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- Attachment SW.7.A and 7.D – Adverse Effect
- Attachment SW.8.B(1) – Adequate Diversion and Means of Operation
- Attachment SW.9.A – Beneficial Use
- Maps/Figures:
  - Two Vicinity Maps
  - Point of Diversion Site Plan
  - Parcel Map with Water Line Location

#### Information Received after Application Filed

- Deficiency letter response from the Applicant to the Department received January 13, 2025. This letter also included a letter with hydraulic calculations and pump specifications provided to the Applicant by Water and Environmental Technologies, dated January 9, 2025.

#### Information within the Department’s Possession/Knowledge

- Lake Five Bathymetry Survey Map. Montana Department of Fish, Wildlife, and Parks conducted this survey on November 11, 2002.
- List of existing surface water rights on Lake Five.

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:

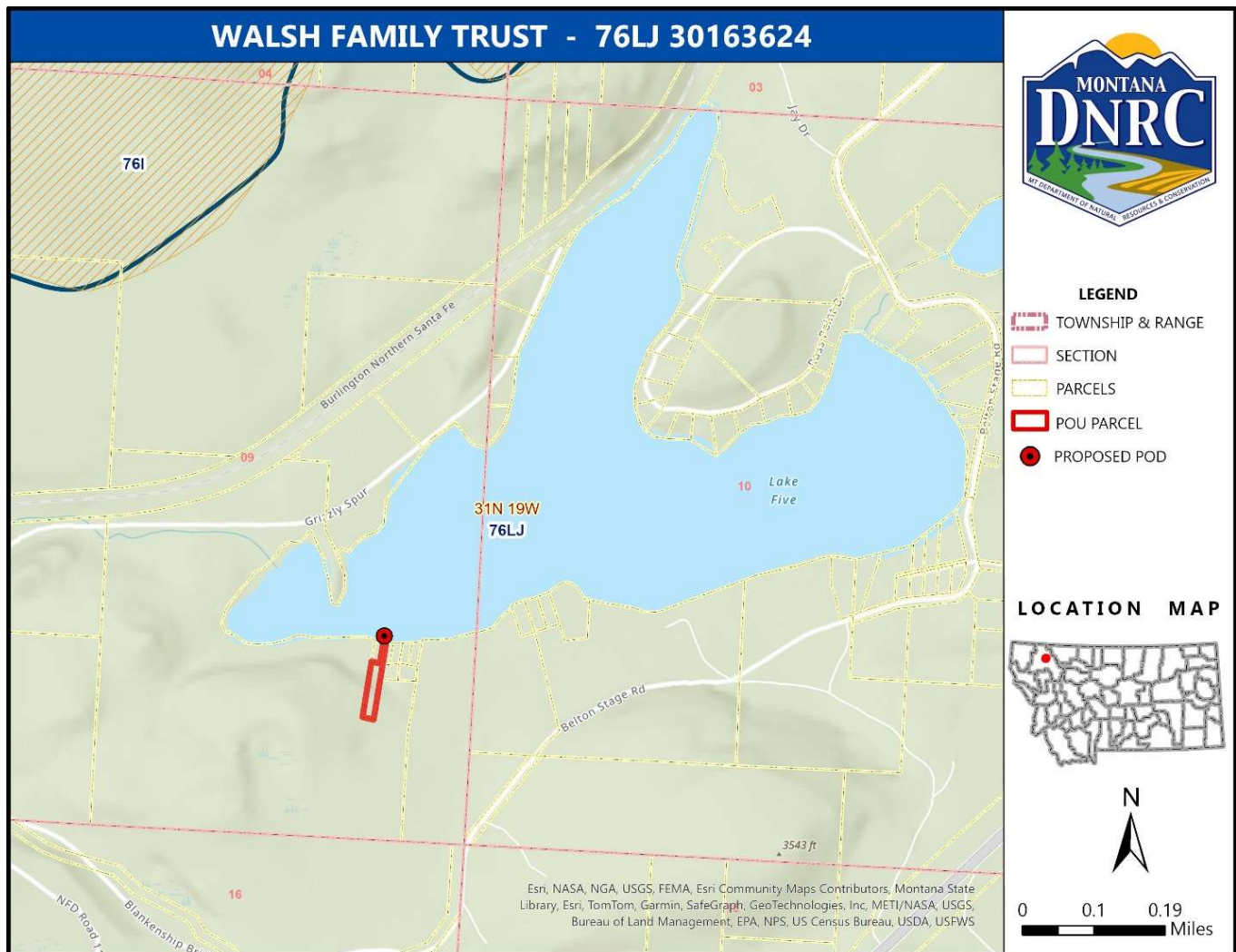
<b>Department</b> or <b>DNRC</b> means the Department of Natural Resources and Conservation	
<b>AF</b> means acre-feet	<b>AOPI</b> means the Area of Potential Impact
<b>ARM</b> means Administrative Rules of Montana	<b>COSA</b> means Certificate of Subdivision Approval
<b>GPM</b> means gallons per minute	<b>HDPE</b> means High Density Polyethylene
<b>MCA</b> means Montana Code Annotated	<b>POD</b> means point of diversion
<b>PSI</b> means pounds per square inch	<b>TDH</b> means total dynamic head

## **PROPOSED APPROPRIATION**

### **FINDINGS OF FACT**

1. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year by means of a pump for domestic use from January 1 – December 31. The proposed POD is in the SWNESE

of Section 9, Township 31N, Range 19W, Flathead County, Montana (Figure 1). The proposed place of use is in Government Lot 3 in the NWSESE of Section 9, Township 31N, Range 19W, Flathead County, Montana, further described as Parcel A of Certificate of Survey No. 19591 (Figure 1). The POD is in the Flathead River Basin (76LJ) in an area that is not subject to water right basin closures or controlled groundwater area restrictions.



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

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

### **GENERAL CONCLUSIONS OF LAW**

2. 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 . . .

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

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

- (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
- (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
  - (A) identification of physical water availability;
  - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of

the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

4. 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.

5. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes*, 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).

6. 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.

7. 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**

8. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year for domestic use. The volume of Lake Five was quantified by the Montana Department of Fish, Wildlife, and Parks through a bathymetric survey conducted November 11, 2002. Per the Lake Five Bathymetry Survey Map<sup>1</sup>, the physically available volume of Lake Five is 2,805 AF.

9. The Department finds that the volume of Lake Five has been quantified by a qualified entity based on bathymetric data pursuant to ARM 36.12.1702(3)(a). The Department finds that the amount of water the Applicant seeks to appropriate, 1.0 AF/year at a flow rate of 12.0 GPM, is physically available in Lake Five.

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<sup>1</sup> Montana Department of Fish Wildlife & Parks, Geographic Data Services Section (2018). *Lake Five Bathymetry Survey Map*. <https://myfwp.mt.gov/fishMT/waterbody/43365>. Accessed: 8 May 2024. This map is also contained in the application file.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

10. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year for domestic use. Lake Five is a pothole lake with the surrounding geology primarily consisting of glacial deposits of unconsolidated boulders and cobbles. Halfmoon Lake is upstream of, and intermittently discharges water to, Lake Five, which is upstream of, and intermittently discharges water to, Mud Lake. There are no water rights on Mud Lake or the intermittent discharge channel between Lake Five and Mud Lake. Since the inflow and outflow of Lake Five is intermittent, and there is no surface connection to nearby surface water sources such as the Flathead River, the AOPI for this application is the waters within the boundary of Lake Five.

11. The Department calculated the volume appropriated by existing users in the AOPI by generating a list of existing water rights on Lake Five and calculating the sum of their total annual volumes (Table 1). The total volume of existing legal demands was then subtracted from the physically available volume of Lake Five to determine the legally available volume (Table 2).

<b>Table 1: Existing Legal Demands within the AOPI on Lake Five</b>		
<b>Water Right Number</b>	<b>Purpose</b>	<b>Maximum Volume (AF)</b>
76LJ 5168 00	LAWN AND GARDEN	0.50
76LJ 5174 00	DOMESTIC	2.50
76LJ 5371 00	DOMESTIC	1.98
76LJ 18587 00	DOMESTIC	1.00
76LJ 25382 00	DOMESTIC	1.50
76LJ 34298 00	DOMESTIC	0.04
76LJ 114528 00	MULTIPLE DOMESTIC	1.25
76LJ 207722 00	DOMESTIC	2.00
76LJ 12438 00	DOMESTIC	0.10
76LJ 49057 00	DOMESTIC	0.37
76LJ 30006633	DOMESTIC	1.63
76LJ 30006628	DOMESTIC	1.63
76LJ 39874 00	DOMESTIC	0.75
76LJ 104679 00	IRRIGATION	5.50
76LJ 131480 00	DOMESTIC	1.25
76LJ 215028 00	LAWN AND GARDEN	1.00
76LJ 5269 00	DOMESTIC	1.50
76LJ 214438 00	DOMESTIC	1.50
76LJ 30113670	DOMESTIC	1.00
Total Volume (AF)		27.00



<b>Table 2: Legal Availability of Lake Five</b>		
<b>Physically Available Volume of Lake Five (AF)</b>	<b>Total Volume of Existing Legal Demands on Lake Five (AF)</b>	<b>Legally Available Volume of Lake Five (AF)</b>
2,805.00	27.00	2,778.00

12. The Department's comparison of the physically available volume of Lake Five with the total volume of existing legal demands within the AOPI on Lake Five demonstrates that the proposed appropriation of 1.0 AF/year diverted at 12.0 GPM is legally available during the proposed period of diversion and use.

### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

13. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year for domestic use. The Applicant stated in their application that they would discontinue their water use by turning off their pump during a time of water shortage when an existing water user contacted them to make a call for water.

14. The Applicant has proven both the physical and legal availability of Lake Five water at the POD. Enough water remains in the source to meet existing legal demands, and the requested 1.0 AF/year diverted at 12.0 GPM. The Applicant has demonstrated that they can regulate their water use and that they have a plan to protect senior water users during times of water shortage. The Department finds that the proposed water use will not adversely affect senior water users.

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

15. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year for domestic use using a Flint and Walling Model CPJ15 1.5-HP jet pump. The pump and motor will be located in a below-grade concrete vault approximately 84-feet upland from the shoreline of Lake Five. A buried 1.5-inch black HDPE waterline will extend approximately 20-feet into the lake where water is diverted through a one-inch foot valve affixed to an upturned five-gallon bucket resting on the lakebed. From the pump, water will be conveyed through a one-inch HDPE water line approximately 389-feet to a Well-X-Trol WX-203 32-gallon capacity hydropneumatic

pressure tank located in the cabin's basement. Water will then flow to the various domestic fixtures through a 0.5-inch waterline.

16. Based on the pump specifications and the TDH figures provided by the applicant, the system will divert between 3.5 GPM at a TDH of 190.3-feet and 12.0 GPM at a TDH of 155.6-feet. The pump will turn on when the system pressure at the cabin drops to 40 PSI and will run until system pressure has returned to 55 PSI.

17. Based on the system design and specifications, the Department finds that the diversion and conveyance system is adequate to supply the requested flow rate of 12.0 GPM up to an annual volume of 1.0 AF.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

18. The Applicant proposes to divert Lake Five water at 12.0 GPM up to 1.0 AF/year for domestic use. No COSA or other sanitary restrictions exist for this property, therefore there is no restriction on the Applicant's use of surface water for in-house domestic use.

19. The Department finds that the proposed domestic use of water is beneficial, and that the requested flow rate of 12.0 GPM up to the Department's standard annual domestic use volume of 1.0 AF is reasonably justified per ARM 36.12.1801(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

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

## **CONCLUSIONS OF LAW**

### **PHYSICAL AVAILABILITY**

21. 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."

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

23. 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).

24. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 8-9)

#### LEGAL AVAILABILITY

25. 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).

26. 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.

27. 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 10-12)

#### ADVERSE EFFECT

28. 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.

29. 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).

30. 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).

31. 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).

32. 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.

33. 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).

34. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 13-14)

#### ADEQUATE DIVERSION

35. 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.

36. 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.

37. 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 15-17)

#### BENEFICIAL USE

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

39. 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).

40. 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).

41. 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*.

42. The Applicant proposes to use water for domestic use which is a recognized beneficial use. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that domestic use is a beneficial use, and that 1.0 AF of volume diverted at 12.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 18-19)

## POSSESSORY INTEREST

43. 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.

44. 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.

45. 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 20)

### **DRAFT PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this DRAFT Preliminary Determination Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30163624 should be GRANTED.

The Department determines the Applicant may divert Lake Five water at 12.0 GPM up to 1.0 AF/year by means of a pump for domestic use from January 1 – December 31. The point of diversion is in the SWNESE of Section 9, Township 31N, Range 19W, Flathead County, Montana. The place of use is in Government Lot 3 in the NWSESE of Section 9, Township 31N, Range 19W, Flathead County, Montana, further described as Parcel A of Certificate of Survey No. 19591.



## **NOTICE**

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this [INSERT DATE].

/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 [INSERT DATE], by first class United States mail.

WALSH FAMILY TRUST  
% ROSEMARY WALSH BURY TTEE  
19210 N LITTLE SPOKANE DR  
COLBERT WA 99005-9622

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TRAVIS WILSON  
Kalispell Regional Office, (406) 752-2288