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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N 30163571 BY BRUCE & ILENE PAULSEN	**DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT IN MODIFIED FORM**

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Bruce and Ilene Paulsen (Applicants) submitted Application for Beneficial Water Use Permit No. 76N 30163571 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation on December 4, 2024. The Applicant proposes diverting up to 0.86 acre-feet of volume from Lynch Creek annually at a flow rate of 30.0 gallons per minute for lawn and garden irrigation. The Department published receipt of the Application on its website on December 9, 2024. The Department sent the Applicant a deficiency letter under § 85-2-302, MCA, dated December 26, 2024. The Applicant responded with information dated April 25, 2025. A preapplication meeting was held between the Department and the Applicant on April 22, 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 April 23, 2024. The Department delivered the department-completed technical analyses on June 7, 2024. An Amendment to Application (timelines reset) was received on May 18, 2025. The application was determined to be correct and complete as of May 23, 2025. An Environmental Assessment for this application was completed on July 1, 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.
- Department-completed Surface Water Permit Technical Analyses Report, dated June 7, 2024.
- Maps:
  - Vicinity Maps
  - Site Plan Map
- Permit preapplication Meeting Form, Form 600P
  - Attachments:

- Applicant-collected Lynch Creek monthly streamflow measurement data for May – September 2023.
- Requested volume calculations
- US Forest Service-collected Lynch Creek streamflow point measurement data for May – July 2019 and June – August 2023.
- Three site photos
- Sage-grouse habitat map

Information Received after Application Filed

- Letter from the Applicant to the Department received April 25, 2025. This letter was in response to the Department's deficiency letter dated December 26, 2024.
- Amendment to Application received May 18, 2025. This amendment form amended the requested flow rate from 35.0 gallons per minute down to 30.0 gallons per minute.

Information within the Department's Possession/Knowledge

- Montana State University Extension – The Float-Area Method (MT 9125) standard procedure.
- USGS Montana StreamStats estimates for Lynch Creek at the proposed point of diversion and at the confluence of Lynch Creek with the Clark Fork River.
- Mean monthly streamflow data for the Clark Fork River from USGS Gaging Station No. 12389000, Clark Fork River near Plains, MT.
- 2023 monthly historical drought data and conditions for Sanders County from the National Integrated Drought Information System.
- List of existing surface water rights on Lynch Creek. This list is divided into two reaches: the reach of Lynch Creek above the proposed point of diversion and the reach of Lynch Creek from the proposed point of diversion down to the confluence of Lynch Creek with the Clark Fork River.
- The Department also routinely considers information which 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 Surface Water without Gage Data, dated April 19, 2019

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

For the purposes of this document:

Department or **DNRC** means the Department of Natural Resources and Conservation	
USDA NRCS means the United States Dept. of Agriculture – Natural Resource Conservation Service	
AF means acre-feet	**AOPI** means the Area of Potential Impact
ARM means Administrative Rules of Montana	**GPD** means gallons per day
GPM means gallons per minute	**MCA** means Montana Code Annotated
PI means prediction interval	**POD** means point of diversion
TDH means total dynamic head	**USGS** means United States Geological Survey

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicants propose to divert up to 0.86 AF of Lynch Creek water by means of a pump at a flow rate of 30.0 GPM for irrigation of 0.343 acres of lawn and garden area from May 1 – September 30 annually. The proposed point of diversion (POD) is in the SWNWSW of Section 36, Township 21N, Range 26W, Sanders County, Montana (Figure 1). The proposed place of use is in the SENESE of Section 35, Township 21N, Range 26W, Sanders County, Montana, further described as Lot 8 of the Sammons Trucking subdivision (Figure 1). The POD is in Water Right Basin No. 76N (the Clark Fork River, below the Flathead River) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

2. The Applicants currently irrigate their existing lawn and garden areas out of their well under Groundwater Certificate No. 76N 14802-00. That water right is for 1.5 AF/year for domestic use diverted at 5.0 GPM. The 1.5 AF/year volume includes 0.5 AF/year for lawn and garden irrigation. The Applicants are seeking this surface water permit because their well does not yield enough water to reliably irrigate their lawn and garden areas. They state in their application that the discharge decreases rapidly after only an hour or two of operation which interferes with domestic uses and the proper functioning of the well pump.

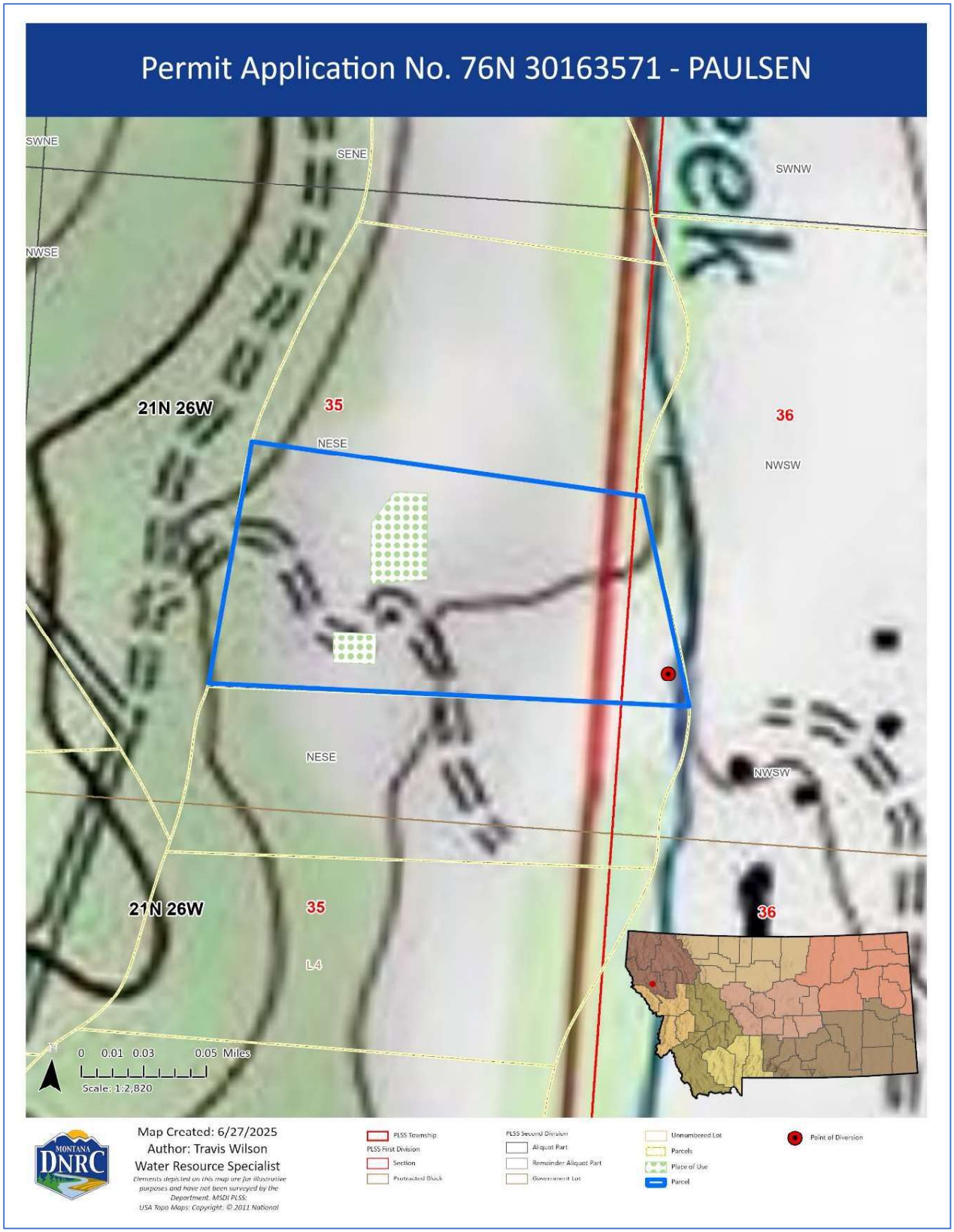

Figure 1: Map of the proposed place of use and point of diversion.

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

GENERAL CONCLUSIONS OF LAW

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 Applicants propose to divert up to 0.86 AF/year of Lynch Creek water at 30.0 GPM for irrigation of 0.343 acres of lawn and garden area. The Department relied on Applicant-collected monthly streamflow measurements to validate a streamflow estimation technique to calculate physical availability of Lynch Creek water because no USGS or equivalent stream gage exists on Lynch Creek.

Method of Measurement

10. The Applicants submitted five streamflow measurements collected during 2023 at their proposed POD using the Float-Area Method (Table 1). One measurement was collected during each month of their proposed period of diversion and use (May – September). The Department deemed the measurements credible after applying the correct velocity conversion coefficient to the Applicants' raw data. The average depth of Lynch Creek at the Applicants' measurement location was less than one foot for each of their five measurements. Following the Montana State University Extension – The Float-Area Method (MT 9125) standard procedure, the appropriate coefficient to apply when the average depth is less than one foot is 0.66 (Figure 3). The Applicants calculated their measurements using a coefficient of 0.85 (Table 1, column B). The Department recalculated the Applicants' measurements using their raw data and the appropriate coefficient of 0.66 (Table 1, column C).

Table 1: Applicant-provided streamflow measurements for Lynch Creek at the POD using the Float-Area Method

A	B	C
Date	**Streamflow measurements calculated by Applicant using a velocity conversion coefficient of 0.85 (CFS)**	**Streamflow measurements calculated by DNRC from Applicant data using a velocity conversion coefficient of 0.66 (CFS)**
May 29, 2023	44.51	34.55
June 29, 2023	17.75	13.75
July 29, 2023	4.38	3.40
August 26, 2023	5.01	3.91
September 30, 2023	9.94	7.70

Coefficients for Converting Float Velocity to Water Velocity	
Average Depth in ft.	Coefficient
Less than 1	0.66
1	0.66
2	0.68
3	0.70
4	0.72
5	0.74
6	0.76
9	0.77
12	0.78
15	0.79
20	0.80
Greater than 20	0.80

Figure 3: Montana State University Extension – The Float-Area Method Coefficients

Method of Estimation

11. To obtain estimated mean monthly streamflow rates and volumes for Lynch Creek at the POD, the Department used USGS Montana StreamStats[1] (hereafter StreamStats) to generate basin characteristics for the Lynch Creek drainage above the Applicants' POD/measurement site (Table 2). The USGS used a process known as regionalization to develop equations that can be used to estimate streamflow statistics for ungaged sites. Regionalization involves the use of regression analysis to relate streamflow statistics computed for a group of selected stream gages to basin characteristics associated with the stream gages. Basin characteristics measured for ungaged sites can be entered into the resulting equations to obtain estimates of streamflow statistics such as mean monthly flow. The Department used StreamStats basin characteristics and USGS equations to estimate mean monthly flows at the POD/measurement site (Table 3).

Table 2: Basin characteristics generated at the POD/measurement site	
Basin Characteristic	**Value**
Contributing drainage area (mi^2)	38.60
Mean annual precipitation (in)	21.36
Percent of area with slopes greater than 50%	5.90

[1] U.S. Geological Survey (USGS), 2019, The StreamStats program, online at https://streamstats.usgs.gov/ss/, accessed April 24, 2024

Table 3: StreamStats monthly streamflow estimates for Lynch Creek at the POD	
Month	**StreamStats mean monthly streamflow (CFS)**
May	46.13
June	39.25
July	16.22
August	8.61
September	6.72

12. The Department tested the accuracy of the basin characteristic method by comparing estimated mean monthly streamflows and their 90% confidence level prediction intervals (PIs) (obtained from the USGS regression equations mentioned above) to the Applicants' streamflow measurements. If the estimates were reasonable, meaning a low percentage of error between estimated and measured values, then the estimates were assumed to represent mean monthly flows. The Applicants' streamflow measurements (Table 4, column B) are closer to the lower PIs for the 90% confidence level (Table 4, column C) for each month measured, and the June and July measurements are less than the lower PI. The Department queried 2023 monthly historical drought data and conditions for Sanders County maintained by the National Integrated Drought Information System[2] and found that the project area experienced "Abnormally Dry" conditions in May and June, and "Severe Drought" conditions from July through September. The StreamStats monthly streamflow estimates were deemed reasonable after comparing the Applicants' measurements to the PIs for the 90-percent confidence level computed by StreamStats while also considering the monthly drought conditions for Sanders County in 2023.

Table 4: Comparison of Applicant streamflow measurements to StreamStats Prediction Intervals for the 90% Confidence Level for Lynch Creek			
A	**B**	**C**	**D**
Month	**Applicant monthly streamflow measurements (CFS)**	**StreamStats prediction intervals for the 90% confidence level**	
		Lower PI (CFS)	*Upper PI (CFS)*
May	34.55	16.03	132.72
June	13.75	15.96	96.52
July	3.40	6.54	40.24
August	3.91	3.27	22.68
September	7.70	2.73	16.52

[2] National Integrated Drought Information System (NIDIS), 2024, U.S. Drought Monitor Historical Data and Conditions, online at https://www.drought.gov/historical-information?state=Montana&dataset=O&selectedDateUSDM=20230926&countyFips=30089, accessed May 31, 2024

13. The Department deemed this method of estimation appropriate because using Applicant-collected monthly streamflow measurements to validate the StreamStats mean monthly streamflow estimations is an approved methodology in the DNRC Technical Memorandum: Physical Availability of Surface Water without Gage Data (2019).

14. The Department calculated the monthly flows appropriated by existing users upstream of the Applicants' POD/measurement site on Lynch Creek (Table 6, column D) by:

i. Generating a list of existing Lynch Creek water rights/legal demands upstream of the POD/measurement site (Table 5);

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

iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source water rights that did not have a designated flow rate (per DNRC adjudication standards); and,

iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

15. The Department subtracted out the flow rate of the existing upstream water rights (Table 6, column D) from the mean monthly StreamStats streamflow estimates (Table 6, column B) to determine the amount of water physically available at the POD/measurement site (Table 6, column E). Physically available monthly flows were then converted to monthly volumes (Table 6, column F) using the following equation: mean monthly flow (CFS) × 1.98 (AF/day/1.0 CFS) × days per month = AF/month.

Table 5: Existing Lynch Creek Legal Demands Upstream of the POD/measurement site

Water Right Number	Purpose	Flow Rate (CFS)
76N 30112583	STOCK	0.08*
76N 116296 00	IRRIGATION	2.50

**In order to account for livestock direct from source rights, Department practice is to assign one combined total flow rate of 0.08 CFS (35.0 GPM) for all stock rights without a designated flow rate.*

Table 6: Physical Availability of Lynch Creek at the Point of Diversion					
A	**B**	**C**	**D**	**E**	**F**
Month	**StreamStats Mean Monthly Streamflow at the POD (CFS)**	**StreamStats Mean Monthly Streamflow at the POD (AF)**	**Existing legal demands upstream of the POD (CFS)**	**Physically Available Water at POD (CFS)**	**Physically Available Water at POD (AF)**
May	46.13	2,831.24	2.58	43.55	2,672.87
June	39.25	2,331.70	2.58	36.67	2,178.45
July	16.22	995.51	2.58	13.64	837.15
August	8.61	528.32	2.58	6.03	369.96
September	6.72	399.20	2.58	4.14	245.95

16. Based on the Department-estimated monthly streamflows in Lynch Creek at the proposed POD during the requested period of diversion, the Department finds that the amount of water the Applicants seek to appropriate, 0.86 AF/year diverted at a flow rate of 30.0 GPM (0.07 CFS), is physically available in Lynch Creek.

LEGAL AVAILABILITY

FINDINGS OF FACT

17. The Applicants propose to divert up to 0.86 AF/year of Lynch Creek water at 30.0 GPM for irrigation of 0.343 acres of lawn and garden area.

18. The area of potential impact (APOI) for this application is Lynch Creek from the Applicants' POD downstream to the confluence of Lynch Creek with the Clark Fork River. There are 12 water rights within the AOPI (Table 7). Lynch Creek is a perennial tributary of the Lower Clark Fork River. Diversion of water at the proposed POD on Lynch Creek would reduce the flow and volume of water in Lynch Creek downstream of the POD. To determine the appropriate downstream terminus of the AOPI, the Department estimated mean monthly streamflow at the mouth of Lynch Creek using StreamStats and obtained mean monthly streamflow data for the Clark Fork River from USGS Gaging Station No. 12389000, Clark Fork River near Plains, MT. The Department compared the monthly StreamStats streamflow estimations generated at the mouth of Lynch Creek to the mean monthly flows of the Clark Fork River. This comparison showed that Lynch Creek contributes less than a tenth of a percent of the total mean monthly flow of the Clark Fork River at the confluence of Lynch Creek. Due to Lynch Creek's flow contribution to the Clark Fork River being relatively minor, the Department opted not to extend the AOPI beyond Lynch Creek into the Clark Fork River.

Table 7: Existing Legal Demands within the AOPI on Lynch Creek		
Water Right Number	**Purpose**	**Flow Rate (CFS)**
76N 116297 00	IRRIGATION	6.25
76N 118297 00	IRRIGATION	0.56
76N 211777 00	IRRIGATION	0.25
76N 214612 00	STOCK	2.5
76N 31197 00	IRRIGATION	0.89
76N 46281 00	IRRIGATION	1.06
76N 138034 00	STOCK	0.08*
76N 40631 00	IRRIGATION	0.33
76N 110835 00	IRRIGATION	0.55
76N 17946 00	IRRIGATION	0.34
76N 105440 00	IRRIGATION	3.75
76N 53633 00	IRRIGATION	0.62

**In order to account for livestock direct from source rights, Department practice is to assign one combined total flow rate of 0.08 CFS (35.0 GPM) for all stock rights without a designated flow rate.*

19. The Department quantified physically available monthly flows and volumes (Table 8, columns B-C) for Lynch Creek at the POD. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the AOPI (Table 8, column D) by:

i. Generating a list of existing water rights within the AOPI (Table 7);

ii. Designating uses as occurring during their claimed/permitted periods of diversion; and,

iii. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

20. The Department subtracted out the flow rates of the existing legal demands (Table 8, column D) within the AOPI from the physically available water (Table 8, columns B-C) to determine legal availability at the POD (Table 8, column E). Legally available monthly flows were then converted to monthly volumes (Table 8, column F). Calculated legally available monthly flows and volumes are negative for the months of July, August, and September, meaning that Lynch Creek is over appropriated at the POD and water is not legally available for new appropriations of water during those months.

Table 8: Legal Availability Analysis of Lynch Creek at the POD					
A	**B**	**C**	**D**	**E**	**F**
Month	**Physically available water at the POD (CFS)**	**Physically available water at the POD (AF)**	**Existing Legal Demands within the AOPI (CFS)**	**Legally Available Water at the POD (CFS)**	**Legally Available Water at the POD (AF)**
May	43.55	2,672.87	17.18	26.37	1,618.59
June	36.67	2,178.45	17.18	19.49	1,157.71
July	13.64	837.15	16.56	-2.92	-179.23
August	6.03	369.96	15.67	-9.64	-591.70
September	4.14	245.95	15.11	-10.97	-651.62

21. The Department's comparison of the physically available monthly flows and volumes of Lynch Creek water to the existing legal demands on the source within the AOPI shows that the requested flow rate of 30.0 GPM (0.07 CFS) and volume of 0.86 AF/year is only legally available from May 1 – June 30 of the requested May 1 – September 30 period of diversion and use. Based on this analysis, the Department finds the Applicant may only appropriate water from May 1 – June 30, annually.

ADVERSE EFFECT

FINDINGS OF FACT

22. The Applicants propose to divert up to 0.86 AF/year of Lynch Creek water at 30.0 GPM for irrigation of 0.343 acres of lawn and garden area. The Applicants provided a plan showing they can regulate their water use to satisfy the water rights of senior appropriators during times of water shortage. Upon receiving a valid call for water from a senior water right owner, the Applicants will cease diverting water and will remove their pump intake from Lynch Creek.

23. Per the Department's legal availability analysis, water is only legally available at the proposed POD from Lynch Creek from May 1 – June 30. Appropriation of water at the proposed POD in July, August, and September would adversely affect senior water rights downstream of the proposed POD. Therefore, the Applicants may not divert water from Lynch Creek from July 1 – September 30.

24. The Applicant has shown that they can regulate their water use and that they have a plan to protect senior water users. The Department finds that the proposed appropriation will not adversely affect senior water users during the period of May 1 – June 30 when water is legally available. The Applicant may not appropriate water during the months of July, August, or September when water is not legally available because doing so would adversely affect senior water right owners.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

25. The Applicants propose to divert up to 0.86 AF/year of Lynch Creek water at 30.0 GPM for irrigation of 0.343 acres of lawn and garden area using a Honda WX10T 25cc gasoline water pump. A 15-foot long 1-inch diameter screened rubber intake line will be set in Lynch Creek. A 10-foot long 1-inch rubber discharge line will be used to fill three 400-gallon portable plastic water tanks, with one tank being mounted in a pickup truck bed with the other two being mounted on a flatbed trailer. The water tanks will be transported via the vehicle/trailer from point of diversion to the place of use. The same Honda WX10T water pump will be used to pump water from the portable water tanks through 1-inch diameter rubber lines varying from 30- to 70-feet in length to rotating impact sprinklers and oscillating sprinklers to irrigate the lawn and garden areas.

26. The maximum TDH while filling the water tanks is approximately 15 feet based on four feet of lift, 10.6 feet of fiction losses in the 25-feet of intake and discharge line, and open discharge flow. Based on the pump specifications and the TDH figures provided by the Applicants, the system will divert 30.0 GPM at 15 feet TDH.

27. Based on the system design and specifications, the Department finds that the proposed system is adequate to divert and convey the requested flow rate of 30.0 GPM up to an annual volume of 0.86 AF.

BENEFICIAL USE

FINDINGS OF FACT

28. The Applicants propose to divert up to 0.86 AF/year of Lynch Creek water at 30.0 GPM for irrigation of 0.343 acres of lawn and garden area. The Applicant calculated their requested volume demand of 0.86 AF/year using the Department's standard of 2.5 AF/acre/year for lawn and garden irrigation as detailed in ARM 36.12.115(2) (0.343 acres x 2.5 AF/acre/year = 0.858 AF/year).

29. The Applicants' place of use is in USDA NRCS climatic area IV (mountain areas). Per ARM 36.12.112, the standard irrigation period of use for climatic area IV is April 25 – October 5 (164 days). The Applicants requested a period of use of May 1 – September 30, however, Lynch Creek water was found to be legally available only through June 30, therefore the Applicants may only divert water from May 1 – June 30 (61 days). With the seasonal irrigation demand for the Applicants' 0.343 acres of lawn and garden area being 0.858 AF, the daily demand for the 164-day irrigation season in climatic area IV is 0.0052 AF (0.858 AF ÷ 164 days = 0.0052 AF/day). Since water is only legally available for 61 days, the lawn and garden volume demand during the period of legally available water is 0.32 AF (0.0052 AF/day x 61 days = 0.319 AF).

30. The Applicants' existing Groundwater Certificate No. 76N 14802-00 is for 1.5 AF/year diverted at 5.0 GPM for domestic use which includes 0.5 AF/year for lawn and garden irrigation. The Applicants are seeking this surface water permit because their well's low yield makes it such that extended use of the well for lawn and garden irrigation interferes with domestic uses and the proper functioning of the well pump. The Applicants can still use this groundwater certificate water right for lawn and garden irrigation at times when Lynch Creek water is not available or if the surface water system becomes temporarily inoperable. When used in combination in a single irrigation season, Groundwater Certificate No. 76N 14802-00 and the proposed provisional permit may not exceed 0.82 AF, which is the sum of the total volume allowed by both water rights for lawn and garden irrigation.

31. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 30.0 GPM is reasonably justified per ARM 36.12.1801(3) because the Applicants calculated their volume demand using DNRC standards set out in ARM 36.12.115. The Department further finds that 0.32 AF is the volume needed to satisfy the requested beneficial use during the period of legal availability of Lynch Creek water (May 1 – June 30).

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

33. 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."

34. 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).

35. 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).

36. 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 9-16)

LEGAL AVAILABILITY

37. 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).

38. 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.

39. 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 17-21)

ADVERSE EFFECT

40. 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.

41. 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).

42. 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).

43. 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).

44. 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.

45. 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).

46. 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 22-24)

ADEQUATE DIVERSION

47. 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.

48. 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.

49. 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 25-27)

BENEFICIAL USE

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

51. 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).

52. 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).

53. 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*.

54. The Applicant proposes to use water for lawn and garden irrigation use which is a recognized beneficial use. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that lawn and garden use is a beneficial use, and that 0.32 AF of volume diverted at 30.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 28-31)

POSSESSORY INTEREST

55. 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.

56. 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.

57. 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 32)

DRAFT PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this DRAFT Preliminary Determination Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76N 30163571 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicants may divert 0.32 AF of Lynch Creek water by means of a pump at a flow rate of 30.0 GPM for irrigation of 0.34 acres of lawn and garden from May 1 – June 30, annually. The point of diversion is in the SWNWSW of Section 36, Township 21N, Range 26W, Sanders County, Montana. The place of use is in the SENESE of Section 35, Township 21N, Range 26W, Sanders County, Montana, further described as Lot 8 of the Sammons Trucking subdivision.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant in Modified Form 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 2nd Day of July, 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 DRAFT PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 2nd Day of July, 2025, by first class United States mail.

BRUCE AND ILENE PAULSEN
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PLAINS MT 59859-9249

TRAVIS WILSON
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