata Polygons

Table 1: Physical Availability Bathymetric Analysis of McGregor Lake Using the End-Area Formula					
Contour Interval (ft)	H (ft)	Area (ac)	Total Area (ac)	Depth Strata (ft)	Volume (AF)
0	20	184.1	1,470.4	0-20	27,567.0
20	20	132.6	1,286.3	20-40	24,400.0
40	20	118.0	1,153.7	40-60	21,894.0
60	20	122.8	1,035.7	60-80	19,486.0
80	20	129.3	912.9	80-100	16,965.0
100	20	131.6	783.6	100-120	14,356.0
120	20	154.8	652.0	120-140	11,492.0
140	20	118.4	497.2	140-160	8,760.0
160	20	120.6	378.8	160-180	6,370.0
180	20	127.3	258.2	180-200	3,891.0
200	20	102.6	130.9	200-220	1,592.0
220	20	28.3	28.3		
				TOTAL VOLUME (AF)	156,773.0

16. The Department finds the requested flow rate of 22 GPM (0.05 CFS) up to an annual volume of 1.05 AF is physically available in McGregor Lake during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

17. The Applicants’ proposed diversion of 1.05 AF at 22 GPM will reduce the volume of water in McGregor Lake. Since the lake outlet is privately regulated, and the lake state is typically lower than the outlet structure invert level, McGregor Creek immediately downstream of the outlet is dry approximately nine months of the year.

18. Neither the Applicants nor the Department could quantify the annual amount of timing of water released from McGregor Lake because a private entity regulates the outflow. The first water right on McGregor Creek is five miles below the lake outlet, just downstream of the Thompson River Road bridge. At this location, tributary inflow and upwelling groundwater dominate McGregor Creek flows.

19. The legal availability analysis in this report is limited to McGregor Lake because McGregor Creek is intermittent immediately downstream of Palm Dam due to regulated outflows at the dam.

20. Existing legal demands on the source were quantified and subtracted from physically available water. Existing water rights downstream of McGregor Lake that use Palm Dam as their primary point of diversion were included as legal demands in addition to rights diverting directly from the lake. The included downstream rights use McGregor Creek as a carrier to transport McGregor Lake water downstream to

secondary points of diversion. The total volume of water physically available in McGregor Lake is 156,773.0 AF (Table 1). Existing legal demands on McGregor Lake total 2,077.9 AF, leaving 154,695.1 AF of water legally available for appropriation from McGregor Lake (Table 2). A list of existing legal demands used for this analysis is contained in the permit application file.

Table 2: Legal Availability of McGregor Lake as of 3/21/2024		
Volume of McGregor Lake (AF)	Existing Legal Demand Volume (AF)	Legally Available Volume (AF)
156,773.0	2,077.9	154,695.1

21. The Department finds that the proposed flow rate of 22 GPM (0.05 CFS) up to an annual volume of 1.05 AF is legally available in McGregor Lake during the proposed period of diversion.

ADVERSE EFFECT

FINDINGS OF FACT

22. Physical availability has been demonstrated by using the volume of McGregor Lake calculated from FWP contour information, showing that there is sufficient water available in the source throughout the proposed period of diversion in the amount requested. Legal availability has been shown by comparing what is physically available on the source and what is legally appropriated by querying water rights with McGregor Creek (McGregor Lake) as the source. Because there is sufficient water to meet all legal demands and the requested rate of 22 GPM (0.05 CFS) up to an annual volume of 1.05 AF, there will be no adverse effect on either upstream or downstream appropriators.

23. The Applicant provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during shortages, the Applicant will:

- i. Eliminate lawn & garden irrigation;
- ii. Initially reduce domestic use by 50 percent;
- iii. The pump will be turned off when a senior water user makes a valid call and/or the Applicant has received notification of a call by a senior appropriator; and
- iv. The Applicant will haul water for potable use.

24. The Department has found that diversion of up to 1.05 AF of water from the total 156,773 AF volume of McGregor Lake will not meaningfully impact downstream users from reasonably exercising their rights.

25. The Applicant has shown that they can regulate their water use and that they have an implementation plan to protect senior water users. The Department finds that the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

26. The Applicants will divert water from McGregor Lake at a maximum rate of 22.0 GPM. The diversion will utilize a 4-inch Goulds 1.0 HP model 18GS10 8-stage submersible pump as the intake, located 70 feet into McGregor Lake from the low water line. A 1.25-inch high density poly ethylene (HDPE) line will extend 130 feet from the low water line to a pump house. The pump house will host a hydropneumatic pressure tank and variable frequency drive (VFD) to maintain the system pressure at 50 psi.

27. The Applicants are required to and are proposing to draw appropriated water from a depth below the natural lake level, as such they will effectively be drawing from naturally stored water at any given time.

28. Water for potable household use will flow through 5- and 1-micron Viqua sediment filtration system and treated with an ultraviolet disinfection system installed in the crawlspace of each domestic unit.

29. Irrigation water needs will be accessed from five hose bib/frost free hydrant connections to irrigate up to 0.25 acres of landscaping around the property. A manual hose and sprinkler system will be utilized to water any lawn areas.

30. The maximum total dynamic head (TDH) of the system is 178.2 feet, based on:

- a. The minimum system operating pressure of 50 psi (equivalent to 115.5 feet of head) at the pressure tank;
- b. The 13-foot elevation gain from McGregor Lake's surface to the main residence;
- c. The friction losses in the 204-foot length of the 1.25-inch HDPE transmission line at 22.0 GPM (equivalent to 20.3 ft of head);
- d. The 14-foot elevation gain from the main residence to the guest residence; and,
- e. The friction losses in the 203-foot length of the 1.25-inch HDPE transmission line at 19.0 GPM (equivalent to 15.4 ft of head.)

31. The pump is capable of producing 22.0 GPM at 178.2 feet TDH based on the applicant provided system specifications. A VFD will be used to restrict the flow rate to 22 GPM. This flow rate will allow the Applicant to supply the lawn and garden irrigation use at a minimum 50 psi operating pressure.

32. The Department finds the system capable of producing and distributing the requested flow rate of 22.0 GPM and annual volume of 1.05 AF.

BENEFICIAL USE

FINDINGS OF FACT

33. The Applicant requests 0.42 AF annually for multiple domestic use for a two bedroom main residence (225 GPD) and a one bedroom guest residence (150 GPD) per design flow standards listed in DEQ Circular 3.1.2(A). The Department accepts this DEQ standard as acceptable, although it is less than the 1.0 AF per household standard adopted by the Department. Consumption of water for domestic use where the means of wastewater disposal involves individual drainfields is estimated by the Department to be 10% of the diverted volume. Therefore, of the 0.42 AF diverted for domestic use, 0.04 AF will be consumed, and 0.38 AF will return to the source.

34. The Applicant requests 0.63 AF annually for 0.25 acres of lawn & garden per DNRC water use standards given in ARM 36.12.115(2)(b) of 2.5 AF per acre. The Applicant requests a period of diversion of April 25-October 5, which is within the DNRC standard period of use for USDA Natural Resource Conservation Service Climatic Area V per ARM 36.12.112(1)(c)(v). Consumption of water for sprinkler irrigation is estimated by the Department to be 70% of the diverted volume, per ARM 36.12.115(2)(e). Therefore, of the 0.63 AF diverted for lawn & garden irrigation, 0.44 AF will be consumed, and the remaining 0.19 AF will return to the source.

35. The Department finds the proposed water use is beneficial and the requested flow rate of 22.0 GPM and multiple domestic and lawn & garden volume of 1.05 AF is reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

36. The Applicant signed the application form affirming the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

37. 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.”

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

39. 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).

[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 9-16)

LEGAL AVAILABILITY

40. 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).

41. 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.

42. 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 17-21)

ADVERSE EFFECT

43. 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.

44. 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).

45. 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).

46. 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).

47. 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.

48. 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).

49. 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 22-25)

ADEQUATE DIVERSION

50. 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.

51. 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.

52. 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 26-32).

BENEFICIAL USE

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

54. 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).

55. 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).

56. 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*.

57. Applicant proposes to use water for multiple domestic and lawn & garden irrigation, which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence multiple domestic and lawn & garden is a beneficial use and that 1.05 AF of diverted volume and 22 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 33-35)

POSSESSORY INTEREST

58. 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.

59. 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.

60. 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 36)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76N 30162478 should be GRANTED.

The Department determines the Applicant may divert water from McGregor Lake, by means of a pump, from January 1 to December 31 at 22 GPM up to 1.05 AF, from a point in the SE ¼ of NE ¼ of NE ¼ of Section 16, Township 26N, Range 25W, Flathead County, Montana, for multiple domestic use from January 1 to December 31 and lawn & garden irrigation use from April 25 to October 5. The Applicant may supply water to two households and irrigate lawn & garden on 0.25 acres. The place of use is located in Government Lot 1, McGregor Lake Cabin Site Lots, Certificate of Survey (COS) 19909, Lot 4, NE ¼ of NE ¼ of NE ¼ of Section 16, Township 26N, Range 25W, Flathead County, Montana.

NOTICE

The Department will provide public notice of this application and the Department’s Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

Dated this 27th day of June, 2024.

/Original signed by Jim Ferch/
Jim Ferch, Regional Manager
Kalispell Regional Office
Montana 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 27th day of June, 2024, by first class United States mail.

MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620

and if applicable:

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102 COOPERATIVE WAY, SUITE 100
KALISPELL, MT 59901

KRISTAL KIEL
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