

# THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



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February 18, 2025

COLE FAMILY LIMITED PARTNERSHIP  
307 38TH AVENUE SW  
CALGARY, AB T2S 0V7  
CANADA

**Subject:** Draft Preliminary Determination to Grant Water Right Permit Application No. 76LJ 30164279

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision within 15 business days of the date of this letter. If no response is received by March 11, 2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you request and are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.

If you have any questions or concerns, please contact me at (406) 752-2746 or [Travis.Wilson@mt.gov](mailto:Travis.Wilson@mt.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "Travis Wilson".

Travis Wilson  
Water Resource Specialist

Encl.: Draft Preliminary Determination to Grant Water Right Permit Application No. 76LJ 30164279

*Cc via email:* Brett Glover, Water & Environmental Technologies, 102 Cooperative Way, Ste. 100, Kalispell, MT 59901



**DNRC.MT.GOV**

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

\* \* \* \* \*

**APPLICATION FOR BENEFICIAL**

**WATER USE PERMIT NO. 76LJ 30164279 )**

**BY COLE FAMILY LIMITED  
PARTNERSHIP**

**DRAFT PRELIMINARY**

**) DETERMINATION TO GRANT PERMIT**

\* \* \* \* \*

Cole Family Limited Partnership (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30164279 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation on December 5, 2024. The Applicant proposes diverting up to 0.83 acre-feet of volume annually at a flow rate of 17.0 gallons per minute from the Whitefish River (Whitefish Lake) for domestic use and lawn and garden irrigation. The Department published receipt of the Application on its website on December 9, 2024. A preapplication meeting was held between the Department and the Applicant's consultant, Water and Environmental Technologies, on August 13, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on August 27, 2024. The Department delivered the completed technical analyses on October 10, 2024. The application was determined to be correct and complete as of December 27, 2024. An Environmental Assessment for this application was completed on February 17, 2025.

**INFORMATION**

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

**Application as filed:**

- Permit Preapplication Meeting Form, Form 600P.
  - Including attachments presented by the Applicant at the preapplication meeting and submitted along with the preapplication meeting form.
- Application for Beneficial Water Use Permit, Form 600.

- Attachments:
  - Attachment A. DNRC Technical Analysis Report
  - Attachment B. Hydraulic Calculations
  - Attachment C. Pump and Pressure Tank Specifications
  - Attachment D. Fixture Demand Calculations
  - Attachment E. Sprinkler Specifications
  - Attachment F. Irrigation Water Requirements
- Maps:
  - Figure 1. 41 Better Way Vicinity Map
  - Figure 2. 41 Better Way Site Map: Existing Irrigation
  - Figure 3. 41 Better Way Site Map: Proposed Irrigation

Information within the Department's Possession/Knowledge

- Mean monthly stream flow data from USGS Gaging Station No. 12366000 Whitefish River near Kalispell, MT. Period of record: October 1929 – May 2024.
- List of existing surface water rights on the Whitefish River System from the Whitefish Lake inlet down to the confluence with the Stillwater River.
  - This list is further divided into two reaches: the reach from the Whitefish Lake inlet down to USGS Gaging Station No. 12366000 and the reach from USGS Gaging Station No. 12366000 down to the confluence with the Stillwater River.
- The Department also routinely considers the following information which is not included in the administrative file for this application but is available upon request. Please contact the Kalispell Regional Office at 406-752-2288 to request copies of the following documents:
  - Technical Memorandum: DNRC Consumptive Use Methodology - Turf Grass, dated March 23, 2010

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>NRCS</b> means the US Department of Agriculture's Natural Resource Conservation Service	
<b>AF</b> means acre-feet	<b>AOPI</b> means the Area of Potential Impact
<b>CFS</b> means cubic feet per second	<b>GPD</b> means gallons per day
<b>GPM</b> means gallons per minute	<b>HDPE</b> means high density polyethylene
<b>IWR</b> means Irrigation Water Requirements	<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 Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.83 AF/year by means of a pump for domestic use (0.28 AF) from January 1 – December 31 and for irrigation of 0.27 acres of lawn and garden (0.55 AF) from April 25 – October 5. The proposed POD is in the NESENW of Section 4, Township 31N, Range 22W, Flathead County, Montana (Figure 1). The proposed places of use for the domestic and the lawn and garden purposes are in the NESENW and E2E2NW, respectively, of Section 4, Township 31N, Range 22W, Flathead County, Montana, further described as Tract 7A of Certificate of Survey No. 19795 (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.

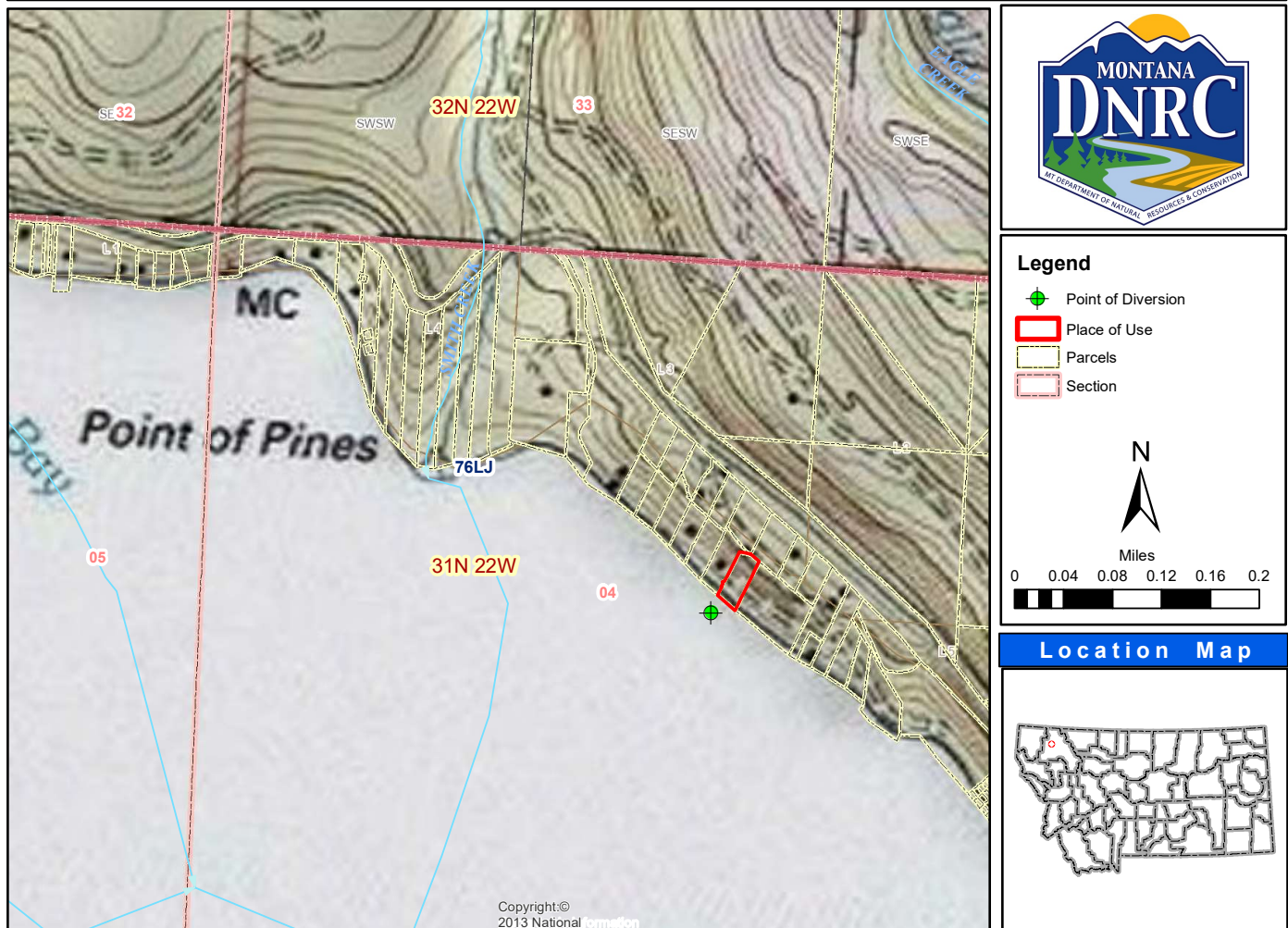


Figure 1: Map of the proposed place of use and point of diversion.

## **§ 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, Starner*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080 (1996), *superseded by legislation on another issue*:

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

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

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

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

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 Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.28 AF/year for domestic use and up to 0.55 AF/year for irrigation of 0.27 acres of lawn and garden area (0.83 AF/year total). The Department used the Whitefish River near Kalispell, MT USGS Gaging Station No. 12366000 (period of record: October 1929 – May 2024) to quantify the physically available monthly flow rates and volumes at the POD during the period of diversion and use (January 1 – December 31). USGS Gaging Station No. 12366000 is the nearest gage to the proposed POD on the Whitefish River (Whitefish Lake), which is approximately 20.3 miles upstream of the gaging station.

9. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Whitefish River using USGS Gaging Station No. 12366000 records for each month of the proposed period of diversion (Table 1, column B). Those flows were converted to monthly volumes in AF (Table 1, column C) using the following equation found in the DNRC Water Calculation Guide: median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.

10. The Department calculated the monthly flows appropriated by existing users on the Whitefish River system between the Whitefish Lake inlet and USGS Gaging Station No. 12366000 (Table 1, column D) by:

- i. Generating a list of existing surface water rights (legal demands) from the Whitefish Lake inlet down to USGS Gaging Station No. 12366000 (list is included in the permit application file and available upon request);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion;
- iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate (per DNRC adjudication standards); and,
- iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

11. Since the gage used is downstream of the proposed POD, the Department added in the flow rates of the existing legal demands (Table 1, column D) between the Whitefish Lake inlet and USGS Gaging Station No. 12366000 to the median of the mean monthly gage values (Table 1, column B) to determine physically available monthly flows and volumes at the proposed POD (Table 1, columns E-F).

<b>Table 1: Physical Availability at the Point of Diversion on the Whitefish River (Whitefish Lake)</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Median of the Mean Monthly Flow at Gage No. 12366000 (CFS)</b>	<b>Median of the Mean Monthly Volume at Gage No. 12366000 (AF)</b>	<b>Existing Rights from the Whitefish Lake Inlet to Gage No. 12366000 (CFS)</b>	<b>Physically Available Water at the POD (CFS)</b>	<b>Physically Available Water at the POD (AF)</b>
January	60.90	3,738.04	33.52	94.42	5,795.50
February	59.80	3,670.52	33.52	93.32	5,173.66
March	90.30	5,542.61	33.52	123.82	7,600.07
April	212.60	13,049.39	84.95	297.55	17,674.68
May	477.40	29,302.81	84.95	562.35	34,517.26
June	583.30	35,802.95	84.95	668.25	39,694.26
July	264.70	16,247.29	84.95	349.65	21,461.73
August	104.20	6,395.80	84.95	189.15	11,610.24
September	80.85	4,962.57	84.95	165.80	9,848.73
October	65.85	4,041.87	84.95	150.80	9,256.32
November	68.20	4,186.12	33.52	101.72	6,042.17
December	61.70	3,787.15	33.52	95.22	5,844.60

12. The stream flow data analysis of the Whitefish River system shows physically available monthly flow rates and volumes in the source exceeding the flow rate and volume of the proposed appropriation. The Department finds that the amount of water the Applicant seeks to appropriate, 17.0 GPM (0.04 CFS) up to 0.83 AF, is physically available in the Whitefish River (Whitefish Lake) at the POD.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

13. The Applicant proposes to divert Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.28 AF/year for domestic use and up to 0.55 AF/year for irrigation of 0.27 acres of lawn and garden area (0.83 AF/year total). The AOPI for this application is the Whitefish River system from the Whitefish Lake inlet downstream to the confluence with the Stillwater River. A total of 328 surface water rights exists within the reach. The Applicant's proposed diversion from Whitefish Lake would reduce the total volume of water discharging from the Whitefish River system. The upper extent of the AOPI is the inlet of Whitefish Lake to account for all users with diversions in the lake. The lower extent of the AOPI is at the confluence of the Whitefish River with the

Stillwater River. Directly upstream of this confluence, the Stillwater River gains large volumes of groundwater from the shallow aquifer due to the increased hydraulic connectivity of the shallow aquifer and surface waters near the Noffsinger Spring complex in Kalispell. Directly downstream of the confluence is the Spring Creek tributary, which gains water from Trumbull Creek and residual water from a slough feature formed from the meandering of the Flathead River. The influx of water near the confluence of the Whitefish River and Stillwater River is substantial. Therefore, the potential impact of this Whitefish Lake appropriation ends at the mouth of Whitefish River.

14. The Department quantified physically available monthly flows (Table 2, column B) and volumes for the Whitefish River at the POD on Whitefish Lake. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 2, columns C-D) by:

- i. Generating a list of existing surface water rights within the AOPI (from the Whitefish Lake inlet to the confluence with the Stillwater River).
  - a. This list is further divided into two reaches: the reach from the Whitefish Lake inlet down to USGS Gaging Station No. 12366000 and the reach from USGS Gaging Station No. 12366000 down to the confluence with the Stillwater River (this list is included in the application file and available upon request);
- ii. Designating uses as occurring during their claimed/permitted periods of diversion;
- iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate (per DNRC adjudication standards); and,
- iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of its period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This leads to an overestimation of legal demands on the physical volume of water. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

15. The Department subtracted out the flow rates of the existing legal demands (Table 2, columns C-D) within the area of potential impact from the physically available water (Table 2, column B) to determine legally available monthly flows at the POD (Table 2, column E). Legally available monthly flows were then converted to monthly volumes (Table 2, column F).

<b>Table 2: Legal Availability at the Point of Diversion on Whitefish Lake</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Physically Available Water at POD (CFS)</b>	<b>Existing Legal Demands from Whitefish Lake Inlet to Gage 12366000 (CFS)</b>	<b>Existing Legal Demands Below Gage 12366000 (CFS)</b>	<b>Physically Available Water Minus Existing Legal Demands = Legally Available Water (CFS)</b>	<b>Physically Available Water Minus Existing Legal Demands = Legally Available Water (AF)</b>
January	94.42	33.52	4.06	56.84	3,488.84
February	93.32	33.52	4.06	55.74	3,090.23
March	123.82	33.52	4.06	86.24	5,293.41
April	297.55	84.95	54.52	158.08	9,389.95
May	562.35	84.95	54.52	422.88	25,956.37
June	668.25	84.95	54.52	528.78	31,409.53
July	349.65	84.95	54.52	210.18	12,900.85
August	189.15	84.95	54.52	49.68	3,049.36
September	165.80	84.95	54.52	26.33	1,564.00
October	150.80	84.95	54.52	11.33	695.44
November	101.72	33.52	4.06	64.14	3,809.92
December	95.22	33.52	4.06	57.64	3,537.94

16. The Department's comparison of the median of the mean monthly flows and volumes of water to existing legal demands within the AOPi on the source of supply demonstrates that the proposed appropriation of 17.0 GPM (0.04 CFS) up to an annual volume of 0.83 AF is legally available during the proposed periods of diversion and use.

## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

17. The Applicant proposes to divert Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.28 AF/year for domestic use and up to 0.55 AF/year for irrigation of 0.27 acres of lawn and garden area (0.83 AF/year total). The Applicant provided a plan showing they can regulate their water use to satisfy the water rights of senior appropriators during times of water shortage. The Applicant states that during times of water shortage they will:

- i. Reduce lawn and garden irrigation by 50%;
- ii. Cease lawn and garden irrigation;
- iii. Reduce domestic use by 50%; and,

- iv. Turn off the pump upon receiving a valid call from a senior water right holder.
- 18. The Applicant has proven both the physical and legal availability of Whitefish River (Whitefish Lake) water at the POD. Enough water remains in the source to meet existing legal demands and the requested 17.0 GPM (0.04 CFS) up to an annual volume of 0.83 AF. 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**

- 19. The Applicant proposes to divert Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.28 AF/year for domestic use and up to 0.55 AF/year for irrigation of 0.27 acres of lawn and garden area (0.83 AF/year total) using a Goulds model 18GS07 submersible pump with a 0.75 horsepower motor. The pump is located on the bed of the Whitefish River (Whitefish Lake) approximately 45-feet from shore.
- 20. The pump will convey water through a 1.25-inch HDPE main supply line approximately 135 feet to a Well-x-Trol WX-255 hydropneumatic pressure tank equipped with a 40-60 PSI pressure control switch in the Applicant's residence. The pump will turn on when the system pressure drops to 40 PSI and will run until system pressure has returned to 60 PSI. From the pressure tank, water will be conveyed to domestic fixtures after filtration and ultraviolet disinfection and to an automated sprinkler system and two hose bib connections. The highest demand lawn and garden irrigation zone will consist of five Hunter PGP and MP rotor sprinklers requiring 13.0 GPM, which will leave 4.0 GPM available for use by domestic fixtures during times of overlapping irrigation.
- 21. The Applicant provided a fixture count analysis, a pump curve, and minimum- and maximum-demand TDH calculations. At the maximum-demand TDH of 142-feet, the pump curve demonstrates that the pump is capable of producing 17.0 GPM.
- 22. 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 17.0 GPM (0.04 CFS) up to an annual volume of 0.83 AF.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

23. The Applicant proposes to divert Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.28 AF/year for domestic use and up to 0.55 AF/year for irrigation of 0.27 acres of lawn and garden area (0.83 AF/year total). The Applicant's request of 0.28 AF for their domestic water needs was calculated using an estimated demand 250.0 GPD, which is reasonable when compared to DEQ and Flathead County wastewater design flow estimates. At 250.0 GPD, the annual domestic demand for a single family residence is 0.28 AF ( $250.0 \text{ GPD} \times 365 \text{ days/year} \div 325,851 \text{ gallons/AF} = 0.28 \text{ AF/year}$ ). The Applicant's request of 0.55 AF for irrigation of 0.27 acres of lawn and garden area is based on Department guidelines from the 2010 Technical Memorandum titled DNRC Consumptive Use Methodology – Turf Grass. Using the NRCS IWR software, Whitefish Weather Station climate data, and assuming 70 percent sprinkler irrigation efficiency, the Applicant identified a gross irrigation requirement in a dry year of 24.51 inches per acre (2.04 AF) per year for the Whitefish area ( $17.16 \text{ inches/acre net irrigation requirement} \div 0.7 \text{ efficiency factor} = 24.51 \text{ inches/acre gross irrigation requirement} \div 12.0 \text{ inches/foot} = 2.04 \text{ AF}$ ). The requested volume of 0.55 AF/year to irrigate 0.27 acres was determined using the IWR gross irrigation requirement value ( $0.27 \text{ acres} \times 2.04 \text{ AF/acre} = 0.55 \text{ AF/year}$ ). The place of use is located within NRCS Climatic Area III, for which the DNRC sprinkler irrigation water use standards range from 2.08 to 2.41 AF/acre (per ARM 36.12.115(2)(e)). The requested lawn and garden irrigation volume is reasonable in comparison to this standard volume range.

24. The requested flow rate of 17.0 GPM can divert 27.42 AF over the requested year-round period of diversion ( $17.0 \text{ GPM} \times 1,440 \text{ minutes/day} \times 365 \text{ days} \div 325,851 \text{ gallons/AF} = 27.42 \text{ AF}$ ). Therefore, the requested flow rate is adequate to satisfy the requested volume of 0.83 AF/year.

25. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 17.0 GPM (0.04 CFS) up to an annual volume of 0.83 AF are reasonably justified per ARM 36.121801(2).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

26. 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**

27. 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.”

28. 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).

29. 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).

30. 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 8-12)

### **LEGAL AVAILABILITY**

31. 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).

32. 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.

33. 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 13-16)

#### ADVERSE EFFECT

34. 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.

35. 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).

36. 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).

37. 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).

38. 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.

39. 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).

40. 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 17-18)

### ADEQUATE DIVERSION

41. 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.

42. 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.

43. 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 19-22)

### BENEFICIAL USE

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

45. 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).

46. 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).

47. 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*.

48. The Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as ‘lawn and garden irrigation’) which is a recognized beneficial use. § 85-2-102(5), MCA. “Domestic use” by DNRC rule means those water uses common to a household including: ... (g) garden and landscaping irrigation up to five acres.” ARM 36.12.101(20). Applicant has proven by a preponderance of the evidence that domestic use and lawn and garden irrigation are beneficial uses and that 0.83 AF of volume diverted at 17.0 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 23-25)

### POSSESSORY INTEREST

49. 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.

50. 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.

51. 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 26)

### **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 30164279 should be GRANTED.

The Department determines the Applicant may divert Whitefish River (Whitefish Lake) water at 17.0 GPM up to 0.83 AF/year by means of a pump for domestic use (0.28 AF) from January 1 – December 31 and for irrigation of 0.27 acres of lawn and garden (0.55 AF) from April 25 – October 5. The point of diversion is in the NESENW of Section 4, Township 31N, Range 22W, Flathead County, Montana. The places of use for the domestic and the lawn and garden purposes are in the NESENW and E2E2NW, respectively, of Section 4, Township 31N, Range 22W, Flathead County, Montana, further described as Tract 7A of Certificate of Survey No. 19795.

## **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 [INSERT DATE].

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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.

COLE FAMILY LIMITED PARTNERSHIP

307 38<sup>TH</sup> AVE SW

CALGARY, AB T2S 0V7

CANADA

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WATER & ENVIRONMENTAL TECHNOLOGIES

ATTN: BRETT GLOVER

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