

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

\*\*\*\*\*

**IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO.  
76K-30109425 BY POGGE, DAVID L  
REVOCABLE TRUST AND POGGE,  
SANDRA L REVOCABLE TRUST**     )

**NOTICE OF ERRATA  
FINAL ORDER**

\*\*\*\*\*

It has been brought to the Hearing Examiner’s attention that the period of diversion requested by the Applicant and publicly noticed was from March 15 through July 30.

The Preliminary Determination to Grant and the Final Order authorized a period of diversion from March 15 through July 31 – this was error.

The period of diversion GRANTED is therefore March 15 through July 30.

Please make these corrections to your copy.

IT IS SO ORDERED.

Dated this 18<sup>th</sup> day of July 2019.

/Original signed by David A. Vogler/

David A Vogler, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-6835

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the NOTICE OF ERRATA - FINAL ORDER was served upon all parties listed below on this 18<sup>th</sup> day of July 2019 by first-class United States mail.

JOHN E. BLOOMQUIST – ATTORNEY  
RICK C. TAPPAN - ATTORNEY  
BLOOMQUIST LAW FIRM PC  
3355 COLTON DR STE A  
HELENA MT 59602-0252

THERESE F HASH - ATTORNEY  
HASH O'BRIEN BIBY & MURRAY PLLP  
PO BOX 1178  
KALISPELL, MT 59903-1178

/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615

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

\*\*\*\*\*

<b>IN THE MATTER OF APPLICATION FOR</b>	)	
<b>BENEFICIAL WATER USE PERMIT NO.</b>	)	
<b>76K-30109425 BY POGGE, DAVID L</b>	)	<b>FINAL ORDER</b>
<b>REVOCABLE TRUST AND POGGE,</b>	)	
<b>SANDRA L REVOCABLE TRUST</b>	)	

\*\*\*\*\*

Pursuant to the provisions of §§ 85-2-309 through 311, MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, a contested case hearing was held before the Department of Natural Resources and Conservation (Department) on February 5, 2019 in Missoula, Montana. Due to the unavailability of a witness for the Applicant, the matter was continued to February 21, 2019 at which point the testimony of the final witness took place via video conference call in Helena and Kalispell, Montana. The purpose of the contested case hearing was to hear the objection to Application for Beneficial Water Use Permit No. 76K-30109425 by David L. Pogge Revocable Trust and Sandra L. Pogge Revocable Trust for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on March 14, 2018. (PD).

This Final Order must be read in conjunction with the March 14, 2018 Preliminary Determination to Grant which is hereby incorporated by reference.

**BACKGROUND**

On February 10, 2017, David L. Pogge Revocable Trust, and Sandra L Pogge Revocable Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76K-30109425 to the Missoula Water Resources Office (MRO) of the Department of Natural Resources and Conservation (Department or DNRC) for 3 cubic feet per second (CFS) up to 144 acre-feet (AF) from Buck Creek a tributary to the Swan River for the purposes of irrigation and recreation. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated July 11, 2017. The Applicant responded with information dated August 7, 2017. The Application was determined to be correct and complete as of November 20, 2017. An

Environmental Assessment for this Application was completed on March 14, 2018. On March 14, 2018 the MRO issued a "Preliminary Determination to Grant Permit" (PD).

Public Notice of the PD was sent to interested individuals in the notice area on April 11, 2018 and published in the Seely Swan Pathfinder on April 12, 2018. The notice area was determined by the Department to be from the proposed point of diversion downstream to the confluence of Buck Creek and the Swan River. The public notice provided the deadline for objections to the Application was May 26, 2018. One objection to the Application was filed by KDO Family Forest. A contested case hearing on this objection was held on February 5, 2019 in Missoula, Montana and continued to February 21, 2019 via video link between Helena and Kalispell, Montana, with written final closing arguments due by March 15, 2019. Applicants filed their "Applicants' Closing Brief" on March 14, 2019 and Objector filed their "Summary of Objector's Position" on March 12, 2019.

### **APPEARANCES**

Applicants, David L Pogge Revocable Trust and Sandra L. Pogge Revocable Trust (Pogge's), appeared at the hearing through counsel John E. Bloomquist. Providing testimony on behalf of the Applicants were David L. Pogge; Karl Uhlig, Senior Water Resource Specialist, WGM Group; Russ Radliff, Water Resource Specialist, WGM Group; Eric Anderson, Project Engineer, WGM Group; and Larry Cawfield, Senior Engineer/Hydrologist, Tetra Tech.

Objector, KDO Family Forest, LLC, appeared at the hearing through counsel Theresa Fox Hash. Providing testimony on behalf of the Objectors were David Owen; Kay Owen; and Kurt Hafferman, Hafferman Engineering.

### **EXHIBITS**

Applicants offered 30 exhibits at the hearing of which 22 were admitted at the hearing (the Hearing Examiner notes that some of these exhibits may already be part of the record).

**Exhibit A-1:** the curricula vitae of Applicant's experts Eric Anderson, Emily Clark, Russ Radliff, Larry D. Cawfield, and Karl Uhlig.

**Exhibit A-2:** a map, December 21, 2015 memo and associated data entitled "Geotechnical Site Investigation Buck Creek Reservoir Condon, Montana."

**Exhibit A-3:** a July 8, 2016 memo and associated maps and data entitled "High Hazard Dam Classification Application - Buck Creek Pond."

**Exhibit A-4:** a letter from Larry Shock, DNRC to David Pogge dated Sept. 7, 2016 entitled “Buck Creek Dam Hazard Classification.”

**Exhibit A-5:** a memorandum and associated data from WGM entitled “Mean Monthly Flows Estimate – Buck Creek dated Dec. 30, 2016.”

**Exhibit A-6:** one page entitled “Stage Rating Curve for Buck Creek Diversion Site” prepared by WGM.

**Exhibit A-7:** one page entitled “2016-2018 Discharge Measurements of Buck Creek Diversion Site” prepared by WGM.

**Exhibit A-8:** 15 pages each entitled “One-Point Velocity Discharge Measurement Checker” prepared by WGM.

**Exhibit A-9:** 18 pages of copies of photographs each entitled “Site Visit Photos”.

**Exhibit A-10:** a one page map showing the Buck Creek and other associated drainage areas prepared by WGM.

**Exhibit A-11:** a one page map showing the Buck Creek and Owens (Objectors) associated watersheds prepared by WGM.

**Exhibit A-12:** the General Abstract of Applicant’s pending permit 76K 30109425.

**Exhibit A-20:** two aerial photograph maps of the Applicant’s project prepared by WGM.

**Exhibit A-21:** information from Ronan Irrigation LLC regarding Applicant’s project.

**Exhibit A-22:** one page containing three scenarios entitled “Proposed Irrigation System Annual Efficiency Estimations” prepared by WGM.

**Exhibit A-23:** a memo from Larry Cawfield to John Bloomquist entitled “Preliminary Reservoir Lining Recommendations” dated Dec. 4, 2018.

**Exhibit A-25:** a copy of “Objector’s First Combined Responses to First Discovery Requests by Applicants.”

**Exhibit A-26:** the General Abstract of Statement of Claim 76K 149789 in the name of KDO Family Forest LLC.

**Exhibit A-27:** a memorandum from Kurt Hafferman to Therese Fox Hash entitled “Objectors Expert Disclosure: Kurtis M. Hafferman dated Nov. 19, 2018.

**Exhibit A-28:** a paper with associated photographs and data entitled “Buck Creek Hydrography Report” by Hafferman Engineering dated Nov. 19, 2018.

**Exhibit A-29:** a report by Mark Vander Meer from Watershed Consulting LLC prepared for Dave and Kay Owen entitled “Preliminary Findings & Qualification” dated Nov. 6, 2018.

**Exhibit A-30:** a memorandum from Kurt Hafferman to Tere Hash entitled “Owens Exhibits: Pond Liner Specifications” dated Jan. 7, 2019.

Applicant’s **Exhibits 13 – 19** and **Exhibit 24** were not admitted at the hearing as they are all simply copies of the PD, the Applicant’s Application materials, an email string between Kathy Shubert, Russ Levens and James Heffner regarding the Application, the deficiency letter, the response to deficiency letter, the application Technical Report, and the Objector’s objection, respectively, and are all already part of the record.

Objector offered 11 exhibits at the hearing of which 10 were admitted (the Hearing Examiner notes that some or all of these exhibits may already be part of the record and/or are duplicative of the Applicant’s exhibits).

**Exhibit O-1:** entitled “Kurt Hafferman Expert Witness Disclosure.”

**Exhibit O-2:** entitled “Owen’s field notes/book and hydrograph of Buck Creek, 2018 KDO Family Forest” and “Kurt Hafferman’s Buck Creek Hydrography report.”

**Exhibit O-3:** entitled “Flow Meter Specifications” (KDO discovery exhibit 6).

**Exhibit O-4:** entitled “Stream Flow Regulation” (KDO discovery exhibit 7).

**Exhibit O-5:** entitled “Pond Liner Specifications” (KDO discovery exhibit 8).

**Exhibit O-6:** entitled “Emails from December 2015 – January 2016, Pogge 0062” (disclosed in discovery)

**Exhibit O-12:** entitled “TetraTech Geotechnical Site Investigation” dated Dec. 21, 2015.

**Exhibit O-13:** entitled “Irrigation efficiency estimations” dated Dec. 13, 2018.

**Exhibit O-14:** entitled “Map of Pogge-Owen Watershed” prepared by WGM.

**Exhibit O-15:** entitled “Memo from Larry Cawfield to John Bloomquist” dated Dec. 4, 2018.

Objector’s **Exhibit O-7** was not admitted at the hearing as it is simply a copy of the application Technical Report and is already part of the record.

## **FINDINGS OF FACT/CONCLUSIONS OF LAW**

### **General Findings of Fact**

1. The Applicant proposes to divert water from Buck Creek, a tributary to Swan River, by means of a headgate located in the NESESE of Section 9, T20N, R16W, Missoula County. The proposed diverted flow rate and volume from Buck Creek is 3 cubic-feet per second (CFS) up to 144 acre-feet (AF) from March 15<sup>th</sup> through July 31<sup>st</sup> annually, for the purposes of irrigation and recreational use. Water will be conveyed through a buried 18” diameter pipeline 1300 feet to an off-stream reservoir. The Applicant proposes a secondary diversion of water from the 60 AF reservoir to irrigate 77 acres of pasture grass. The Applicant proposes an ancillary use the reservoir for recreational purposes from May 1<sup>st</sup> to September 30<sup>th</sup> annually in the event that all water is not diverted from the reservoir for irrigation purposes. The place of use is generally located in the SWNE, W2SE, NENESW, SENW of Section 9, T20N, R16W, Missoula County. (PD ¶ 1; Deficiency Response)

2. Water will be pumped from the lined reservoir using a variable speed 800 GPM pump into an underground pipeline system that serves multiple sprinkler systems including a center pivot sprinkler, wheel lines and/or a hose reel sprinkler. (PD¶ 2)

3. Consumptive use for the 77-acre pasture irrigation is estimated to be 101.5 AF annually using IWR software. Using a sprinkler efficiency of 70% the applied volume of water needed to achieve the consumptive use is 145.2 AF. The Applicant is requesting a diverted volume of 144 AF, 1.2 AF less than calculated diverted volume for irrigation requirements. (PD ¶ 3)

4. The requested volume of 144 AF is based on a detailed irrigation pumping schedule provided by the Applicant for the timeframe spanning from May 1 to the end of the period of diversion, July 31. The pumping schedule applies the required volume of water to the fields for

irrigation during these months, which is estimated to be 76.5 AF. At the end of the period of diversion the Applicant desires to maintain a full reservoir, accounting for an additional 60 AF of water diverted from Buck Creek. The 60 additional AF will either be all used for irrigation from August 1 through September 30 or some may remain in the reservoir for recreation depending on seasonal weather conditions. The remaining 7.5 AF of requested diverted volume accounts for evaporative losses in the reservoir during the months of April, May, June, and July. (PD ¶ 4; Deficiency Response)

5. The PD included the following measurement condition: “The appropriator shall install a department approved measuring device at a point in the delivery line approved by the department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30 of each year and upon request at other times during the year until the beneficial water use permit is perfected and the department receives a project completion notice. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the water resources regional office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.” (PD ¶ 5)

6. In an effort to maintain the stream flows in Buck Creek the Applicant’s plan for operation of its permit proposed, and the PD conditioned the permit, on the following flow rate trigger condition: “Throughout the period of diversion water will only be diverted at the maximum flow rate of 3 CFS if the flow in Buck Creek, above the point of diversion, is 7.5 CFS or greater. When flows in Buck Creek are between 7.5 CFS and 4.5 CFS only a portion of the proposed diverted flow rate will be diverted. This portion is variable but must result in the flows immediately downstream of the diversion to remain at 4.5 CFS or more. When flows above the diversion are 4.5 CFS no diversion will occur.” (PD ¶ 6; Application)

7. The Applicant has also proposed, and the PD conditioned the permit on, the following condition to ensure no adverse effect to hydropower operations at Big Fork, Montana. “Water may not be appropriated when the flow rate at USGS gauging station no.12370000 (Swan River near Big Fork) drops below 712.29 CFS during the period of diversion – March 15<sup>th</sup> to July 31<sup>st</sup>. During such times the flow rate reported for the Swan River drops below this trigger point, the

headgate will be closed. The flows at the aforementioned USGS gauging stations can be checked at the current internet site: <http://waterdata.usgs.gov/mt/nwis/rt> (PD ¶ 7)

8. On March 14, 2018 the MRO issued a "Preliminary Determination to Grant Permit" (PD) finding that all of the applicable criteria under § 85-2-311, MCA had been met. Notice of the PD was published on April 12, 2018 in the Seely Swan Pathfinder and notice was provided to interested individuals on April 11, 2018, as required by § 85-2-307, MCA. The public notice set an objection deadline of May 26, 2018. (Department File)

9. The Department received one objection to the Application postmarked May 24, 2018 from KDO Family Forest LLC, a downstream water right holder. The Department determined that the objection was valid relating to the criteria of physical availability, legal availability and beneficial use (see Conclusion of Law 10). No further objections were received. (Department File)

### **General Conclusions of Law**

10. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA. Those criteria state, in relevant part, that:

...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. [The applicant is not required to prove a lack of adverse effect for any water right identified in

a written consent to approval filed pursuant to subsection (9) in connection with a permit application.]

(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[.]

(Criteria relating to water quality are not implicated in the instant Application)

11. Under the Montana Water Use Act, the Department must make a preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit right § 85-2-307(2)(a)(ii), MCA. If the preliminary determination proposes to grant the application, the Department must prepare a public notice of the application, including a summary of the preliminary determination. The notice must state that by a date set by the Department, persons may file with the Department written objections to the application. §§ 85-2-307(2)(b) and 85-2-307(3), MCA. The Department followed this procedure and received one valid objection, from KDO Family Forest LLC, alleging that the physical availability, legal availability and beneficial use criteria were not satisfied.

12. Because a valid objection was received on the Application, the Department was required to conduct a contested case hearing on the objection. Only those criteria that were at issue in the objection are subject to the hearing proceeding and the Hearing Examiner will summarily affirm the Department's determination on those criteria that were not objected to. § 85-2-309, MCA (“(1) If the department determines that an objection to an application . . . states a valid objection, it shall hold a contested case hearing . . . *on the objection* . . .” (emphasis provided)). Accordingly, the criteria of physical availability (85-2-311(1)(a)(i)), legal availability (85-2-311(1)(a)(ii)), and beneficial use (85-2-311(1)(d)) were the subject of the contested case proceeding. The following criteria were not at issue in this hearing – adverse effect (85-2-311(a)(b)), means of diversion (85-2-311(1)(c)), and possessory interest (85-2-311(1)(e)). The findings and conclusions on those criteria from the PDG are hereby adopted. (FOF 9)

13. The applicant in a permit proceeding has the burden of proof, at all stages of the proceeding, to prove that the applicable criteria have been met. That being said, at the onset of a contested case proceeding in which a Preliminary Determination to Grant has already been

issued by the Department, the Department has determined that the applicant has satisfied the applicable criteria for issuance of a permit or change in appropriation right. § 85-2-307(2)(ii), MCA. If valid objections are not received on an application and the Department preliminarily determined to grant the permit, the department shall grant the application as proposed in the preliminary determination. § 85-2-310(3), MCA. In the instant matter, the MRO issued its Preliminary Determination to Grant finding and concluding that the Application satisfied the applicable physical availability, legal availability and beneficial use criteria. Therefore, the burden of production shifted to the Objector to demonstrate that the Applicant failed to satisfy its burden on those criteria in the contested case proceeding. Because the Applicant retains the burden of proof as to the criteria, Applicant may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing.<sup>1</sup>

#### **Findings of Fact - Physical Availability/Legal Availability**

14. At the outset of the hearing, during Objector's opening statement the Objector's conceded that the Applicant proved by a preponderance of the evidence that the criteria of physical availability and legal availability were satisfied. (Audio Tk. 2 @6:40)

15. Counsel for the Applicants asked for and received confirmation that with the concession of physical availability and legal availability, the only criteria at issue for the remainder of the hearing would be the criteria of beneficial use. (Audio Tk 2 @ 9:15)

#### **Conclusions of Law—Physical Availability/Legal Availability**

16. Concession of one or more criteria objected to is tantamount to accepting as true, valid, or accurate the Department's findings in the PD that those criteria have been met. Therefore, the Hearing Examiner adopts verbatim the Findings of Fact and Conclusions of Law in the PD related to physical availability and legal availability. (PD ¶¶ 14 – 32). The Applicant has proven by a preponderance of the evidence that §§ 85-2-311-(1)(a)(i) and (ii), MCA, have been met. (FOF 14, 15)

---

<sup>1</sup> See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT96, 112 P.3d 964 (2005) (MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim."; § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")

### **Findings of Fact – Beneficial Use**

17. This Application is for irrigation and recreation (PD @ ¶ 1). Both irrigation and recreation are specifically enumerated as beneficial uses under the Water Use Act. (§ 85-2-102(4), MCA)

18. There is no dispute that the diverted volume requested under this permit is reasonable for the proposed beneficial use of irrigation. Indeed, the amount requested for irrigation is conservative based upon the evidence. Likewise, no evidence or argument was presented by the Objector calling into question the PD's findings and conclusions regarding recreational use. More precisely stated, the legal issue presented by the objection is whether the amount of water requested by the Applicant and authorized by the PD is necessary for the proposed use or will result in waste. Although the objection did not challenge the adequacy of diversion criteria, whether seepage from the pond constitutes waste necessarily implicates whether or not the Applicant's pond is adequately designed for the proposed beneficial use.

19. Objector premises their objection related to beneficial use on the theory that "seepage" from the proposed pond is not a beneficial use of water. Objector asserts that because seepage was not calculated by DNRC the PD is "fatally deficient." Essentially, the Objector maintains that the Applicant's proposal constitutes a waste of water. (Exhibit A-25, p. 18)

20. From the initial application stage, a bentonite lined pond was proposed for the storage reservoir (Supplement to Application, p. 6, January 2017). Throughout the project development process Applicant's consultants analyzed seepage from a bentonite lined pond and used NRCS guidelines in conducting that analysis (Exhibit A-22, 23). Objector's own expert recommends that the Applicant utilize NRCS guidelines for a bentonite lined pond for the Applicant's project. (Exhibit A-30, KDO-5; Audio Tk. 7)

21. Use of bentonite to seal irrigation ditches, ponds and reservoirs is a Department recognized industry standard for reducing or eliminating seepage losses from water appropriations. (Audio Tk. 7 @ 18:45)

22. The crux of the Objector's concern is that there was no calculation of seepage from the pond in the PD thus how does the Department know that there is not waste. (Audio Tk. 7 @ 6:15). However, it was pointed out that in the process of developing an appropriation, the actual amount of seepage from the pond cannot be known until after the pond is constructed and that any issues with the efficacy of the as built project are addressed in the "notice of completion and

verification” phase of the project. (Audio Tk. 7 @ 19:50)

23. Nearly all appropriations include losses to seepage, return flow and evaporation. Whether such losses constitute a component of the amount required for beneficial use or waste depends upon the reasonableness of the applicant’s design and plan for operation of its permit based upon the evidence. (See COL 27 - 30)

24. Objector provided no evidence or testimony as to what it believes would constitute an unreasonable amount of seepage.

25. The evidence establishes that the Applicant has a detailed and well thought out plan for the development of their proposed appropriation. The evidence establishes that the Applicant’s plan for development of their property and operation of this permit has taken into careful consideration both the water resources available in the Buck Creek drainage and the amount of water necessary for its proposed beneficial uses. (Audio Tk. 5; Department file). The applicant’s plan to use a bentonite liner for the proposed reservoir is a reasonable design to prevent excessive seepage that could result in waste of the resource.

### **Conclusions of Law – Beneficial Use**

26. Irrigation and recreation are recognized beneficial uses under the Montana Water Use Act. Some amount of seepage and other losses are inevitable and are part and parcel of the appropriation. (FOF 17, 23)

27. The common law and DNRC have long recognized that seepage is a part of any irrigation and/or storage appropriation. *Wheat v. Cameron*, 64 Mont 494, 501-502, 210 P. 761 (1922). So much so that DNRC even defines seepage in its administrative rules. “Seepage water’ means that part of a diverted flow which is not consumptively used and which slowly seeps underground and eventually returns to a surface or groundwater source, and which other water users can appropriate, but have no legal right to its continuance. Typical examples of seepage water include underground losses from an irrigation ditch or pond.” (ARM 36.12.101(65)).

28. Waste is defined by statute as “[t]he unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.” § 85-2-102(25), MCA.

29. Montana case law recognizes that one hundred percent efficiency is not required for an

appropriation. The level of efficiency in appropriation required is determined on a case-by-case basis. The Montana Supreme Court has explained “There is no question that waste of our water resources must be minimized in the general interest, but it is equally manifest that there is a vanishing point at which the possible waste of water would be more than overcome by the waste incidental to the abandonment of reasonably efficient diversion systems and [ ] the establishment of diversion systems whose expense is neither warranted nor permitted by the benefit to be derived from the water.” E.g. Crowley v. District Court, 108 Mont 89, 88 P.2d 23 (1939).

30. The Department likewise recognizes that an appropriation need not be 100% efficient to be considered beneficial use of water. The law only requires that it be reasonable under the circumstances for the proposed beneficial use. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981).

31. The Department has determined that lining a pond is a reasonable means of establishing that the amount of water stored or used in a pond will not be wasted. E.g. *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (Proposal for Decision October 30, 2002, pp. 13-14) (*adopted* by DNRC Final Order January 19, 2003, p. 5).

32. The evidence establishes that the amount of water requested by the Applicant and authorized by the PD is required for the proposed beneficial use. The evidence further establishes that the Applicant’s planned design of its pond and plan for beneficial use are reasonable and will not result in waste. Objectors did not meet their burden of production or provide any probative evidence contradicting the beneficial use determination in the PD. Accordingly, there is no evidentiary basis for disturbing the PD’s conclusion that the Applicant proved by a preponderance of the evidence that the proposed use of water is a beneficial use. § 85-2-311(1)(b), MCA.

### **CONCLUSION**

Pursuant to the findings in the PD regarding the criteria of adverse effect (85-2-311(b), MCA) means of diversion (85-2-311(1)(c), MCA), and possessory interest (85-2-311(1)(e), MCA), which were not contested by the Objectors, and the evaluation of the analysis and testimony regarding physical availability (85-2-311(a)(i), MCA), legal availability (85-2-311(1)(a)(ii), MCA) and beneficial use (85-2-311(d), MCA) as found above, the Applicant has

proven by a preponderance of the evidence that all applicable criteria have been met.

### **FINAL ORDER**

Application for Beneficial Water Use Permit No. 76K 30109425 is **GRANTED** subject to the following conditions:

#### **FLOW MEASUREMENT AND REPORTING CONDITION**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

#### **PERIOD OF DIVERSION RESTRICTION CONDITIONS**

1. IN AN EFFORT TO MAINTAIN THE STREAM FLOWS IN BUCK CREEK THE APPLICANT HAS AGREED TO THE FOLLOWING FLOW RATE TRIGGER CONDITION: THROUGHOUT THE PERIOD OF DIVERSION WATER WILL ONLY BE DIVERTED AT THE MAXIMUM FLOW RATE OF 3 CFS IF THE FLOW IN BUCK CREEK, ABOVE THE POINT OF DIVERSION, IS 7.5 CFS OR GREATER. WHEN FLOWS IN BUCK CREEK ARE BETWEEN 7.5 CFS AND 4.5 CFS ONLY A PORTION OF THE PROPOSED DIVERTED FLOW RATE WILL BE DIVERTED. THIS PORTION IS VARIABLE BUT MUST RESULT IN THE FLOWS IMMEDIATELY DOWNSTREAM OF THE DIVERSION TO REMAIN AT 4.5 CFS OR MORE. WHEN FLOWS ABOVE THE DIVERSION ARE 4.5 CFS OR LOWER NO DIVERSION WILL OCCUR.
2. WATER MAY NOT BE APPROPRIATED WHEN THE FLOW RATE AT USGS GAUGING STATION NO.12370000 (SWAN RIVER NEAR BIG FORK) DROPS BELOW 712.29 CFS DURING THE PERIOD OF DIVERSION – MARCH 15<sup>TH</sup> TO JULY 31<sup>ST</sup>. DURING SUCH TIMES AS THE FLOW RATE REPORTED FOR THE SWAN RIVER DROPS BELOW THIS TRIGGER POINT, THE HEADGATE WILL BE CLOSED. THE FLOWS AT THE AFOREMENTIONED USGS GAUGING STATIONS CAN BE CHECKED AT THE CURRENT INTERNET SITE IS <HTTP://WATERDATA.USGS.GOV/MT/NWIS/RT>

**NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the reviewing court.

Dated this 11<sup>th</sup> day of June 2019

/Original signed by David A. Vogler/  
David A. Vogler, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-6835

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 11<sup>th</sup> day of June, 2019 by first class United States mail.

JOHN E. BLOOMQUIST – ATTORNEY  
RICK C. TAPPAN - ATTORNEY  
BLOOMQUIST LAW FIRM PC  
3355 COLTON DR STE A  
HELENA MT 59602-0252

THERESE F HASH - ATTORNEY  
HASH O'BRIEN BIBY & MURRAY PLLP  
PO BOX 1178  
KALISPELL, MT 59903-1178

/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615

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

\*\*\*\*\*

<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76K - 30109425</b>	)	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
<b>BY: DAVID L. POGGE REVOCABLE</b>		
<b>TRUST AND SANDRA L. POGGE</b>		
<b>REVOCABLE TRUST</b>		

\*\*\*\*\*

On February 10, 2017, David L. Pogge Revocable Trust, and Sandra L Pogge Revocable Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76K-30109425 to the Missoula Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 3 cubic feet per second (CFS) up to 144 acre-feet (AF) from Buck Creek a tributary to the Swan River for the purposes of irrigation and recreation. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated July 11, 2017. The Applicant responded with information dated August 7, 2017. The Application was determined to be correct and complete as of November 20, 2017. An Environmental Assessment for this Application was completed on March 14, 2018.

**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 SW
- All necessary Application attachments
- Maps:
  - 2013 colored aerial photograph 1" = 1,000' scale depicting the point of diversion, place of use

- Topographic map depicting the specification for the reservoir.

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

- Analysis of mean monthly flow estimates using USGS paper #2365, entitled "Methods of Estimating Monthly Stream Flow Characteristics at Ungaged Sites in Western Montana".
- Legal availability analysis on Buck Creek using the Department's water right query system.

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

### **PROPOSED APPROPRIATION**

#### FINDINGS OF FACT

1. The Applicant proposes to divert water from Buck Creek, a tributary to Swan River, by means of a headgate located in the NESESE of Section 9, T20N, R16W, Missoula County. The proposed diverted flow rate and volume from Buck Creek is 3 cubic-feet per second (CFS) up to 144 acre-feet (AF) from March 15<sup>th</sup> through July 31<sup>st</sup> annually, for the purposes of irrigation and recreational use. Water will be conveyed through a buried 18" diameter pipeline 1300 feet to an off-stream reservoir. The Applicant proposes to divert water from the 60 AF reservoir to irrigate 77 acres of pasture grass and use the reservoir for recreational use from May 1<sup>st</sup> to September 30<sup>th</sup> annually. The place of use is generally located in the SWNE, W2SE, NENESW, SENW of Section 9, T20N, R16W, Missoula County.
2. Water will be pumped from the lined reservoir using a variable speed 800 GPM pump into an underground pipeline system that serves multiple sprinkler systems including a center pivot sprinkler, wheel lines and/or a hose reel sprinkler.
3. Consumptive use for the 77-acre pasture irrigation is estimated to be 101.5 AF annually using IWR software. Using a sprinkler efficiency of 70% the applied volume of water needed to

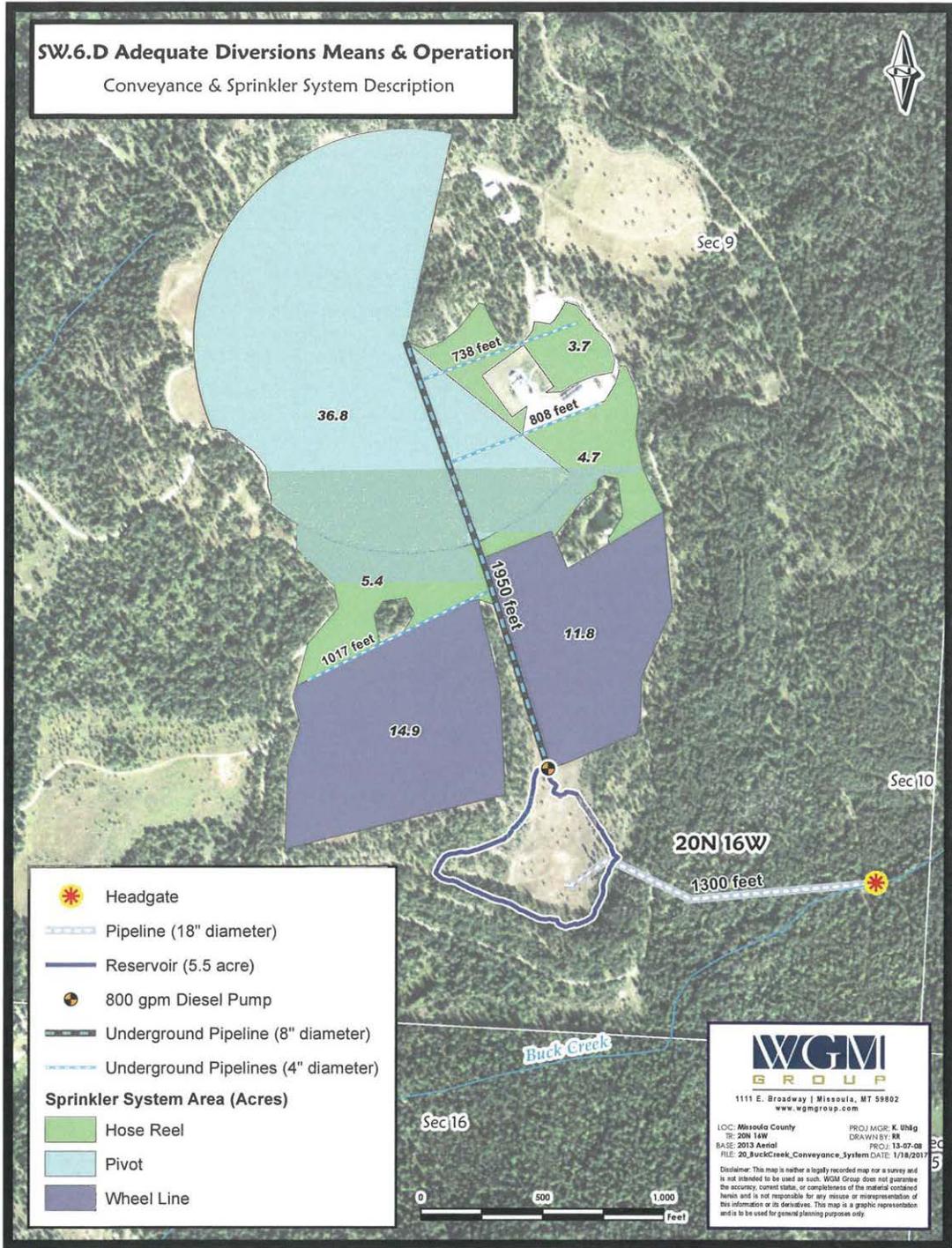
achieve the consumptive use is 145.2 AF. The Applicant is requesting a diverted volume of 144 AF, 1.2 AF less than calculated diverted volume for irrigation requirements.

4. The requested volume of 144 AF is based on a detailed irrigation pumping schedule provided by the Applicant for the timeframe spanning from May 1 to the end of the period of diversion, July 31. The pumping schedule applies the required volume of water to the fields for irrigation during these months, which is estimated to be 76.5 AF. At the end of the period of diversion the Applicant desires to maintain a full reservoir, accounting for an additional 60 AF of water diverted from Buck Creek. The remaining 7.5 AF of requested diverted volume accounts for evaporative losses in the reservoir during the months of April, May, June and July.

5. The Applicant has agreed to the following measurement condition: “The appropriator shall install a department approved measuring device at a point in the delivery line approved by the department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30 of each year and upon request at other times during the year until the beneficial water use permit is perfected and the department receives a project completion notice. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the water resources regional office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.”

6. In an effort to maintain the stream flows in Buck Creek the Applicant has agreed to the following flow rate trigger condition: “Throughout the period of diversion water will only be diverted at the maximum flow rate of 3 CFS if the flow in Buck Creek, above the point of diversion, is 7.5 CFS or greater. When flows in Buck Creek are between 7.5 CFS and 4.5 CFS only a portion of the proposed diverted flow rate will be diverted. This portion is variable but must result in the flows immediately downstream of the diversion to remain at 4.5 CFS or more. When flows above the diversion are 4.5 CFS no diversion will occur.”

7. The Applicant has also agreed to the following condition to ensure no adverse effect to hydropower operations at Big Fork, Montana. “Water may not be appropriated when the flow rate at USGS gauging station no.12370000 (Swan River near Big Fork) drops below 712.29 CFS during the period of diversion – March 15<sup>th</sup> to July 31<sup>st</sup>. During such times the flow rate reported for the Swan River drops below this trigger point, the headgate will be closed. The flows at the aforementioned USGS gauging stations can be checked at the current internet site is <http://waterdata.usgs.gov/mt/nwis/rt>”



Application for Beneficial Water Use Permit No. 76K - 30109425.

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

**GENERAL CONCLUSIONS OF LAW**

8. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

9. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

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

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

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

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

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

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

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

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

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

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

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

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

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

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

compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

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

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

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

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

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

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

### **Physical Availability**

#### **FINDINGS OF FACT**

14. USGS gaging stations are not available on Buck Creek to calculate physical availability of water for the proposed appropriation. The Applicant utilized USGS paper #2365, titled “Methods of Estimating Monthly Stream Flow Characteristics at Ungaged Sites in Western Montana”, to estimate mean monthly flows on Buck Creek (Table 1). This is an acceptable method for estimating stream flow under ARM 36.12.1702. Mean monthly flows were also converted to mean monthly volumes.

15. Physical availability at the proposed point of diversion was determined by the Applicant using USGS Montana StreamStats software using regression equations in Montana Streamstats (SIR 2015-5019-G) Appendix G by McCarthy, Sando, et. Al. (2016). The Applicant’s stream flow estimation technique, coefficients used in the regressions equations as well as calculations for the proposed period of diversion, were verified by James Heffner, Hydrologist – DNRC Water Management Bureau and found to be correct. This program estimates mean monthly discharge in a designated basin using specific basin characteristic inputs. The program does not account for any water use occurring upstream of the proposed point of diversion, therefore to conservatively estimate flows at the proposed point of diversion upstream legal demands are subtracted from the estimated mean monthly flows during the period of diversion for these rights. This method mimics the data obtained from actual USGS gage sites. In this situation, there are no upstream legal demands to subtract. The average monthly flow rate of both methods is shown in Table 1.

**Table 1:** Mean Monthly Flow (CFS) and Volume (AF) Estimates for Buck Creek -The average of the two methods is the recommended value to be used for water availability analysis for the proposed period of diversion.

<b>Period of Diversion</b>	<b>March</b>	<b>April</b>	<b>May</b>	<b>June</b>	<b>July</b>
<b>USGS Paper 2365 (CFS)</b>	1.3	4.1	17.2	13.7	16.6
<b>USGS SIR 2015-50190G (CFS)</b>	1.5	4.3	13.7	17.7	8.3
<b>Average of Both Methods (CFS)</b>	1.4	4.2	15.5	15.7	12.4
<b>Monthly Volume Estimates (AF)</b>	85.9	249.5	951.4	932.6	761.1

16. Stream flow gaging records are not available for Buck Creek; however, the Applicant provided ten flow measurements to support their estimation technique for physical availability analysis. The Applicant’s measurements, support water availability in the amount requested through this appropriation.

17. The stream flow measurements were taken at the proposed point of diversion during the months of March, April, May, June, July. The measurements represent a single point measurement taken on one day during a given month. A portable flowmeter (March-McBirney Model 2000) and standard USGS methodology were used to measure the discharge of Buck Creek. The Department determined that the Applicant used an acceptable method to measure stream flow.

**Table 2:** Applicant Supplied Flow Measurements for Buck Creek (CFS)

Date	Applicant Supplied Flow Measurement (CFS)	
	2016	2017
3/24/17		5.371
4/26/17		4.955
5/8/17		20.028
5/24/17		33.344
6/1/16	13.7	
6/5/17		44.586
6/27/16	10.4	
7/12/16	4.13	
7/29/16	1.71	

**Table 3:** The Applicant’s individual flow measurements were averaged per month and are shown below in cubic feet per second and acre-feet

	March	April	May	June	July
<b>Physical measurement CFS</b>	5.37	4.96	26.69	22.90	4.99
<b>Monthly Volume (AF)</b>	329.67	294.33	1637.99	1359.98	305.98

18. The Applicant’s monthly stream flow estimations and physical measurements of water flowing in Buck Creek at the proposed point of diversion demonstrates that water is physically available at the proposed point of diversion in adequate quantities to supply the proposed rate of diversion of 3 CFS up to 144.0 AF in every month of the proposed appropriation.

## CONCLUSIONS OF LAW

19. 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.”

20. 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).

21. 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).

22. 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 No. 14-18)

## **Legal Availability:**

### FINDINGS OF FACT

23. To determine legal availability the Department queried its records for all water rights listing Buck Creek as the source between the proposed point of diversion downstream to the confluence of Buck Creek and Swan River. There are five existing water rights on Buck Creek below the Applicant’s proposed point of diversion, with a combined total flow rate of 0.50 CFS and an annual volume of up to 40.0 AF.

24. The Department considers this to be an appropriate reach for calculating legal availability due to the amount of water determined to be physically available at the point of diversion. The source of appropriation and the reach of stream used for legal availability analysis are located in

an area that is open to surface water appropriations and does not experience shortages or water disputes.

25. Water Rights on the Swan River downstream of the confluence with Buck Creek were not assessed for legal availability because the proposed period of diversion ends on July 31. Water was previously shown to be legally available in the Swan River during the proposed period of diversion in Beneficial Water Use Permit Application 76K 30068084, which is for an appropriation of 470 GPM up to 444.48 AF from the Swan River near the town of Big Fork.

26. Legal availability analysis data was determined by subtracting downstream water rights on the source from the estimated mean monthly flows at the point of diversion.

27. The existing legal demands were then compared to the physical mean monthly flow and volume to determine legal availability. The following table lists monthly legal and physical availability in flow rate and volume compared to monthly existing legal demands in flow rate and volume:

**Table 4: A comparison of the physical and legal water supply at the point of diversion to the existing water rights in the area of potential impact over the requested period of diversion**

Month	Physical Availability at POD (CFS)	Existing Legal Demands Below POD (CFS)	Legally Available (CFS)	Physically Available @ POD (AF)	Existing Legal Demands Below POD (AF)	Legally Available (AF)
March	5.37	0.05	5.32	329.67	3.10	326.60
April	4.96	0.05	4.91	294.33	3.00	291.36
May	26.69	0.50	26.19	1637.99	30.70	1607.30
June	22.90	0.50	22.40	1359.98	29.70	1330.28
July	4.99	0.50	4.49	305.98	30.70	275.29

28. The Department’s calculation of the mean monthly flow and volume of water compared to existing legal demands on the source of supply demonstrates that the proposed appropriation of

3 CFS up to 144.0 AF is legally available in every month of the proposed period of diversion.

29. The Swan River flows into Flathead Lake which is controlled by Salish-Kootenai Dam. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

30. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

31. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as

measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF to meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

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

#### CONCLUSIONS OF LAW

33. 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).

34. 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.

35. 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 No. 23-28)

### **Adverse Effect**

#### **FINDINGS OF FACT**

36. The Applicant proposes to divert water from Buck Creek at a flow rate of 3 CFS through a headgate with a control structure. The Applicant's use of water can be controlled and the Applicant proposes to monitor usage with a totalizing flow meter installed in the 18" intake line. A staff gage and stream rating curve will be used to estimate flows in Buck Creek upstream of the point of diversion.

37. The Applicant's plan to prevent adverse effect to water rights of a prior appropriator in time of extreme water shortage is as follows:

1. During the period of diversion, water will only be diverted at the maximum flow rate if the flows in Buck Creek above the point of diversion are 7.5 CFS.
2. When flows in Buck Creek are between 7.5 CFS and 4.5 CFS a portion of the flow rate will be diverted. This portion is variable but must result in the flows immediately downstream of the diversion to remain 4.5 CFS or more.

3. When flows above the point of diversion are 4.5 CFS or less, the Applicant will cease diverting.

38. To satisfy downstream legal demands of Swan River water rights the Applicant agrees to stop diverting if at any time during the period of diversion the flows at USGS gaging station number 12370000 Swan River near Bigfork, MT falls below 712.29 CFS during the proposed period of diversion.

39. The Department finds that water from Buck Creek is both physically and legally available in amounts sufficiently exceeding the requested appropriation of 3 CFS and 144.0 AF to ensure no adverse effect to senior appropriators diverting from the same source.

#### CONCLUSIONS OF LAW

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

41. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

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

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

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

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

46. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b) , MCA. (FOF Nos. 36-39)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

47. The Applicant proposes to divert 3 CFS of water from Buck Creek using a headgate structure located in the NESESE quarter of Section 9 T20N, R16W into a buried 18” pipeline that gravity feeds water a distance of 1,300 feet to a 60 AF lined reservoir located in the SWSE quarter of Section 9, T20W, R16W. Water will be diverted during high spring flows starting March 15<sup>th</sup> continuing until July 31<sup>st</sup> annually. The period of diversion start date is outside the normal period of diversion for Climatic Area V, which is April 25<sup>th</sup> through October 5<sup>th</sup>. The Applicant is targeting the diversion of high spring flows to store water in the reservoir for later use. It will take approximately 10 days to fill the reservoir to capacity. Once the reservoir is filled the headgate will be closed until the period of use starts May 1<sup>st</sup>. When the Applicant

starts to pump out of the reservoir to irrigate 77 acres, the headgate will be adjusted to inflow equals outflow to maintain a full pool.

48. Water will be pumped from the reservoir using an 800 GPM variable RPM diesel pump into an underground pipeline system that serves multiple sprinkler systems. The 8” main underground pipeline will run 1,950 feet north and end at the center of the pivot sprinkler. From the main line; three 4-inch underground sub-main pipelines will be connected to serve wheel lines and hose reel sprinkler systems. The main line will also have additional risers to supply water to wheel lines or hose reel systems. The irrigation system was designed by Ronan Irrigation and the Applicant supplied specifications to demonstrate the capabilities of the entire system.

49. The Applicant provided an irrigation schedule based on data from the USDA’s Irrigation Water Requirements (IWR) to show the annual irrigation demand is 145.2 AF. Per the Applicant’s irrigation schedule a proposed 144 AF will be diverted; based on the period of diversion, capacity of reservoir and proposed diversion schedule, only 144 AF will be diverted from Buck Creek.

#### CONCLUSIONS OF LAW

50. 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.

51. 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.

52. 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 No. 47-49).

## **Beneficial Use**

### **FINDINGS OF FACT**

53. The proposed appropriation of 3 CFS up to 144 AF per year from Buck Creek is for the purposes of irrigation and recreation. Water will be diverted from Buck Creek March 15<sup>th</sup> through July 31<sup>st</sup> to fill the reservoir then pumped from the reservoir for irrigation purposes from May 1 through September 30<sup>th</sup> annually. The requested 3 CFS flow rate is based on physical availability in Buck Creek during high spring flows. The Applicant submitted irrigation schedules demonstrating the ability to utilize the stored water for both recreation and irrigation uses. Year to year use of stored water for both uses will be variable depending on management strategies and weather conditions. The Applicant requests the use of recreation to be able to use the stored water for this purpose when irrigation is not taking place. The recreation use of 60 AF represents one fill of the reservoir, with the reservoir being full at the end of the period of diversion each year. The Applicant requests a full reservoir for recreation to provide favorable pool levels for recreational activities such as boating and swimming.

54. The Applicant would like the ability to manage the reservoir for either irrigation after the period of diversion during the months of August and September, or recreation, depending on factors such as precipitation, temperature, required hay production for stock, etc. The 60 AF volume for recreation represents a multiple use of the water diverted for irrigation, as the irrigation needs in a dry year equal the 144 AF requested and that amount may be applied to the fields in a dry year.

55. The period of diversion ends on July 31 annually. The Applicant desires to have a full pool on this date that may either be used for recreation for the remainder of the year or be pumped dry for continued irrigation through September 30. Regardless of management between the two uses, the maximum amount of water diverted from Buck Creek will be limited to the irrigation need of 144 AF. An information remark will be added to the provisional permit stating, “the appropriator may use up to the stated volume for each individual purpose, however, the combined volumes shall not exceed 144 acre-feet per year.”

56. The Applicant calculated consumptive use for irrigation using USDA's Irrigation Water Requirement (IWR) software for pasture grass. The annual irrigation consumptive use calculated using IWR is 1.32 AF per acre, for a consumptive use of 101.51 AF. To achieve full consumptive use, the Applicant must divert 145.2 AF due to the 70% efficiency of the proposed sprinkler system. The Applicant proposes to divert 144 AF; due to the climatic area with forested mountain environment surrounding the proposed place of use and their proposed irrigation schedule. The Applicant does not expect to be able to produce grass hay sufficient for two full cuttings, however, the Applicant does expect, at a minimum, to irrigate pasture grass for livestock grazing and one cutting per year to bail and store to reduce costs of purchasing hay.

57. The Applicant calculated evaporation for the bentonite lined reservoir using Potts Evaporation based on the Seeley, MT weather station to be 17.6 AF per year. The evaporation from the pond during the period of diversion is included in the 144 AF requested, as this is the maximum amount of water that could be diverted into the reservoir by July 31 annually based off the Applicant's proposed irrigation schedule. Evaporation is not included in the Applicant's diversionary needs after July 31 because evaporative losses will not be replaced. The proposed reservoir location is a natural depression that will not require an outlet or dam. The maximum amount of water diverted into the reservoir is controlled by the amount of water pumped out of the reservoir for irrigation, as irrigation pumping will lower the reservoir level allowing for more water to be diverted to refill to the maximum height.

### CONCLUSIONS OF LAW

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

59. #An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on

*Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

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

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

61. Applicant proposes to use water for irrigation and recreation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation and recreation is a beneficial use and that 144 AF of diverted volume and 3 CFS of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF Nos. 53-57)

### **Possessory Interest**

#### **FINDINGS OF FACT**

62. The Applicant signed the affidavit on 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

63. 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.

64. 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.

65. 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 No. 62)

### **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. 76K 30109425 should be GRANTED.

The Department determines the Applicant may divert water from Buck Creek, by means of a headgate, from March 15<sup>th</sup> to July 31<sup>st</sup> at 3 CFS up to 144 AF, from a point in the NESESE of Section 9, T20N, R16W, Missoula County, for irrigation and recreation use from May 1 to September 30th. The applicant may irrigate pasture grass on 77 acres. The place of use is located SWNE, W2SE, NENESW, SENW of Section 9, T20N, R16W, Missoula County. Applicant may store the granted volume of water in a reservoir located in the SWSE of Section 9, T20N, R16W, Missoula County.

The application will be subject to the following conditions, limitations, or restrictions.

#### **FLOW MEASUREMENT AND REPORTING CONDITION**

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL THE BENEFICIAL WATER USE PERMIT IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

#### **PERIOD OF DIVERSION RESTRICTION CONDITIONS**

1. IN AN EFFORT TO MAINTAIN THE STREAM FLOWS IN BUCK CREEK THE APPLICANT HAS AGREED TO THE FOLLOWING FLOW RATE TRIGGER CONDITION: THROUGHOUT THE PERIOD OF DIVERSION WATER WILL ONLY BE DIVERTED AT THE MAXIMUM FLOW RATE OF 3 CFS IF THE FLOW

IN BUCK CREEK, ABOVE THE POINT OF DIVERSION, IS 7.5 CFS OR GREATER. WHEN FLOWS IN BUCK CREEK ARE BETWEEN 7.5 CFS AND 4.5 CFS ONLY A PORTION OF THE PROPOSED DIVERTED FLOW RATE WILL BE DIVERTED. THIS PORTION IS VARIABLE BUT MUST RESULT IN THE FLOWS IMMEDIATELY DOWNSTREAM OF THE DIVERSION TO REMAIN AT 4.5 CFS OR MORE. WHEN FLOWS ABOVE THE DIVERSION ARE 4.5 CFS OR LOWER NO DIVERSION WILL OCCUR.

2. WATER MAY NOT BE APPROPRIATED WHEN THE FLOW RATE AT USGS GAUGING STATION NO.12370000 (SWAN RIVER NEAR BIG FORK) DROPS BELOW 712.29 CFS DURING THE PERIOD OF DIVERSION – MARCH 15<sup>TH</sup> TO JULY 31<sup>ST</sup>. DURING SUCH TIMES AS THE FLOW RATE REPORTED FOR THE SWAN RIVER DROPS BELOW THIS TRIGGER POINT, THE HEADGATE WILL BE CLOSED. THE FLOWS AT THE AFOREMENTIONED USGS GAUGING STATIONS CAN BE CHECKED AT THE CURRENT INTERNET SITE IS [HTTP://WATERDATA.USGS.GOV/MT/NWIS/RT](http://waterdata.usgs.gov/mt/nwis/rt)

**NOTICE**

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

DATED this 14<sup>th</sup> day of March 2018.

/Original signed by Jim Nave/  
Jim Nave, Regional Manager  
Missoula Regional 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 14<sup>th</sup> day of March 2018, by first class United States mail.

DAVID L & SANDRA L POGGE REVOCABLE TRUST  
850 RUMBLE LANE  
CONDON, MT 59826

WGM GROUP  
1111 E. BROADWAY  
MISSOULA MT 59802  
ATTN: RUSS RADLIFF

\_\_\_\_\_  
NAME

\_\_\_\_\_  
DATE