

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76J 30163755 BY USFS FLATHEAD NATIONAL FOREST)))	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On February 6, 2025 the United States Forest Service- Flathead National Forest (Applicant) submitted Application for Beneficial Water Use Permit No. 76J 30163755 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1,399.92 Acre Feet for Recreation and Fish & Wildlife Purposes. On February 20, 2025, the Applicant submitted an Amendment requesting a corrected volume of 1,442.41 AF. A preapplication meeting was held between the Department and the Applicant on May 28, 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 Form 600P on November 22, 2024. The Department delivered the Department-completed Technical Analysis on December 20, 2024. The application was determined to be correct and complete as of March 13, 2025. An Environmental Assessment for this application was March 13, 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 & accompanying Memo to DNRC from Allied Engineering Services, Inc. Dated February 5, 2025
- Addenda:
 - Technical Analysis Addendum, Form 600-TAA
 - Reservoir/ Place of Storage Addendum, Form 600-SA & accompanying Memo
- Attachments:
 - Department- completed Technical Analyses based on information provided in the Preapplication Checklist, dated December 20, 2024.
 - Lion Lake Dikes diagrams, dated April 11, 1966
 - General Plan and Sections- South Dike
 - General Plan and Sections- North Dike

- Outlet Works Plan and Sections
 - Lion Lake Dam Rehabilitation Plan, dated January 13, 2021
- Maps:
 - Figure 1: Lion Lake Water Rights Vicinity Map, dated February 3, 2024
 - Figure 2: Lion Lake Water Rights Application Map, dated January 30, 2025
 - Figure 3: Bathymetry Map from MTFWP Survey, undated
 - Figure 4: Plat Map of Township 30 N Range 19W, dated July 23, 1952

Information Received after Application Filed:

- Amendment, Form 655, dated February 20, 2025, correcting proposed volume to include evaporation plus bathymetric volume.

Pre-Application as filed:

- Preapplication Meeting Form- Permit, Form 600P & accompanying Memo
- Addenda:
 - Technical Analysis Addendum, Form 600-TAA
 - Reservoir/ Place of Storage Addendum, Form 600-SA
- Attachments:
 - Variance Request, Form 653
 - USFS Whelp Creek Flow measurements, dated April 2, 2019- December 12, 2019
 - Lion Lake Dikes diagrams, dated April 11, 1966
 - General Plan and Sections- South Dike
 - General Plan and Sections- North Dike
 - Outlet Works Plan and Sections
 - Lion Lake Dam Rehabilitation Plan, dated January 13, 2021
- Maps:
 - Figure 1: Lion Lake Water Rights Application Map, dated January 30, 2025
 - Figure 3: Lion Lake Water Rights Vicinity Map, dated February 3, 2024

Information within the Department's Possession/Knowledge

- Montana Department of Fish, Wildlife, and Parks (MTFWP) bathymetric (contour interval line) data for Lion Lake
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please

contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents:

- DNRC Technical Memorandum: *Pond and Wetland Evaporation/Evapotranspiration*, dated June 7, 2023;
- DNRC Technical Memorandum: *Physical Availability of Ponds*, dated April 22, 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 of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; ARM means the Administrative Rules of Montana; MCA means Montana Code Annotated; USFWS means the United States Fish and Wildlife Service; FWP means the Montana Department of Fish Wildlife and Parks; USFS means United States Forest Service; NOAA means the National Oceanic and Atmospheric Administration; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to impound water from Whelp Creek (Lion Lake), hereafter Lion Lake, by means of a dam, from January 1 to December 31 up to 1,442.41 AF, from a point in the SW ¼ of the SW ¼ of the SE ¼ of Section 16, Township 30 N, Range 19 W, Flathead County, Montana, for Recreation and Fish & Wildlife use from January 1 to December 31. The place of use is generally located in the SE ¼ of the SE ¼ of the SW ¼ and in the S ½ of the SW ¼ of the SE ¼ of Section 9 and all of Section 16, in Township 30 N, Range 19 W, Flathead County, Montana. Lion Lake is an onstream reservoir on the perennial source of Whelp Creek. The proposed appropriation, its sources, and the area of potential impact are entirely located on United States Forest Service (USFS)- Flathead National Forest property.

2. There are two other water rights on the source; 76J 51670-00 & 76J 51668-00, which are also owned by the USFS. 76J 51670-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.62 AF from July 1 to August 1. 76J 51668-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.50 AF from May 1 to October 31. These rights are not supplemental to the proposed appropriation.

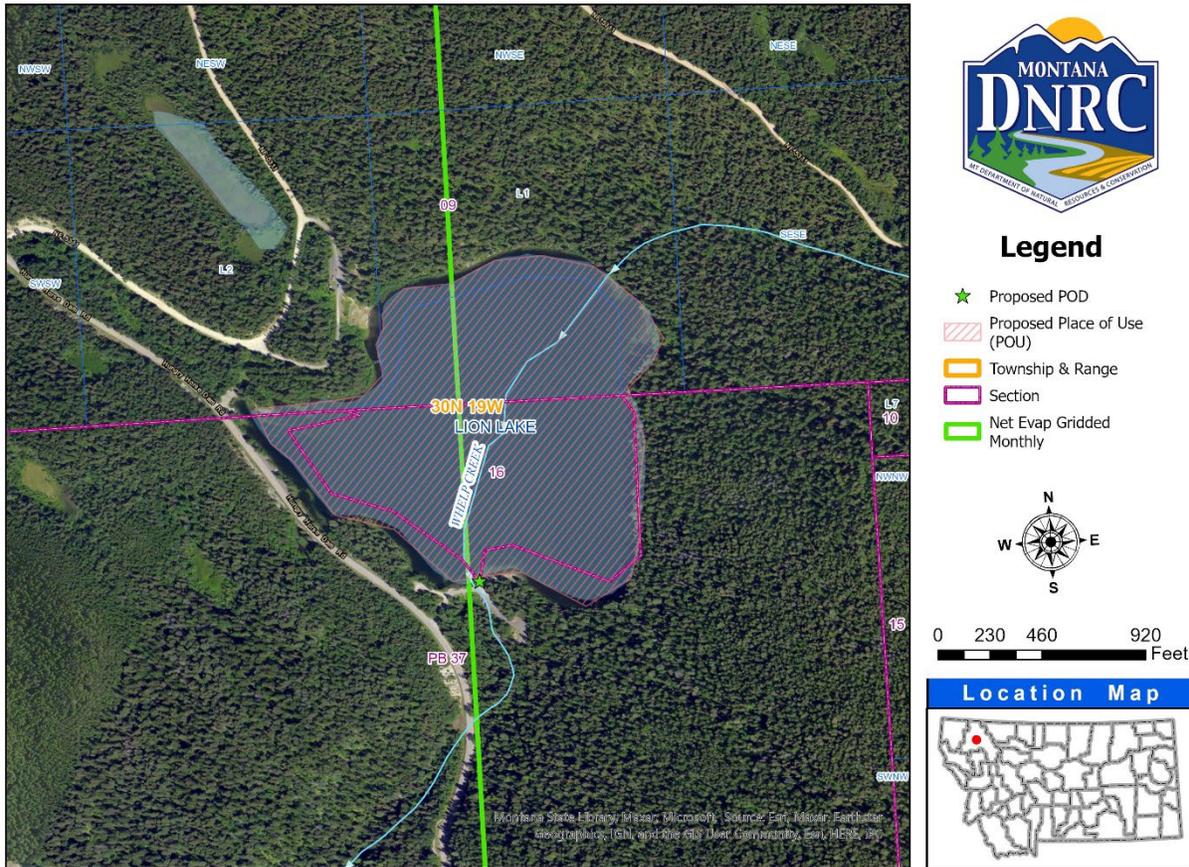


Figure 1-Map of the Applicant's proposed POD on the source and proposed place of use.

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

5. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); *see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of*

Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

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

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

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

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

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

8. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

PHYSICAL AVAILABILITY

FINDINGS OF FACT

9. The Applicant proposes to use the impounded water from Whelp Creek, to support Recreation and Fish & Wildlife uses in the onstream reservoir of Lion Lake.

10. The Applicant supplied flow measurements on Whelp Creek from April 2, 2019 to December 12, 2019 and requested a variance from ARM 36.12.1702 (4) from the requirement to submit a measurement from each month during the proposed appropriation. As the source of water for the proposed appropriation exists as an onstream reservoir, flow rate measurements are not required per ARM 36.12.113. Therefore, the flow measurements and variance were not considered by the Department for physical availability analysis.

11. Lion Lake is a naturally occurring lake that was dammed by the United States Bureau of Reclamation in 1947 to increase storage capacity to service construction of the nearby Hungry Horse Dam. The United States Fish and Wildlife Service (USFWS) National Wetlands Inventory lists Lion Lake as a Lake Habitat with a Permanently Flooded Water regime. Bathymetry data from the Montana Department of Fish, Wildlife, and Parks (FWP) allows for calculation of volume of Lion Lake as 1,399.92 AF (methodology described in FOF 13 below). The Department finds that the volume of Lion Lake as quantified by the FWP Bathymetric data is an appropriate measure of physical availability per ARM 36.12.1702(3).

12. The outlet of Lion Lake consists of an embankment-style dam (Proposed POD or POD 1) on its southern margin (South Dam Area in the Lion Lake Rehabilitation Plan) with seepage draining system for water to pass through at a controlled rate to the continuation of Whelp Creek. A second embankment along the western margin of the lake (North Dam Area in the Lion Lake Rehabilitation Plan) has been in existence since original construction and does not discharge water to any flowing waterways other than through natural subsurface seepage.

13. The Department quantified Lion Lake's volume using publicly available bathymetric data from FWP FishMT website. FWP surveyed Lion Lake on July 18, 2011. The Department used ESRI's ArcPro GIS software to generate polygons of depth strata from this data (**Figure 2**), allowing the Department to quantify the total area of each depth stratum. Lion Lake's total area was calculated as 42.11 acres based on the sum of all depth strata areas. The end-area formula (below) for finding the volume of prismatic forms, was used to quantify the total volume of water within each depth stratum (**Table 1**). The department calculates 1,399.92 AF as a reasonable estimate of Lion Lake's physical availability.

End-Area Formula:

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

Where:

H = difference in depth between two successive depth contours;

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

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

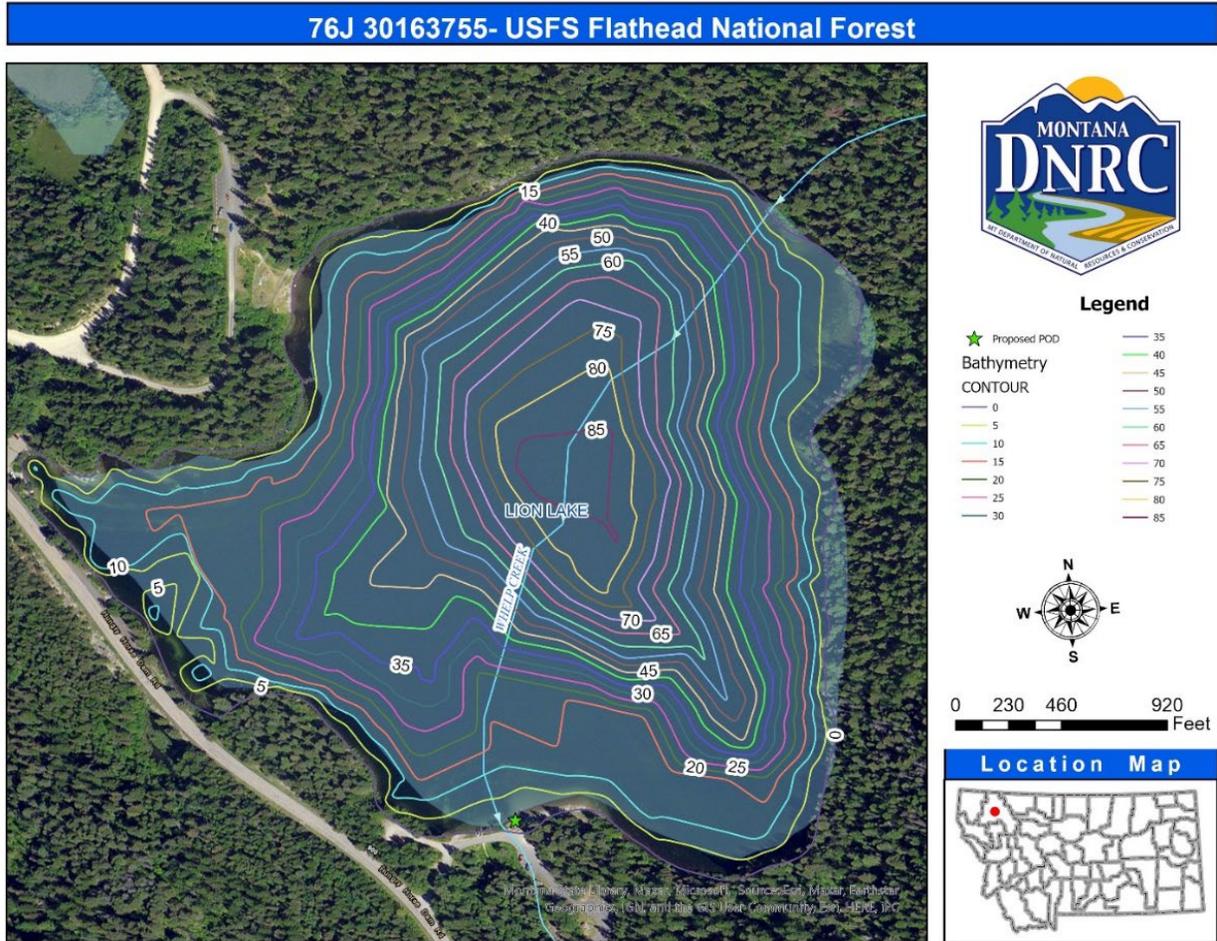


Figure 2- FWP Bathymetric Data for Lion Lake

Table 1 : Bathymetric Analysis of Lion Lake Volume Using the End-Area Formula					
Contour Interval (ft)	H (ft)	Area (ac)	Total Area (ac)	Depth Strata (ft)	Volume (AF)
85	5	0.72	0.72	80-85	7.26
80	5	1.47	2.19		
75	5	1.28	3.47	75-80	14.13
70	5	1.36	4.83	70-75	20.73
65	5	1.51	6.34	65-70	27.91
60	5	1.56	7.90	60-65	35.58
55	5	1.68	9.57	55-60	43.67
50	5	1.75	11.32	50-55	52.22
45	5	1.91	13.23	45-50	61.37
40	5	2.24	15.47	40-45	71.75
35	5	2.30	17.77	35-40	83.09
30	5	2.29	20.06	30-35	94.55
25	5	2.34	22.40	25-30	106.13
20	5	2.44	24.84	20-25	118.08
15	5	3.68	28.52	15-20	133.38
10	5	4.85	33.37	10-15	154.73
5	5	3.95	37.33	5-10	176.75
0	5	4.78	42.11	0-5	198.59
				Total Volume (AF)	1,399.92

Reservoir Evaporation:

14. 30-year monthly gridded climate normals from 1991-2020 from the NOAA National Center for Environmental Information were evaluated for average temperature, minimum temperature, elevation, and latitude to calculate gridded gross evaporation using the Penman-Linacre (P/L) method. Monthly gridded precipitation data was subtracted from the gridded gross evaporation data to produce the monthly net evaporation shown in **Table 2** below. Lion Lake is divided by two grids of evaporation data, therefore the data is applied to each side of Lion Lake proportionally.

Table 2: Gridded Monthly Evaporation for Lion Lake			
West Side of Lake (appx. 20.51 ac)		East Side of Lake (appx. 21.60 ac)	
Month	Evaporation (in/acre)	Month	Evaporation (in/acre)
January	0	January	0
February	0	February	0
March	0	March	0
April	0	April	0
May	0	May	0.22
June	0.34	June	0.94
July	0.16	July	0.75
August	4.36	August	4.54
September	4.22	September	4.52
October	2.01	October	2.31
November	0	November	0
December	0	December	0
TOTAL	11.09	TOTAL	13.18

15. Reservoir-wide evaporation is calculated by proportionally applying the gridded monthly evaporation to each side of Lion Lake:

$$\textit{West Side Evap.} = 20.51 \textit{ acres} * \frac{11.09 \textit{ in}}{\textit{acre}} * \frac{1 \textit{ ft}}{12 \textit{ in}} = 18.95 \textit{ AF}$$

$$\textit{East Side Evap.} = 21.60 \textit{ acres} * \frac{13.08 \textit{ in}}{\textit{acre}} * \frac{1 \textit{ ft}}{12 \textit{ in}} = 23.54 \textit{ AF}$$

$$\textit{Reservoir – Wide Evap.Total} = 18.95 \textit{ AF} + 23.54 \textit{ AF} = \mathbf{42.49 \textit{ AF}}$$

16. The sum of yearly evaporation plus Lion Lake volume is equal to the total amount of required appropriation:

$$42.49 \textit{ AF (evap. volume)} + 1,399.92 \textit{ AF (Lake volume)} = \mathbf{1,442.41 \textit{ AF total appropriation volume}}$$

17. The Department finds the requested volume of 1,442.41 AF annually as physically available in Lion Lake during the proposed period of use.

LEGAL AVAILABILITY

FINDINGS OF FACT

18. The area of potential affect is Whelp Creek below the USFS dam and to its confluence with the South Fork of the Flathead River. There are no water rights located within this reach.

19. Lion Lake is a naturally occurring lake that was dammed by the United States Forest Service in 1947 to increase storage capacity. The dam was put in place to service construction of the nearby Hungry Horse Dam on the South Fork of the Flathead River. Inflow water from Whelp Creek flows through the impoundment dam structure via a 3-foot diameter concrete pipe controlled by a slide gate and multiple drain pipes, providing flow of Whelp Creek through the dam. Water levels in the South Fork of the Flathead River are primarily controlled by the Hungry Horse Dam, making it indistinguishable whether water from Whelp Creek (or lack thereof due to impoundment) would be contributing to users downstream of the confluence. Additionally, with the proposed appropriation, there will be no further impoundment of Lion Lake beyond what has existed since 1947; therefore, the Department determines there are no downstream legal demands that require consideration.

20. Existing legal demands on Lion Lake are owned by the Applicant. 76J 51670-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.62 AF from July 1 to August 1. 76J 51668-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.50 AF from May 1 to October 31. Appropriation of Lion Lake for Recreation and Fish & Wildlife purposes will not impose on the Applicant's ability to exercise these rights.

21. The Department finds the proposed appropriation of 1442.41 AF annually to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

22. The Applicant provided a plat map for Township 30 north, Range 19 west, Flathead County, generated by the United States Department of the Interior's Bureau of Land Management dated July 23, 1962, demonstrating the existence of Lion Lake since at least this date. Furthermore, Lion Lake is classified as a Permanently Flooded water regime by USFWS, meaning that water covers the area throughout the year in all years. There will be no new diversion or impounding of water because of the establishment of the proposed Recreation and Fish & Wildlife purposes.

23. Existing legal demands on the Lion Lake are owned by the Applicant. 76J 51670-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.62 AF from July 1 to August 1. 76J 51668-00 is a Statement of Claim issued with a priority date of July 1, 1966 for a bucket diversion from Whelp Creek at a rate of 4.49 GPM up to 0.50 AF from May 1 to October 31. Appropriation of Lion Lake for Recreation and Fish & Wildlife purposes will not impose on the Applicant's ability to exercise these rights.

24. While Lion Lake is naturally occurring, it was enhanced in 1947 by the emplacement of the outlet works at the dam, which both enhances the storage capacity of the lake and permits flow through of Whelp Creek at the dam. The Applicant intends to maintain the natural and impounded lake levels for Fish & Wildlife and Recreation purposes. Following the proposed appropriation, the natural and controlled flow through of Whelp Creek will continue as they have since the emplacement of the outlet works in 1947 (and the 2021 improvements).

25. In response to a call being made, the Applicant has stated that the appropriation can be reduced from the normal surface elevation of 3,465.90 feet (1,399.92 AF) to the volume associated with the lowest elevation of the outlet works at 3,451.12 feet (1,379.19 AF).

26. The Department finds that the proposed use of 1,442.41 AF annually for Recreation and Fish & Wildlife purposes will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

27. The original 1947 and recent 2021 Lion Lake Rehabilitation Plan for the impoundment structures were provided by the Applicant. Lion Lake is naturally occurring, with the original dam increasing storage volume in 1947. The inlet of the dam includes a trashrack structure which feeds a 3-foot diameter concrete pipe that runs perpendicular through the embankment to an outlet portal. On the lakeside of the embankment, there is a vertical shaft that contains a handrail and slide gate to release water through the pipe below the embankment, allowing the dam operator to reduce the volume of Lion Lake to the inlet structure if necessary.

28. The recent (2021) improvements to the dam embankment leave the original 1947 structures in place with no changes to the normal surface water elevation or low-level outlet elevations of Lion Lake. These improvements included embankment reinforcement and repair, and installation of toe drains and slip-lining of the existing outlet pipe preventing losses and excessive seepage contributing to increased compliance with high-hazard dam safety.

29. The Applicant has no plan to divert water in and out of Lion Lake in addition to the natural and controlled flow through of Whelp Creek that has occurred annually since its initial impoundment.

30. The Department finds that the proposed means of diversion and conveyance can support the proposed volume to be appropriated.

BENEFICIAL USE

FINDINGS OF FACT

31. The Applicant plans to utilize water in Lion Lake for public Recreation and Fish & Wildlife purposes, which are recognized as beneficial uses per MCA 85.5.102(5). The Applicant is currently working with FWP to obtain permitting and guidance to annually stock Lion Lake with fish, including Westslope Cutthroat Trout, as demonstrated by publicly available information on the FWP FishMT website. Lion Lake is located on United States Forest Service land and offers hiking, fishing, swimming, picnicking, and other recreational opportunities to the public.

32. The Applicant's requested volume has been calculated in alignment with procedures outlined in the DNRC Technical Memoranda: "*Physical Availability of Ponds*" and "*Pond and Wetland Evaporation/Evapotranspiration*."

33. Because there is no way to distinguish between waters utilized by Recreators or Fish & Wildlife within Lion Lake, the Department finds that the entire volume of the Lion Lake, plus evaporative losses represents a reasonable requested volume for the proposed appropriation.

34. Per ARM 36.12.113, there is no flow rate required for on stream reservoirs, therefore there will be no flow rate associated with this application.

35. The Department finds the proposed water use as beneficial, and the requested annual volume of 1,442.41 AF as reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

37. Pursuant to § 85-2-311(1)(a)(i), MCA, an Applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate.”

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

39. An Applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the Applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

40. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 9-17)

LEGAL AVAILABILITY

41. 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).

42. 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.

43. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 18-21)

ADVERSE EFFECT

44. 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.

45. 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).

46. 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).

47. 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).

48. 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.

49. 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).

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

ADEQUATE DIVERSION

51. 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.

52. 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.

53. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 27-30)

BENEFICIAL USE

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

55. 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).

56. 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).

57. 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*.

58. Applicant proposes to use water for Recreation and Fish & Wildlife which are recognized as beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence Recreation and Fish & Wildlife are beneficial uses and that 1,442.41 AF of diverted volume is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 31-34)

POSSESSORY INTEREST

59. 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.

60. 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.

61. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 35)

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. 76J 30163755 should be GRANTED.

The Department determines the Applicant may divert water from Whelp Creek (Lion Lake), by means of an embankment dam, from January 1 to December 31 at up to 1,442.41 AF, from a point in the SW ¼ of the SW ¼ of the SE ¼ of Section 16, Township 30N, Range 19W, Flathead County, Montana, for Recreation and Fish & Wildlife use from January 1 to December 31. The place of use is located in the SE ¼ of the SE ¼ of the SW ¼ and in the S ½ of the SW ¼ of the SE ¼ of Section 9 and all of Section 16, in Township 30 N, Range 19 W, Flathead County, Montana. Applicant may store water in an on-stream reservoir located in the SE ¼ of the SE ¼ of the SW ¼ and in the S ½ of the SW ¼ of the SE ¼ of Section 9 and all of Section 16, in Township 30 N, Range 19 W, Flathead County, Montana.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to [Grant/ 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 14th Day of March, 2025.

/Original signed by Jim Ferch/

Jim Ferch, Manager
Kalispell Regional Office
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 14th Day of March 2025, by first class United States mail.

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