

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

**APPLICATION FOR BENEFICIAL)
WATER USE PERMIT NO. 76LJ 30158865)
BY MARK G OWENS, LBO PROPERTIES) PRELIMINARY DETERMINATION TO
LP, AND FLATHEAD VILLAGE GREENS) GRANT PERMIT
LLC)**

Mark G. Owens, LBO Properties LP, and Flathead Village Greens LLC (Applicants) submitted Groundwater Application for Beneficial Water Use Permit No. 76LJ 30158865 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on November 17, 2022. The Department published receipt of the Application on its website on December 5, 2022. The Applicant proposes diverting up to 331.8 acre-feet (AF) of volume annually at a flow rate of 300.0 gallons per minute (GPM) for multiple domestic, lawn and garden irrigation, and commercial purposes. The DNRC deemed the Application to be correct and complete as of May 15, 2023. An Environmental Assessment was completed on August 11, 2023.

INFORMATION

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

Application as filed:

- Groundwater Application for Beneficial Water Use Permit, Form 600-GW
- Aquifer Testing Addendum, Form 600-ATA
- Attachments:
 - Attachment A. Proposed Development Maps
 - Attachment B. Provisional Permit 76LJ 7577-00
 - Attachment C. Well Log Reports
 - Attachment D. Aquifer Testing Data (Form 633)

- Attachment E. Water System Hydraulics and Pump Selection
- Attachment F. Irrigation Water Requirements (IWR) Calculations
- Variance Request

Information within the Department’s Possession/Knowledge

- Letter from DNRC to Water & Environmental Technologies granting a variance from ARM 36.12.121(3)(a) approving a variation in pumping rate, dated December 22, 2022. The original variance request from the Applicant was submitted with the application as noted above.
- Groundwater Permit Report by DNRC Water Sciences Bureau (WSB) Groundwater Hydrologist Jack Landers, dated March 3, 2023.
- Amended Groundwater Permit Report by DNRC WSB Groundwater Hydrologist Jack Landers, dated July 14, 2023. The amendment was made to recalculate the multiple domestic and commercial consumption rate from 10% to 100% consumptive per DNRC standards for land-applied treated wastewater.
- Mean monthly stream flow data from United States Geological Survey (USGS) Gaging Station No. 12363000, Flathead River at Columbia Falls, MT. Period of record: October 1951 – October 2022.
- Mean monthly stream flow data from USGS Gaging Station No. 12372000, Flathead River near Polson, MT. Period of record: October 1938 – November 2022.
- List of existing water rights on the Flathead River from USGS Gaging Station No. 12363000 down to the inlet of Flathead Lake.
- List of existing water rights on the Flathead River from the inlet of Flathead Lake down to USGS Gaging Station No. 12372000.

The following information is routinely considered by the Department. It is not included in the administrative file for this application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents:

- DNRC Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer, 2019 (*DNRC (2019)*).

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater at 300.0 GPM up to 331.8 AF annually by means of two public water supply (PWS) wells, identified as CF-1 (GWIC ID: 318895) and CF-2 (GWIC ID: 319285), from January 1 – December 31. The purposes proposed for the PWS are multiple domestic and commercial use from January 1 – December 31, and lawn and garden irrigation from April 15 – October 15. The Applicant proposes to use an annual volume of 191.0 AF of water to supply the multiple domestic use for 700 “Equivalent Dwelling Units” (EDUs), 135.8 AF to irrigate 70.0 acres of lawn and garden, and 5.0 AF for commercial uses.

2. The two points of diversion (PODs), CF-1 and CF-2, are in the NWSWSE of Section 14, Township (T) 27 North (N), Range (R) 21 West (W), Flathead County, Montana (Figure 1). For the purposes of this Application, the project area will be referred to as the Cooper Farms Subdivision. Cooper Farms Subdivision will be constructed within 363.32 acres, however the irrigated acreage applied for is 70 acres as listed below. The multiple domestic, lawn and garden, and commercial purposes associated with Cooper Farms Subdivision are in Flathead County, Montana, within the following legally described locations (Figure 1):

- 63 acres in the SE, S2N2, NWNE Section 14, T 27N, R 21W.
- 7 acres in the SWSWNW, W2NWSW Section 13, T 27N, R 21W.

The points of diversion are in the Flathead River (to and including Flathead Lake) Basin (76LJ) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.

The PWS wells must also comply with appurtenant Montana Department of Environmental Quality (DEQ) PWS laws, rules, and regulations. The water system, designed by licensed Professional Engineers from Carver Engineering, shall comply with appurtenant laws, rules, and regulations, and receive approval from DEQ.

5. The total annual proposed consumption for the diverted volume associated with this permit request is 291.1 AF as shown in **Table 1**.

Table 1: Total Annual Proposed Diverted and Consumed Volume		
Purpose	Proposed Diverted Volume (AF)	Proposed Consumed Volume (AF)
Multiple Domestic	191.0	191.0
Commercial	5.0	5.0
Lawn & Garden	135.8	95.1
TOTAL	331.8	291.1

6. Existing Provisional Permit 76LJ 7577-00 is associated with the place of use of Cooper Farms Subdivision because it falls within the same 363.32 acres, but the places of use do not overlap. Permit 76LJ 7577-00 has a priority date of February 26, 1976, and is for 5.25 cubic feet per second (CFS) out of Wiley’s Slough with a maximum annual volume of 750.50 AF. The purposes of this existing Permit are stock use from January 1 – December 31, and sprinkler irrigation from May 15 – September 15. The applicant will utilize this existing right to irrigate common areas using the separate water system. The private residential lawn and garden irrigation for the proposed lots in Cooper Farms Subdivision is to be supplied by the PWS system being applied for in this application.

7. The proposed provisional permit will be subject to the following condition upon issuance:
 THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON

REQUEST AT OTHER TIMES DURING THE YEAR UNTIL FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

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

GENERAL CONCLUSIONS OF LAW

8. 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 . . .

9. 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.

10. 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.

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

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

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

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

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

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

13. 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

14. Physical availability for the purpose of evaluating legal availability was evaluated pursuant to the memo to the DNRC Water Resources Division Administrator from the Water Management Bureau (now Water Sciences Bureau) dated December 12, 2019, entitled Technical Memorandum: Legal Availability of Groundwater in the Flathead Deep Aquifer, *DNRC (2019)*. As described in *DNRC (2019)*, groundwater levels in the Deep Aquifer (and physical availability of groundwater in the context of a legal availability analysis) are effectively controlled by the stage of Flathead River and Flathead Lake.

15. *Flathead River – Physical Availability (quantified for the purpose of analyzing physical availability of the Deep Aquifer)*: Physical availability of the Flathead River from USGS Gaging Station No. 12363000 to the Flathead Lake inlet was quantified monthly. The Department used the Flathead River at Columbia Falls, MT, USGS Gage No. 12363000 (period of record: October 1951 – October 2022) and the method below to quantify physically available monthly flow rates and volumes in this reach during the period of groundwater diversion and surface water depletion (year-round). USGS Gage No. 12363000 marks the upstream extent of the reach of the Flathead River that is considered hydraulically connected to the Deep Aquifer. The date range used includes the entire period of record for this gage.

16. The Department calculated median of the mean monthly flow rates in CFS for the Flathead River using USGS Gage No. 12363000 records for each month of the year (**Table 2**, column B). Those flow rates were converted to monthly volumes in AF (**Table 2**, column C) using the following equation found on DNRC Form 615 (Water Conversion Table):

$$\text{median of the mean monthly flow (CFS)} \times 1.98 \text{ (AF/day/1 CFS)} \times \text{days per month} = \text{AF/month.}$$

17. For analysis of a reach where the gaging station used is upstream of the depleted reach, as is the case for this application, the median of the mean monthly gage value also represents physical availability for the reach (**Table 2**, columns B-C).

Table 2: Physical Availability Analysis of Flathead River from USGS Gaging Station No. 12363000 at Columbia Falls, MT to the Flathead Lake Inlet		
A	B	C
Month	Median of the Mean Monthly Flow at Gage 12363000 / Physically Available Water (CFS)	Median of the Mean Monthly Volume at Gage 12363000 / Physically Available Water (AF)
January	5,244.5	321,907.4
February	4,869.0	269,937.4
March	4,920.0	301,989.6
April	10,820.0	642,708.0
May	22,645.0	1,389,950.1
June	24,700.0	1,467,180.0
July	11,415.0	700,652.7
August	5,444.0	334,152.7
September	4,440.5	263,765.7
October	4,955.0	304,137.9
November	4,626.5	274,814.1
December	5,499.0	337,528.6

18. *Flathead River (Flathead Lake) – Physical Availability (quantified for the purpose of analyzing physical availability of the Deep Aquifer)*: Physical availability of Flathead River (Flathead Lake), hereafter Flathead Lake, from the lake inlet to USGS Gaging Station No. 12372000 was quantified monthly. The Department used the Flathead River near Polson, MT USGS Gage No. 12372000 (period of record: October 1938 – November 2022) and the method below to quantify physically available monthly flow rates and volumes in this reach during the period of groundwater diversion and surface water depletion (year-round).

19. This Gage was used because Séliš Ksanka Q’lispè Dam (formerly known as Kerr Dam) near Polson is the control structure for Flathead Lake, and depletions to the Flathead River and Flathead Lake will reduce the total volume of water flowing down the river and leaving the lake (passing over/through the dam). USGS Gage No. 12372000 on the Flathead River near Polson, MT is the nearest gage downstream of the Séliš Ksanka Q’lispè Dam and is representative of the amount of water leaving the lake. The date range used includes the entire period of record for this Gage.

20. The Department calculated median of the mean monthly flow rates in CFS for Flathead Lake using USGS Gage No. 12372000 records for each month of the proposed period of depletion

(**Table 3**, column B). The flow rates were converted to monthly volumes in AF (**Table 3**, column C).

21. The Department calculated the monthly flow rates appropriated by existing users upstream of the Gage on the source (**Table 3**, column D) by:

- i. Generating a list of existing water rights from the Flathead Lake inlet to USGS Gage No. 12372000 (list is included in the application file and available upon request);
- ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
- iii. Designating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards; and,
- v. 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 assumption leads to an overestimation of legal demands on the physical volume of water. The Department finds this method an appropriate measure of assessing existing rights as it protects existing water users.

22. Since the Gage is downstream of the depleted reach, the Department added the flow rates of the existing rights between Flathead Lake inlet and USGS Gage No. 12372000 (**Table 3**, column D) to the median of the mean monthly gage values (**Table 3**, column B) to determine physical availability in this reach, and thus the Deep Aquifer (**Table 3**, columns E-F).

Table 3: Physical Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gaging Station No. 12372000 near Polson, MT					
A	B	C	D	E	F
Month	Median of the Mean Monthly Flow at Gage 12372000 (CFS)	Median of the Mean Monthly Volume at Gage 12372000 (AF)	Existing Rights from Flathead Lake Inlet to Gage 12372000 (CFS)	Physically Available Water in Depleted Reach/Deep Aquifer (CFS)	Physically Available Water in Depleted Reach/Deep Aquifer (AF)
January	10,405.0	638,658.9	105.7	10,510.7	645,145.3
February	9,173.5	508,578.8	105.7	9,279.2	514,437.5
March	7,821.5	480,083.7	105.7	7,927.2	486,570.1
April	9,336.5	554,588.1	176.5	9,513.0	565,069.7
May	18,960.0	1,163,764.8	176.5	19,136.5	1,174,595.8
June	25,820.0	1,533,708.0	176.5	25,996.5	1,544,189.6
July	12,745.0	782,288.1	176.5	12,921.5	793,119.1
August	6,180.0	379,328.4	176.5	6,356.5	390,159.4
September	6,022.0	357,706.8	176.5	6,198.5	368,188.4
October	7,277.0	446,662.3	176.5	7,453.5	457,493.3
November	8,556.0	508,226.4	105.7	8,661.7	514,503.6
December	9,976.5	612,357.6	105.7	10,082.2	618,844.0

23. Stream flow data analysis of the Flathead River and Flathead Lake, per *DNRC (2019)*, shows physically available monthly flow rates and volumes in those sources exceeding the proposed appropriation’s flow rate and volume. Based on these facts, the Department finds that the amount of groundwater the Applicant seeks to appropriate, 300.00 GPM up to 331.80 AF, is physically available in the aquifer and hydraulically connected surface water sources.

24. Production well CF-1 is predicted to experience a total drawdown of 116.00-feet but is predicted to have 159.36-feet of remaining available water column. Production well CF-2 is predicted to experience a total drawdown of 117.80-feet but is predicted to have 159.36-feet of remaining available water column – as detailed in the Adequate Diversion section of this document and the Groundwater Permit Report. In accordance with ARM 36.12.1703, the Department finds that the requested appropriation can be sustained at the proposed location in the Deep Aquifer.

CONCLUSIONS OF LAW

25. 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.”
26. 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).
27. 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).
28. Applicant has proven that water is physically available at the proposed points of diversion and hydraulically connected surface waters in the amount the Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Findings of Fact (FOF) No. 14-24)

Legal Availability

FINDINGS OF FACT

29. *DNRC (2019)* states that groundwater within the Deep Aquifer is controlled by the Flathead River and Flathead Lake; surface water depletion caused by the Applicant’s proposed appropriation from the Deep Aquifer would primarily occur through propagation of drawdown, via connections through the overlying semi-confining layer to the Flathead River east of the project area, downstream of Kalispell. Therefore, these two surface water sources (depleted reaches) were evaluated for legal availability.
30. Net depletion is equal to consumption for a proposed groundwater use. It is described as the calculated volume, rate, timing, and location of reductions to surface water that are offset by return flows (non-consumed water). Net depletion is evaluated by 1) quantifying the consumptive volume

associated with the proposed use; 2) identifying hydraulically connected surface waters; and 3) calculating the monthly rate and timing of depletions to affected surface water(s).

31. The depleted reaches for this Application are measured from:

- i. The Flathead River northeast of the project area downstream of Kalispell (evaluated from USGS Gage No. 12363000 at Columbia Falls, MT to the Flathead Lake inlet); and
- ii. Flathead Lake from the Lake inlet down to USGS Gage No. 12372000 near Polson, MT.

32. Explanation of why this is an appropriate reach:

- i. The legal availability analyses of the Flathead River and Flathead Lake are evaluated in this section pursuant to *DNRC (2019)*.
- ii. Seli's Ksanka Qlispe' Dam near Polson is the control structure for Flathead Lake, and depletions to Flathead Lake will reduce the total volume of water leaving the lake (passing over/through the dam). USGS Gage No. 12372000 is approximately 0.6 miles downstream of the dam.

33. *Flathead River – Legal Availability (quantified for the purpose of analyzing legal availability of the Deep Aquifer)*: The Department determined (*DNRC, 2019*) that the proposed use of groundwater from the Deep Aquifer will deplete the hydraulically connected reach of the Flathead River, reducing the total volume of water in this reach of the Flathead River. The Department quantified legal availability of this reach of the Flathead River during the period of surface water depletion (year-round) using the method below.

34. The Department quantified physically available monthly flow rates and volumes (**Table 4**, columns B-C) for the depleted reach of the Flathead River. The Department calculated the monthly flow rates appropriated by existing users (legal demands) on the source within the area of potential impact (**Table 4**, columns D) by:

- i. Generating a list of existing water rights from USGS Gage No. 12363000 at Columbia Falls, MT to the Flathead Lake inlet (list is included in the application file and available upon request);

- ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
- iii. Designating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards; and,
- v. 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 assumption leads to an overestimation of legal demands on the physical volume of water. The Department finds this method an appropriate measure of assessing existing rights as it protects existing water users.

35. The Department subtracted the flow rates of the existing legal demands (**Table 4**, column D) within the depleted reach from the physically available water (**Table 4**, column B) to determine legal availability within the depleted reach. (**Table 4**, columns E-F).

Table 4: Legal Availability Analysis of Flathead River from USGS Gaging Station No. 12363000 at Columbia Falls, MT to the Flathead Lake Inlet					
A	B	C	D	E	F
Month	Physically Available Water in the Depleted Reach (CFS)	Physically Available Water in the Depleted Reach (AF)	Existing Legal Demands from Gage 12363000 to Flathead Lake Inlet (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	5,244.5	321,907.4	3,508.3	1,736.2	106,566.7
February	4,869.0	269,937.4	3,508.3	1,360.7	75,436.1
March	4,920.0	301,989.6	3,508.3	1,411.7	86,648.9
April	10,820.0	642,708.0	6,814.0	4,006.0	237,954.8
May	22,645.0	1,389,950.1	8,289.0	14,356.0	881,169.6
June	24,700.0	1,467,180.0	8,289.0	16,411.0	974,811.8
July	11,415.0	700,652.7	5,566.0	5,849.0	359,010.0
August	5,444.0	334,152.7	3,664.0	1,780.0	109,254.8
September	4,440.5	263,765.7	3,664.0	776.5	46,122.5
October	4,955.0	304,137.9	3,664.0	1,291.0	79,239.9
November	4,626.5	274,814.1	3,508.3	1,118.2	66,419.9
December	5,499.0	337,528.6	3,508.3	1,990.7	122,187.9

36. *Flathead Lake – Legal Availability (quantified for the purpose of analyzing legal availability of the Deep Aquifer)*: Evaluated from the Flathead Lake inlet downstream to USGS Gage No. 12372000 near Polson, MT. Legal availability of Flathead Lake water was quantified monthly. The DNRC used the method below to quantify legally available monthly flow rates and volumes in the depleted reach during the period of surface water depletion (year-round).

37. The Department quantified physically available monthly flow rates and volumes (**Table 5**, columns B-C) for the depleted reach of Flathead Lake. The Department calculated the monthly flow rates appropriated by existing users (legal demands) on the source within the depleted reach (**Table 5**, columns D) by:

- i. Generating a list of existing water rights from the Flathead Lake inlet to USGS Gage No. 12372000 (list is included in the application file and available upon request);
- ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31 to include all standard periods of use;
- iii. Designating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate, per Department adjudication standards; and,
- v. 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 assumption leads to an overestimation of legal demands on the physical volume of water. The Department finds this method an appropriate measure of assessing existing rights as it protects existing water users.

38. The Department subtracted the flow rates of the existing legal demands (**Table 5**, columns D) within the depleted reach from the physically available water (**Table 5**, column B) to determine legal availability in the depleted reach (**Table 5**, columns E-F).

Table 5: Legal Availability Analysis of Flathead Lake from the Flathead Lake Inlet to USGS Gaging Station No. 12372000 near Polson, MT					
A	B	C	D	E	F
Month	Physically Available Water in the Depleted Reach (CFS)	Physically Available Water in the Depleted Reach (AF)	Existing Legal Demands in Flathead Lake (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	10,510.7	645,145.3	105.7	10,405.0	638,658.9
February	9,279.2	514,437.5	105.7	9,173.5	508,578.8
March	7,927.2	486,570.1	105.7	7,821.5	480,083.7
April	9,513.0	565,069.7	176.5	9,336.5	554,588.1
May	19,136.5	1,174,595.8	176.5	18,960.0	1,163,764.8
June	25,996.5	1,544,189.6	176.5	25,820.0	1,533,708.0
July	12,921.5	793,119.1	176.5	12,745.0	782,288.1
August	6,356.5	390,159.4	176.5	6,180.0	379,328.4
September	6,198.5	368,188.4	176.5	6,022.0	357,706.8
October	7,453.5	457,493.3	176.5	7,277.0	446,662.3
November	8,661.7	514,503.6	105.7	8,556.0	508,226.4
December	10,082.2	618,844.0	105.7	9,976.5	612,357.6

39. The proposed appropriation is approximately 2.6 miles from Ashley Creek and 3.5 miles from the Flathead River. Ashley Creek was evaluated for hydraulic connectivity with wells less than 50 feet deep, with reported static water levels (SWL), and located within 1,000 feet of the Creek. Data from shallow wells and local stratigraphy provide little evidence for potential hydraulic connection between the shallow aquifer and Ashley Creek. Additionally, analyses performed in previously approved groundwater permit applications 76LJ 30063181, 76LJ 30026983, 76LJ 30048581, 76LJ 30068678 and 76LJ 30151701 concluded that Ashley Creek is not hydraulically connected to the Deep Aquifer. The Flathead River between Kalispell and Flathead Lake, as well as Flathead Lake itself are considered the hydraulically connected sources for depletion. *DNRC (2019)*

40. Following DNRC standards for systems that utilize spray irrigation for treated wastewater (land application) and USDA Natural Resources Conservation Service (NRCS) Irrigation Water Requirements (IWR), the consumption for the multiple domestic, commercial uses, and lawn and garden irrigation is estimated to be 291.1 AF. Consumption is estimated by assuming 100% of the total multiple domestic and commercial water demand of 196.0 AF (196.0 x 100% = 196.0 AF)

and 70% of the total lawn and garden water demand of 135.8 AF ($135.8 \times 70\% = 95.1$ AF). **Table 6** summarizes the anticipated monthly net depletions (volume and flow rate) from hydraulically connected surface waters.

Table 6: Total Consumption and Net Monthly Surface Water Depletions			
Month	Consumption (AF)	Flathead River & Flathead Lake Depletions (AF)	Flathead River & Flathead Lake Depletions (GPM)
January	16.6	24.7	180.4
February	15.0	22.3	180.4
March	16.6	24.7	180.4
April	24.4	23.9	180.4
May	32.7	24.7	180.4
June	31.7	23.9	180.4
July	32.7	24.7	180.4
August	32.7	24.7	180.4
September	31.7	23.9	180.4
October	23.9	24.7	180.4
November	16.1	23.9	180.4
December	16.6	24.7	180.4
TOTAL	291.1	291.1	---

41. The depth of the wells and semi-confining unit cause depletion effects to be dampened resulting in a constant year-round rate of depletion of 180.4 GPM (0.4 CFS), which is equivalent to the total consumed volume of 291.1 AF. Even though consumption from the proposed appropriation is concentrated in the summer, monthly depletions are constant due to the dampening of depletions caused by the semi-confining unit. The variation in the monthly depletion volume displayed in **Table 6** is a result of the months having different number of days.

42. The physical and legal availability analyses for the Flathead River and Flathead Lake find that water is physically and legally available in both surface water sources during the period of anticipated depletion in the amounts equivalent to the constant year-round net depletions.

43. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Sèliš Ksanka Qlispè Dam. Statements of Claim 76L 94408-00 and 76L 94409-00 for Sèliš Ksanka Qlispè Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation (equivalent to 1,217,106 AF), respectively. A second-foot

day is the volume of water represented by a flow of one cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity. The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the combined claimed flow rate of 14,540 CFS flowing 24 hours per day, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

44. Sèliš Ksanka Qíispè Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Sèliš Ksanka Qíispè Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Sèliš Ksanka Qíispè Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

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

46. Comparing the physical availability data to the existing legal demands and net depletions of the Flathead River and Flathead Lake shows legally available monthly flow rates and volumes in those sources exceeding the proposed appropriation's flow and volume. Based on these facts, the Department finds that the amount of groundwater the Applicant seeks to appropriate, 300.00 GPM up to 331.80 AF, is legally available in the aquifer and hydraulically connected surface water sources.

CONCLUSIONS OF LAW

47. 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).

48. 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.

49. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of*

Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also* Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990) (since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

50. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake

Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

51. 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 29-46)

Adverse Effect

FINDINGS OF FACT

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

- i. Initially reduce irrigation application by 50 percent;
- ii. Cease irrigation application with the exception of trees and shrubberies;
- iii. Initiate domestic and commercial water rationing to 50 percent during extreme shortage; and,
- iv. The well pumps will be turned off when a senior user makes a valid call.

53. Per the Applicant, “These steps will be implemented upon written notification to the Applicant that a call has been made by a senior appropriator which has demonstrated they have been adversely affected by the water use associated with this application.” (Beneficial Water Use Permit Application, G.W.7).

54. The drawdown in existing wells in the Deep Aquifer was modeled for proposed conditions using the following inputs: Neuman-Witherspoon (1969) solution, a Transmissivity = 144 ft²/day, Storativity = 3.1 x 10⁻⁴, and the monthly pumping schedule (**Table 7**) for a period of five years. The two proposed wells were modeled as one well due to their proximity to each other. Drawdown is the largest at the end of the fifth September of the monthly pumping schedule. Drawdown greater than one foot occurs within 19,000 ft of the production wells. Drawdown was truncated to the Flathead Deep Aquifer boundary, defined by the Belt Supergroup margin to the west and Flathead Lake to the south. There are 236 wells with active water rights and total depths greater than 100

feet that are located within the 1-foot drawdown contour. All wells with known depths will have remaining water column available (list can be found in the Groundwater Permit Report, Appendix A).

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

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

CONCLUSIONS OF LAW

56. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

57. 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).

58. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

59. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

60. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

61. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

62. 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 52-55)

Adequate Diversion

FINDINGS OF FACT

63. The Department evaluated the adequacy of the system and flow rate using Applicant-supplied data from a 72-hour aquifer test on CF-1 (GWIC ID: 318895) beginning on May 2, 2022, and a 72-hour aquifer test on CF-2 (GWIC ID: 319285) beginning on June 20, 2022. DNRC Water Sciences Bureau, Groundwater Hydrologist, Jack Landers used the data from the tests to produce the March 3, 2023, Groundwater Permit Report (amended on July 14, 2023, to reflect a 100% consumptive rate for multiple domestic and commercial uses). Variances from Aquifer Testing Requirements in ARM 36.12.121(3)(a) were granted by the DNRC Kalispell Regional Office on

December 22, 2022, for fluctuating pumping rates during the aquifer tests. The aquifer testing data is available in the administrative file and available upon request.

64. CF-1 (GWIC: 318895) was evaluated with a 72-hour aquifer test at an average flow rate of 300.00 GPM. The test began with a discharge of 304.30 GPM and fluctuated between 366.70 and 283.30 GPM during the first 30 minutes of the test. The maximum drawdown was 174.28 feet below the SWL of 23.64 feet below top of casing (BTC), leaving 106.08 feet of available water column above the well bottom. At the end of the monitored 48-hour recovery period, the well was 1.56 ft below pre-test SWL.

65. CF-2 (GWIC: 319285) was evaluated with a 72-hour aquifer test at an average flow rate of 300.00 GPM. The test began with a discharge of 310.0 GPM and fluctuated between 310.5 and 260.0 GPM during the first 40 minutes of the test. The maximum drawdown was 190.35 feet below the SWL of 22.38 feet BTC, leaving 107.27 feet of water column above the well bottom. At the end of the 48-hour recovery period, the well was 1.75 ft below pre-test SWL.

66. The recommended aquifer Transmissivity (T) of 144 ft²/day and Storativity (S) of 3.1 x 10⁻⁴ is from the Neuman-Witherspoon (1969) solution analysis of well CF-2 (May 2, 2022, Aquifer Test). An analysis of aquifer tests in the Deep Aquifer provides a T range of 36 ft²/day to 98,172 ft²/day and S range of 10⁻⁶ to 0.39. Therefore, the recommended T and S are representative of Deep Aquifer properties because they fall within these ranges.

67. The combined requested diverted volume for multiple domestic (191 AF) and commercial (5 AF) of 196 AF was apportioned evenly throughout the year. The requested lawn and garden irrigation diverted volume of 135.8 AF was apportioned April through October according to the monthly net irrigation requirement for the Creston Weather Station listed in the NRCS IWR program. However, this resulted in the calculated flow rate to exceed the proposed flow rate of 300 GPM during the summer months. The Applicant's system design includes a 423,000-gallon (1.3 AF) storage tank. In addition, the Applicant stated that the system has been designed to deliver up to a rate of 1-inch per week for lawn and garden irrigation and will use the remaining volume after multiple domestic and commercial use demands are met. Therefore, the lawn and garden irrigation volume was distributed evenly across the proposed period of diversion from April 15 to October 15 as seen in **Table 7**.

Table 7: Assumed Volumes and Monthly Pumping Schedule for the Production Wells CF-1 and CF-2					
Month	IWR (inches) – Creston	Lawn and Garden Irrigation Diverted Volume (AF)	Multiple Domestic / Commercial Diverted Volume (AF)	Total Diverted Volume (AF)	Flow Rate (GPM)
January	0.00	0.0	16.6	16.6	121.72
February	0.00	0.0	15.0	15.0	121.72
March	0.00	0.0	16.6	16.6	121.72
April	0.25	11.9	16.1	28.0	211.43
May	2.07	23.0	16.6	39.7	289.93
June	3.14	22.3	16.1	38.4	289.93
July	4.61	23.0	16.6	39.7	289.93
August	4.15	23.0	16.6	39.7	289.93
September	1.96	22.3	16.1	38.4	289.93
October	0.10	10.4	16.6	27.0	197.68
November	0.00	0.0	16.1	16.1	121.72
December	0.00	0.0	16.6	16.6	121.72
TOTAL	16.3	135.8	196.0	331.8	---

68. Predicted theoretical drawdown for the proposed wells was modeled for the period of diversion using the monthly pumping schedule identified in **Table 7**. Total drawdown (**Table 8**) is the sum of interference drawdown and predicted drawdown with well loss. Well loss was calculated by dividing the predicted theoretical maximum drawdown by a well efficiency value. Well efficiency was calculated by dividing the modeled maximum drawdown for the aquifer test by the maximum observed drawdown of the aquifer test. The remaining available water column for the proposed wells CF-1 and CF-2 is 159.36 ft and 174.8 ft respectively and is equal to the available drawdown above the bottom of the perforated interval minus total drawdown.

Table 8: Remaining Available Water Column for the Production Wells CF-1 and CF-2			
Drawdown Estimate	---	CF-1 (GWIC ID: 318895)	CF-2 (GWIC ID: 319285)
Total Depth at Bottom of Perforated Interval	<i>(ft)</i>	299.00	315.00
Pre-Test Static Water Level	<i>(ft BTC)</i>	23.64	22.38
Available Drawdown Above Bottom of Perforations	<i>(ft)</i>	275.36	292.62
Observed Drawdown of Aquifer Test	<i>(ft)</i>	174.28	190.35
Modeled Drawdown Using Mean Aquifer Test Rate	<i>(ft)</i>	187.00	187.00
Well Efficiency	<i>(%)</i>	100.00	98.00
Predicted Theoretical Maximum Drawdown	<i>(ft)</i>	99.00	99.00
Interference Drawdown	<i>(ft)</i>	17.00	17.00
Total Drawdown	<i>(ft)</i>	116.00	117.80
Remaining Available Water Column	<i>(ft)</i>	159.36	174.80

69. As proposed, the Cooper Farms Subdivision PWS system will consist of:
- i. Production well CF-1 (GWIC ID: 318895; completed to a depth of 304.0 feet BGS by O’Keefe Drilling Company (WWD-718) on January 25, 2022, in the Deep Aquifer);
 - ii. Production well CF-2 (GWIC ID: 319285; completed to a depth of 320.0 feet BGS by O’Keefe Drilling Company (WWD-718) on March 4, 2022, in the Deep Aquifer);
 - iii. CF-1 and CF-2 are each proposed to have a Gould’s model 275 H30 submersible pump with a 30-horsepower motor controlled by an integral variable frequency drive (VFD).
 - iv. Bolted steel 423,000-gallon storage tank;
 - v. Booster pump station with heat, lights, ventilation, and a floor drain consisting of:
 - a. five (5) Grundfos vertical multiple stage centrifugal pumps, two (2) Model CR32-2-1 with 10 horsepower motors, and three (3) Model CR95-3-2 with 40 horsepower motors;
 - b. VFD for each pump;
 - c. Well-X-Trol Model 250 hydropneumatic tank;
 - d. An insert magnetic flowmeter;
 - e. Silent check valves on the discharge side of each pump;
 - f. Pressure gauges on the suction and discharge sides;
 - g. A smooth-nosed sample cock; and,

- h. All necessary pipes, valves, and fittings.
- vi. A 250-kW generator for backup power to the well pumps and booster pumps;
- vii. Approximately 26,000 lineal feet of 8”, 10”, and 12” water mains with proper valving, hydrants, and controls; and,
- viii. Each lot will be serviced with HDPE, SIDR 7 water lines, curb stop, and a meter box.

70. The system has been designed by licensed Professional Engineers and the Applicant will obtain permits to register the system as a Montana Public Water Supply with the Montana DEQ. The final system design shall be approved by the Montana DEQ PWS Section, as is required for public water supply systems in Montana.

71. Water will be diverted based on the demands of the residents and commercial users. Well pumps will be controlled by the water level in the storage tank and system pressure will be maintained by the booster pump station. The well pumps will alternate each demand cycle – neither well is capable of individually providing the full peak instantaneous demand, therefore the storage tank will be utilized to provide water during periods of peak water use. Low water levels in the tank will produce lower hydrostatic pressure against which the well pump will pump, and therefore produce a higher flow rate. To limit the submersible well pumps from exceeding 300 GPM, a flow control valve will be utilized to restrict the flow to 300GPM. A VFD automated booster pump control system will be utilized to control the flow rate and maintain pressure of 70 PSI in the water system.

72. The wells were designed and constructed to include 55-feet of grout and 10-feet of screened interval with 10-inch casing diameters. Both wells are proposed to have a 30 Hp Gould’s model 275 H30 submersible pump capable of diverting 300 GPM at 262 feet TDH from CF-1 and CF-2. The system can meet demand with an estimated TDH of 262 feet while maintaining service pressures of 70 PSI to obtain the 300 GPM needed to satisfy the multiple domestic, commercial, and lawn and garden uses at full build-out.

73. A flow meter with a totalizer will be installed into the system. At minimum, the metering of the system shall account for the total water diverted from the wells in combination.

74. Discharge from the multiple domestic and commercial uses will be piped to the Lakeside Water and Sewer Districts' spray irrigation system. The wastewater will be treated, and land applied by the District. The lawn and garden irrigation excess discharge water will return to the subsurface as return flow to the shallow groundwater.

75. Based on the results of the 72-hour aquifer tests on CF-1 and CF-2, the assumed monthly pumping flow rate can be achieved with the proposed 300 GPM flow rate. There will be water column remaining in both CF-1 and CF-2 to sustain the Cooper Farms Subdivision water demands at full build-out. The Department finds the aquifer conditions and well productivity adequate to supply the requested flow rate of 300 GPM and annual volume of 331.8 AF through the entire proposed period of diversion.

76. Based on the anticipated TDH conditions, the pump performance, and system specifications, the Department finds that the diversion and conveyance system is adequate to supply the requested annual volume 331.80 AF at a flow rate of 300 GPM.

77. The Department finds that the diversion works will conform to current industry design, construction, and operation standards as it will be designed by Montana licensed Professional Engineers and obtain DEQ approval. The well construction is in accordance with ARM 36.21.6, certified on the well log via signature by O'Keefe Drilling (WWC-718), who is licensed by the Montana Board of Water Well Contractors.

CONCLUSIONS OF LAW

78. 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.

79. 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.

80. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 411-105511 by Flying J Inc.* (DNRC Final Order 1999).

81. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

82. 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 63-77)

Beneficial Use

FINDINGS OF FACT

83. The Applicant is requesting diverted volumes of 191 AF for multiple domestic use and 5 AF for commercial use. The water demands by area were estimated based on the density ranges given in the Cooper Farms Neighborhood Plan adopted by Flathead County. A breakdown of the water demands based on the Neighborhood Plan is presented in **Table 9**. A map of the Neighborhood Plan Areas displaying the average gallons per day per area is shown in **Figure 2**.

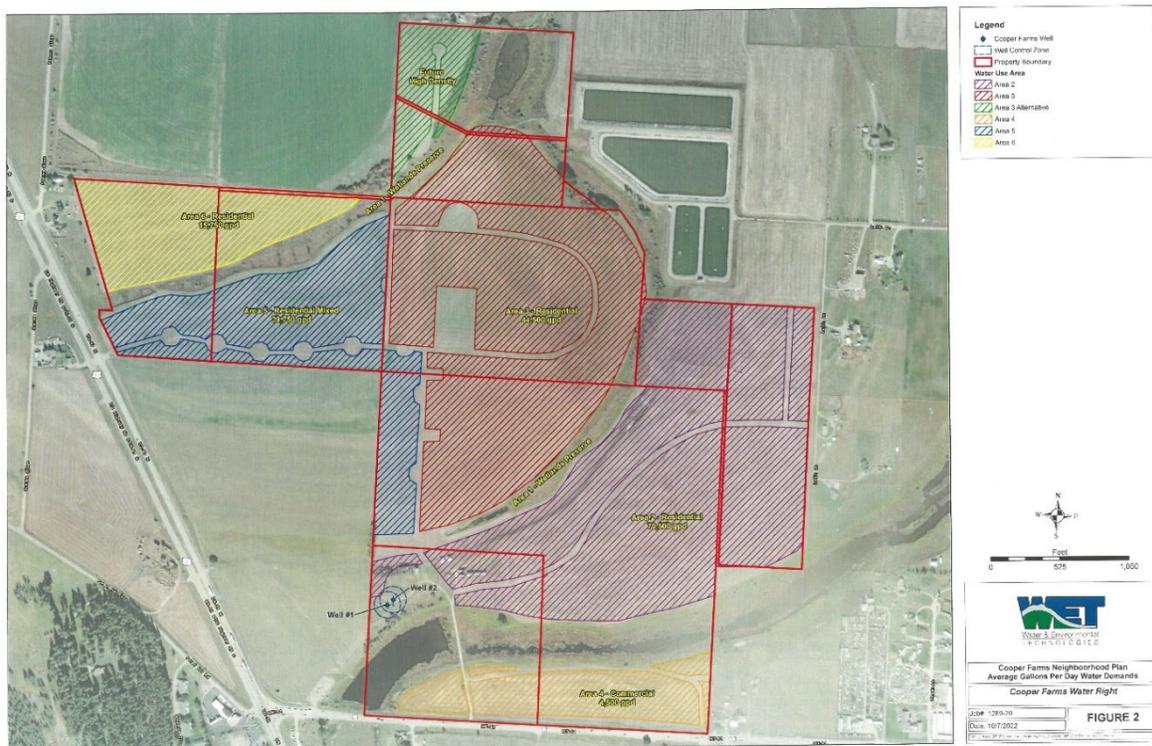


Figure 2. Cooper Farms Neighborhood Plan – average gallons per day water demands.

84. The Applicant made the following assumptions for the multiple domestic and commercial water demand calculations:

- i. Each dwelling unit was one (1) EDU;
- ii. Area Four – Commercial consists of a total of 18 EDUs;
- iii. Per each dwelling unit there are an average of 2.5 persons per household;
- iv. Per each person, 100 gallons per day is used;
- v. A max day factor of two was assumed (the largest volume of flow to be received during a continuous 24-hour period – multiplied by two); and,
- vi. A peak hour factor was calculated using equation 10-1 from Chapter 10, Section 11.24 of Circular DEQ-2 Design Standards for Public Sewage Systems 2018.

Area Designation from Neighborhood Plan	Total EDU	Average Gallons per Day	Acre-Feet per Year
Area One – Wetland Preserves	0	0	0
Area Two – Domestic	282	70,500	79
Area Three – Domestic and Parks	178	44,500	50
Area Four - Commercial	18	4,500	5
Area Five - Domestic	159	39,750	45
Area Six - Domestic	63	15,750	18
Totals	700	175,000	196

85. This is equivalent to 0.28 AF per dwelling unit (700 EDUs x 0.28 AF/year = 196 AF/year), which deviates from the DNRC domestic use standard of 1.0 AF/year per household in ARM 36.12.115. However, based on Circular DEQ-3, Chapter 3, Section 3.2.1.2.a, domestic use water demands are estimated using 100 gallons per capita per day (gpcd), or 100 gallons per day (GPD) per person. Using the DEQ requirements we calculate ((700 EDUs x 2.5 persons) x 100 GPD x (365 days / 325,852 gallons) x 1AF = 196 AF)). The Department finds this requested volume is supported by substantial and credible information.

86. Applicant proposes a diverted volume of 135.8 AF to irrigate 70.0 acres of lawn and garden based on Department guidelines from the 2010 technical memorandum “DNRC Consumptive Use Methodology – Turf Grass.” Using the United States Department of Agriculture - Natural

Resources and Conservation Service (USDA-NRCS) Irrigation Water Requirements (IWR) software and the Creston Weather Station climate data, the Applicants identified an irrigation requirement of 16.27 inches, or 1.36 AF per acre per year (16.27 inches/acre ÷ 12.0 inches/foot = 1.36 AF/acre). Sprinkler irrigation in Climate Zone III is considered to be 70% efficient (ARM 36.12.115(1)(e)), therefore, the irrigation requirement is 23.24 inches (1.94 AF per acre). Thus, the requested annual irrigation volume is 135.8 AF for 70.0 acres of lawn and garden area (1.94 AF/acre x 70.0 acres = 135.8 AF). This plan will allow for 0.1 acres of lawn and garden irrigation per dwelling unit (700 dwelling units x 0.1 acres/dwelling = 70.0 acres). The Applicant states the water system will be designed to accommodate an irrigation demand of up to one inch of irrigation application per week.

87. The requested flow rate of 300.00 GPM can supply the requested diverted volume of 331.8 AF. The wells are capable of producing 238.7 AF during the 183 days from April 15 – October 15 when multiple domestic, commercial use, and lawn and garden irrigation are greatest. The water demand during this timeframe is 233.8 AF (135.80 AF for irrigation, 2.5 AF for commercial, and 95.5 AF for multiple domestic). The water system will be designed to operate at a maximum flow rate of 300 GPM. Both wells are individually capable of producing 300 GPM; the 423,000-gallon storage tank will be utilized to accommodate the peak instantaneous water demands. The requested flow rate is to be approved by DEQ PWS section as an adequate flow rate to serve the proposed purposes.

88. The Applicant has requested volumes for the uses associated with this permit that deviate from DNRC standards. However, these volumes are justified with substantial and credible information above. The Applicant has stated their willingness to supply DNRC with yearly measurement reports upon request. To ensure the Applicant does not exceed the flow rate and volumes requested, the provisional permit will be subject to the following measurement condition upon issuance:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE

APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

89. Existing Provisional Permit 76LJ 7577-00 will not be utilized to irrigate any of the acreage being applied for in this Application. There will be no overlap in irrigated acreage between 76LJ 7577-00 and this proposed appropriation (76LJ 30158865). This existing permit is noted in this application because their places of use share one common parcel.

90. Based on the Applicant-provided information and comparison to DNRC and DEQ water use standards and requirements, the Department finds the proposed appropriation is a beneficial use of water and the requested flow rate of 300.00 GPM and diverted volume of 331.80 AF is justified.

CONCLUSIONS OF LAW

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

92. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186,

Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

93. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

94. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

95. Applicant proposes to use water for multiple domestic, lawn and garden irrigation, and commercial purposes, which are recognized as beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that multiple domestic, lawn and garden irrigation, and commercial water uses are beneficial uses and that up to 331.8 AF of volume diverted at 300.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 83-90)

Possessory Interest

FINDINGS OF FACT

96. This Application is for distribution in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. The Applicant 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.

CONCLUSIONS OF LAW

97. 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.

98. 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.

99. 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 96)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30158865 should be GRANTED.

The Department determines the Applicant may divert groundwater at a flow rate of 300.0 GPM up to a volume of 331.8 AF annually by means of two production wells, CF-1 and CF-2, from January 1 – December 31. The Applicant may divert 191.0 AF of water to supply the multiple domestic use for 700 single-family dwellings, 135.8 AF of water to irrigate 70.0 acres of lawn and garden, and 5.0 AF of water for commercial use.

The two points of diversion are in the NWSWSE of Section 14, T 27N, R 21W, Flathead County, Montana. The place of use for the multiple domestic, lawn and garden, and commercial purposes is in Flathead County, Montana, within the following legally described locations:

- 63 acres in the SE, S2N2, NWNE of Section 14, T 27N, R 21W.
- 7 acres in the SWSWNW, W2NWSW of Section 13, T 27N, R 21W.

The proposed provisional permit will be subject to the following condition upon issuance:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL FORM 617 PROJECT COMPLETION NOTICE IS SUBMITTED. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE RECORDS MUST BE SENT TO THE KALISPELL REGIONAL WATER RESOURCES OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 29th Day of August 2023.

/Original signed by James Ferch
JAMES FERCH
Regional Manager
Kalispell Regional Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 29th Day of August 2023, by first class United States mail.

MARK G OWENS
LBO PROPERTIES LP
FLATHEAD VILLAGE GREENS LLC
500 PALMER DRIVE
KALISPELL, MT 59901

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTN: BRAD BENNETT
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

ALEXIS ALDERMAN
Kalispell Water Resources Office; (406) 752-2288
Department of Natural Resources and Conservation

DATE