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

* * * * * * * * *

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q-30116484 BY WILLIAM AND LAURIS BYXBE	**)** **)** **)** **)**	**FINAL ORDER**

* * * * * * * * *

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 13, 2019, via live videoconference in both Helena and Billings, Montana. The purpose of the contested case hearing was to hear objections to Application for Beneficial Water Use Permit No. 43Q-30116484 by William and Lauris Byxbe (Applicants) for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on May 31, 2018. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PDG) which is incorporated herein by reference.

BACKGROUND

On March 14, 2018 a pre-application meeting was held and attended by the Applicants, Christine Schweigert and Mark Elison from the Department. The Application was filed with the Department's Billings Water Resources Office (BRO) on March 19, 2018. On May 17, 2018, the Department determined that the Application was correct and complete. An Environmental Assessment for the Application was completed on April 23, 2018. The BRO issued a Preliminary Determination to Grant Permit on May 31, 2018.

Public Notice of the Preliminary Determination to Grant Permit was sent to interested individuals in the notice area on June 12, 2018 and published in the Billings Gazette on June 13, 2018. The notice area was determined by the Department to be from the point where Fly Creek joins the Yellowstone to a point approximately six miles downstream on Fly Creek to the proposed point of diversion and place of use in the North ½ of Section 9, the South ½ of the South ½ of Section 4, the Northwest ¼ of Section 10, and the Southwest ¼ of Section 3, Township 2 North, Range 30 East, Yellowstone County, Montana. The public notice provided that the deadline for objections to the Application was July 27, 2018. One objection to the Application was filed by

Donielle A. and Gary S. Slanina. A contested case hearing on this objection was held on February 13, 2019.

APPEARANCES

Applicant William Byxbe appeared at the hearing on his own behalf. No witnesses were called by the Applicant.

Objectors Donielle A. and Gary S. Slanina appeared at the hearing on their own behalf. No witnesses were called by the Objectors.

EXHIBITS

Applicants and Objectors offered the following exhibits at the hearing all of which were admitted:

Exhibit A-1 is a letter dated October 11, 2018 showing the results from a stream flow measurement performed in Fly Creek by the USDA, Billings Field Office.

Exhibit O-1 is a photograph of one of the Objectors' pump sites, precipitation chart, and pivot information from Big Sky Irrigation.

Exhibit O-2 is the General Abstract for water right 43Q 4331-00 for Objectors.

Exhibit O-3 is a duplicate of the same General Abstract as O-2, with a handwritten note indicating "Relevant Factual Evidence, 9 a-e," two acknowledgements of water right transfer certificate, a bill summary from Yellowstone Valley Electric Cooperative, Inc. with a handwritten note indicating "Relevant Factual Evidence, 10," an "Agri-Range Package Index" from Farmers Alliance Insurance, a photograph of one of the Objectors' pump sites with a handwritten note indicating "Relevant Factual Evidence 12" with a similar precipitation chart, and irrigation chart as in Exhibit O-1, and a copy of Objector's Objection to Application form with a handwritten note indicating "Relevant Factual Evidence 13."

No exhibits or witnesses were disclosed by either party prior to the hearing. The Applicant did not respond to Objectors' discovery requests. The Objectors stipulated to the one exhibit offered by the Applicant at the hearing, though they said it should have been made available to them prior to the hearing in answer to their discovery requests. The Objectors offered their exhibits at the hearing and the Applicant objected to them to the extent they are irrelevant. The Objectors' exhibits were admitted over the Applicant's objection.

FINDINGS OF FACT/CONCLUSIONS OF LAW

General Findings of Fact

1. Application for Beneficial Water Use Permit No. 43Q-30116484 in the name of William and Lauris A. Byxbe was filed with the Department on March 19, 2018. (Department File)

2. The Environmental Assessment (EA) prepared by the BRO for this application was reviewed and is included in the record of this proceeding. (Department File)

3. Applicant proposes to divert up to 4 CFS from Fly Creek, by means of a transitory pump in the S2S2 of Section 4, the NE of Section 9, and the W2W2W2 of Section 10, all in Township 2 North, Range 30 East from January 1 through December 31 for 100 animal units of livestock up to 1.7 AF and from March 15 through November 15 to irrigate 265.2 acres of alfalfa up to 944.3 AF with 19.8 acres in the SWSW of Section 3, 70 acres in the S2SE, and 13.2 acres in the W2NWNW of Section 10, all in Township 2 North, Range 30 East, Yellowstone County. The Applicant proposes 4 stock reservoirs in the E2NW of Section 9, Township 2 North, Range 30 East: (1) 1.8 AF capacity reservoir in the N2NENW of Section 9, (2) 0.57 AF capacity in the SENENW of Section 9; (3) 0.11 AF capacity in the NWSENW and (4) 0.92 AF capacity in the SWSENW of Section 9, all in Township 2 North, Range 30 East, Yellowstone County. The reservoirs will be filled using a pump and pipeline from Fly Creek. The requested volume of 951.55 AF includes one fill for each of the reservoirs and evaporation from their surfaces, 3.4 CFS of the water will be used for an initial fill of four reservoirs, with 2.15 AF accounted for in annual evaporative losses. The place of use is located approximately 4 miles south, southwest of the town of Pompeys Pillar in Yellowstone County. (Department File)

4. On May 31, 2018, the BRO issued a "Preliminary Determination to Grant Permit" (PDG) finding that all of the applicable criteria under § 85-2-311, MCA had been met. Notice of the PDG was published on June 13, 2018 in the *Billings Gazette* and provided notice to interested individuals on June 12, 2018, as required by § 85-2-307, MCA. The public notice set an objection deadline of July 27, 2018.

5. On July 27, 2018, the Department received a valid objection from Donielle A. and Gary S. Slanina, downstream water right holders. The Department determined that the objection was valid as relating to the criteria of physical availability and adverse effect (see Conclusion of Law 6). No further objections were received. (Department File)

General Conclusions of Law

6. 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;
>
> (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[.]

7. An applicant is not required to meet a water quality criterion when a valid water quality objection is not raised or is withdrawn. Mont. Admin. R. 36.12.117.

8. 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 Donielle A. and Gary S. Slanina, alleging that the physical availability and adverse effect criteria were not satisfied.

9. 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. Mont. Code Ann. § 85-2-309. Accordingly, the criteria of physical availability per § 85-2-311(1)(a)(i)), and adverse effect, per § 85-2-311(1)(b), were the subject of the contested case proceeding. The following criteria were not at issue in this hearing –legal availability, per § 85-2-311(1)(a)(ii), means of diversion (85-2-311(1)(c), beneficial use (85-2-311(1)(d), and possessory interest (85-2-311(1)(e). The findings and conclusions on those criteria from the PDG are hereby adopted. (See Finding of Fact (FOF) 5).

10. The applicant in a permit proceeding has the burden of proof, at all stages of the proceeding, to prove that the required criteria have been met. At the onset of a contested case proceeding in which a PDG has been issued by the Department, the Department has already determined that the applicant 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.

11. Here, the BRO issued its Preliminary Determination to Grant finding and concluding that the Application satisfied the applicable physical availability and adverse effect criteria. Therefore, the burden of production shifted to the Objector to demonstrate that the Applicant failed to satisfy its burden in the contested case proceeding. Because the Applicant retains the burden of proof as to the criteria, Applicant can present evidence to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing.[1]

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1 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 from the PDG: Physical Availability

12. The BRO prepared a Technical Report (TR) for the Application. The Applicant did not provide any flow measurements or other data to show the availability of water. The TR utilized data from the USGS Gaging Station No. 06217750 "Fly Creek at Pompey's Pillar, MT" with a period of record from 10/1/1968 through 10/30/1981. The entire period of record for this gage, which is located approximately six miles downriver from the proposed point of diversion and is the only gage on the source, was used to determine the median of the mean monthly flows for the months January through December (the proposed period of diversion) at the gage. To determine the physical availability of water at the point of diversion the BRO accounted for the legal demand of water right permit No. 43Q 4331-00, Objector's water right, which diverts up to 1.34 CFS and 396.5 AF from May to September. The BRO added the legal demand to the median of the mean monthly flow and volume at the gage to determine the amount of water physically available at the requested POD. The monthly volume of the legal demand was calculated by dividing the total volume by the number of months in the period of diversion. The tables below show the amount of water physically available in both flow rate and volume:

Table 1. Physical Availability (CFS)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Median of mean monthly flow	6.41	10.7	10.7	13.7	39.4	57.5	37.4	40.6	59.8	15.3	9.04	6.38
Legal demand between gage and POD					1.34	1.34	1.34	1.34	1.34			
Physically Available (Median plus demands)	6.41	10.7	10.7	13.7	40.74	58.84	38.74	41.94	61.14	15.3	9.04	6.38

(Department File, TR)

Table 2. Physical Availability (AF)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Median of mean monthly flow*	393.5	593.2	656.8	813.8	2,418.4	3,415.5	2,295.6	2,492.0	3,552.1	939.1	537.0	391.6

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Legal demand between gage and POD					73.9	73.9	73.9	73.9	73.9			
Physically Available (Median plus demand)	393.5	593.2	656.8	813.8	2,492.3	3,489.4	2,369.5	2,565.9	3,626.0	939.1	537.0	391.6

* Calculated as flow in CFS times 1.98 times the number of days each month.

(Department File, TR)

13. The BRO concluded that the applicant met its burden to prove water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, per Mont. Code Ann. § 85-2-311(1)(a)(i). (Department File, PDG)

Findings of Fact from the PDG: Adverse Effect

14. The BRO found that the Applicant's plan to not create adverse effect is to shut down their diversion if call is made. The pumps can be turned off and/or removed from the river. The flow rate and volume physically available at the point of diversion exceed the legal demands in all months throughout the proposed period of diversion in the amount the applicant proposes to divert.

Findings of Fact for both Physical Availability and Adverse Effect[2]

15. Objectors presented evidence as to the physical availability of water by testifying that the last known measurement of Fly Creek was taken in 1981, which was 40 years ago. Objectors also offered hearsay testimony that to the best of their knowledge there is less water today flowing in Fly Creek than there was in 1981. (Hearing Recording, Track 3)

16. Applicant provided additional information from the USDA showing a flow measurement taken at his proposed POD on October 10, 2018 and it was made part of the record. (Exhibit A-1) Objectors stipulated to the exhibit but stated that it should've been provided as part of responding to their discovery requests. Applicant requested that his information be compared to the flow at the Objectors' POD. (Hearing Recording, Track 3)

17. Objectors provided pump flow measurements from their POD. They also testified that this

2. The testimony and evidence given by both the Objector and the Applicant did not distinguish what portion of that testimony and evidence related to physical availability vs. adverse effect. Therefore all relevant evidence and testimony is presented in a single section of this Order.

shows what they are removing from the stream. They testified that in the late 1990s to early 2000s the Huntley Project Irrigation District had a pump on the stream adjacent to the Objectors and they could not start their pump without Objectors first shutting off. Objectors testified that they would be starved for suction if the irrigation district would start pumping. They offered that this shows that they will be adversely impacted by any upstream pumping but were unable to provide any evidence to back up their testimony. (Hearing Recording, Track 3)

18. Objectors pointed out that Applicant's additional exhibit, when compared to the 10-year average of the USGS data, is one quarter of the median of the mean average stream flow available. The mean flow rate data from the USGS gage shows 19 CFS flowing in October, whereas Exhibit A-1 shows 5.9 CFS. Furthermore, Objectors contend that this does not show year-round availability as it accounts for only one day of measured streamflow. The cumulative impacts of diverting year-round could also impact the physical availability of water and cause adverse impact to Objectors. Objectors did not provide any proof as to any impacts from year-round cumulative effects. (Hearing Recording, Track 3)

19. Objectors did testify that pump suction can lead to damage of their pump. Further they testified that if they lose water availability they will lose the crops, costing them an estimated $600/acre. (Hearing Recording, Track 5)

20. Applicant testified that physical availability is addressed by the additional measurement he provided at the hearing. (Exhibit A-1) He testified that even at the lowest time of year there is still enough streamflow to meet both water rights. (Hearing Recording, Track 4)

21. Being able to make call on Applicant in part addressed Objectors' concerns regarding physical availability and adverse effect. Objector testified that knowing when to make call remained a challenge. (Hearing Recording, Track 5)

Conclusions of Law (Physical Availability)

22. An applicant has the burden of proving 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." Mont. Code Ann. § 85-2-311(1)(a)(i).

23. 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); *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).

24. 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).

25. Visual observations are insufficient without estimation of flow data. *In the Matter of Application for Beneficial Water Use Permit No. 43D 10220900 by Sam McDowell* (DNRC Final Order 2007).

26. In the instant matter the BRO issued its PDG determining that the Applicant satisfied the physical availability criteria by a preponderance of the evidence. See PDG at ¶ 8-10. Therefore, the burden of production shifted to the Objectors in the contested case proceeding. While the BRO conducted their analysis based on dated gage information for this Application, that analysis comports with the procedure and methodology provided as guidance by the Department. The BRO's analysis was the only technical evidence related to physical availability contained in the record. No probative scientific evidence was submitted in the contested case hearing contradicting the physical availability analysis contained in the BRO's Technical Report and PDG. (FOF 8 – 19; Footnote 1 & 2).

27. The Objectors did not meet their burden of production or provide any probative evidence contradicting the physical availability determination in the PDG. Indeed, the Applicant provided information at the hearing showing the results of a stream flow measurement performed by the USDA, natural Resources Conservation Service (NRCS) in Fly Creek at the proposed POD on October 10, 2018 indicating a total measured discharge of 5.7 cfs. (Exhibit A-1)

28. Accordingly, there is no evidentiary basis for disturbing the PDG's conclusion that the Applicants proved by a preponderance of the evidence that water can reasonably be considered physically available during the period in which the Applicants seek 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 8 – 10, 12 – 19; PDG at ¶ 8 - 10)

Conclusions of Law (Adverse Effect)

29. Pursuant to § 85-2-311(1)(b), MCA, an 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. 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.

30. In the instant matter, the BRO issued its PDG determining that the Applicant satisfied the adverse effect criteria by a preponderance of the evidence. See PDG at ¶ 14 - 16. Therefore, the burden of production shifted to the Objectors in the contested case proceeding.

31. The Department has recognized that planning to turn off a pump when water is in short supply or when a call is made can be an adequate plan to prevent adverse effect on prior appropriators depending on the circumstances. *In the Matter of Application for Beneficial Water Use Permit No. 76D-30025038 by Marl Lake Inc.,* DNRC Final Order (2007) ("The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or stat reservations will not be adversely affected is to have a pump which can be shut off if a legitimate call is received.") (Citing *In the Matter of Beneficial Water Use Permit Application No. 60194-76LJ by Leonard and Leroy Cobler*, Proposal For Decision (1988) adopted by Final Order).

32. There was conflicting testimony regarding water availability and the potential for adverse effect to senior water users on the impacted reach of Fly Creek. FOF 15 - 19. While there may be times when the Applicant's use could interfere with senior water users, this is not a case of constant call. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler (*DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen (*DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (*DNRC Final Order 1992)(applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company (*DNRC 2006).

33. Applicant stated in his Application his plan to prevent adverse effect is to shut down the pumps should a call by a senior appropriator be made. This type of plan can be sufficient to prove lack of adverse effect for surface water diversions in an open basin. The Objector testified that knowing when to make call could present a challenge to ensuring they will not be adversely affected, but further presented no evidence that the Applicants' plan would be inadequate. (Department File, FOF 19)

34. The Objectors testimony that previous diversions have caused them adverse effect and that if a call was not responded to at the right time they would be adversely affected is probative to the issue of adverse effect. However, Objectors did not provide any evidence beyond their testimony to meet their burden of production or provide any probative evidence contradicting the adverse effect determination in the PDG. Accordingly, there is no evidentiary basis for disturbing the PDG's conclusion that the Applicant proved 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. See PDG at ¶ 31 - 39.

CONCLUSION

Pursuant to the findings in the PD regarding the criteria of legal availability (85-2-311(1)(a)(ii), MCA), means of diversion (85-2-311(1)(c), MCA), beneficial use (85-2-311(1)(d), 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(1)(a)(i), MCA) and adverse effect (85-2-311(1)(b), 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. 43Q 30116484 is **GRANTED**.

The Department determines the Applicant may divert water from Fly Creek, by means of a pump, from January 1 through December 31 at 4 CFS up to 951.55 AF, from a transitory diversion in the S2S2 Sec.4, NE Sec. 9 and W2W2W2 Sec. 10, T2N, R30E, Yellowstone County. Water may be diverted from March 15 through November 15 for irrigation of 265.2 acres of alfalfa with 19.8 acres in the SWSW Sec. 3, 70 acres in the S2SE and 13.2 acres in the SESW Sec.4, 114.3 acres

in the NW and 31.2 acres in the E2NE Sec. 9 and 16.7 acres in the W2NWNW Sec. 10, T2N, R30E, Yellowstone County. Water may be diverted from January 1 through December 31 for stock water for 100 animal units to be stored in four reservoirs located in the N2NWNW, SENESW, NWSENW SWSENW Sec. 9, T2N, R30E, Yellowstone County.

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 district 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 district court.

Dated this 14th day of May 2019.

/Original signed by Ada C. Montague/

Ada C. Montague, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
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 14th day of May 2019 by first class United States mail.

WILLIAM BYXBE
LAURIS A BYXBE
3927 KILLDEER LN
BILLINGS, MT 59102

DONIELLE A SLANINA
GARY S SLANINA
2425 FLY CREEK RD
POMPEYS PILLAR, MT 59064

/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

* * * * * * *

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q 30116484 BY WILLIAM AND LAURIS BYXBE	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

* * * * * * *

On March 19, 2018, William and Lauris Byxbe (Applicant) submitted Application for Beneficial Water Use Permit No. 43Q 30116484 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4 CFS and 951.55 AF for irrigation and stock beneficial uses. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of May 17, 2018. Christine Schweigert and Mark Elison from the Department met with the Applicant (William Byxbe) on March 14, 2018 for a pre-application meeting. An Environmental Assessment for this Application was completed on April 23, 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.
- Maps: Aerial photograph showing proposed transitory diversion, reservoirs and place of use.
- Letter from Montana Sage Grouse Habitat Conservation Program dated February 7, 2018
- Copy of January 12, 2018 document with map from Huntly Project Irrigation District discussing "Surplus Contract 2003-3 – William Byxbe", with conclusions and recommendation to cancel William Byxbe Surplus Contract.

Information within the Department's Possession/Knowledge

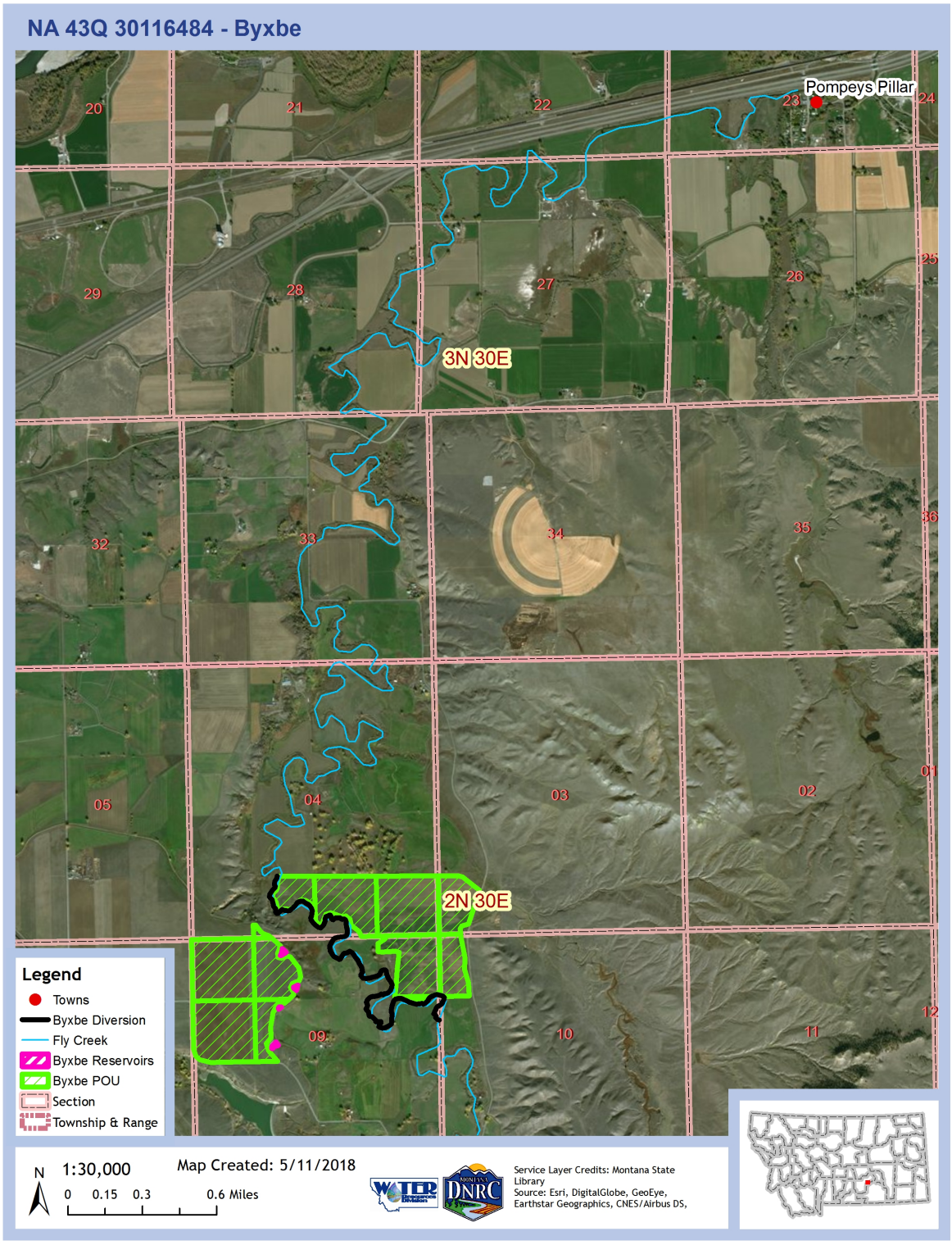
- State of Montana water right records.
- USGS Gaging Station No. 06217750 Fly Creek at Pompeys Pillar MT with a period of record from October 1968 through September 1981.
- SCS Technical Note: Environment No. 7, Evaporation Pond Design for Agricultural Wastewater Disposal, February 1974. (SCS 1974).

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). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert up to 4 CFS from Fly Creek, by means of a transitory pump in the S2S2 Sec.4, NE Sec. 9 and W2W2W2 Sec. 10, T2N, R30E, from January 1 through December 31 for 100 animal units of livestock up to 1.7 AF and from March 15 through November 15 to irrigate 265.2 acres of alfalfa up to 944.3 AF with 19.8 acres in the SWSW Sec. 3, 70 acres in the S2SE and 13.2 acres in the SESW Sec.4, 114.3 acres in the NW and 31.2 acres in the E2NE Sec. 9 and 16.7 acres in the W2NWNW Sec. 10, T2N, R30E, Yellowstone County. The Applicant proposes 4 stock reservoirs in the E2NW Sec. 9, T2N, R30E; (1) 1.8 AF capacity in the N2NENW Sec. 9, (2) 0.57 AF capacity in the SENENW Sec.9, (3) 0.11 AF capacity in the NWSENW and (4) 0.92 AF capacity in the SWSENW Sec. 9. The reservoirs will be filled using a pump and pipeline from Fly Creek. The requested volume of 951.55 AF includes one fill for each of the reservoirs and evaporation from their surfaces. The place of use is located approximately 4 miles south southwest of the town of Pompeys Pillar in Yellowstone County.



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 43Q 30116484.

§ 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.

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 (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).

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. § 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. USGS gage 06217750 Fly Creek at Pompeys Pillar Montana was used to determine the physical availability of water at the proposed POD. This gage is located approximately 6 miles downstream of the proposed POD and has a period of record from October 1968 through September 1981; it is the only gage on the source. The table below shows the median of the mean monthly flow rate and volume at the gage. The volume was calculated by multiplying the median of the mean monthly flow by 1.98 and by the number of days each month.

Table 1. Median of the mean monthly flow (CFS) and volume (AF) at USGS gage 06217750

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate (CFS)	6.41	10.7	10.7	13.7	39.4	57.5	37.4	40.6	59.8	15.3	9.04	6.38
Volume (AF)	393.5	593.2	656.8	813.8	2,418.4	3,415.5	2,295.6	2,492.0	3,552.1	939.1	537.0	391.6

9. There is one legal demand between the POD and the downstream gage. Water right permit no. 43Q 4331-00 (10/2/1975) diverts up to 1.34 CFS and 396.5 AF from May through Sept. The Department added the legal demand to the median of the mean monthly flow and volume at the gage to determine the amount of water physically available at the POD. The monthly volume of the legal demand was calculated by dividing the total volume by the number of months in the period of diversion. The tables below show the amount of water physically available in both flow rate and volume.

Table 2. Physically available at the POD in CFS

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of Mean Monthly Flow	6.41	10.7	10.7	13.7	39.4	57.5	37.4	40.6	59.8	15.3	9.04	6.38
Legal Demand Between Gage and POD					1.34	1.34	1.34	1.34	1.34			

Physically Available (Median Plus Legal Demand)	6.41	10.7	10.7	13.7	40.74	58.84	38.74	41.94	61.14	15.3	9.04	6.38

Table 3. Physically available at the POD in AF

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of Mean Monthly Volume*	393.5	593.2	656.8	813.8	2,418.4	3,415.5	2,295.6	2,492.0	3,552.1	939.1	537.0	391.6
Legal Demand Between Gage and POD					73.9	73.9	73.9	73.9	73.9			
Physically Available (Median Plus Legal Demand)	393.5	593.2	656.8	813.8	2,492.3	3,489.4	2,369.5	2,565.9	3,626.0	939.1	537.0	391.6

***Volume calculated as mean monthly flow times 1.98 times the number of days each month**

CONCLUSIONS OF LAW

10. 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."

11. 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).

12. 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).

13. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001).

14. Applicant's personal observations of streamflow and snow drifts in the upper drainage since 1992 not confirmed by applicant's own weir measurements of flow at the proposed point of diversion; permit denied. *In the Matter of Application for Beneficial Water Use Permit No. 43C-112035 by Gary and Clara Borland dba Crow Chief Meadows* (DNRC Final Order 2001).

15. Visual observations are insufficient.without estimation of flow. *In the Matter of Application for Beneficial Water Use Permit No. 43D 10220900 by Sam McDowell* (DNRC Final Order 2007).

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

Legal Availability:

FINDINGS OF FACT

17. The area of potential impact for this application is approximately 6 miles, to the mouth of Fly Creek at the Yellowstone River. The Yellowstone River is an appropriate hydrologic boundary and the Dept. has knowledge that the legal demands on the Yellowstone River below the confluence with Fly Creek are met. FWP has not made call on the Yellowstone River below Fly Creek in several years and the Dept. has granted 4 new permits on the Yellowstone River

below Fly Creek since 2003 (42K 30071035, 42K 30112844, 42M 30003470 and 42M 30064201).

18. There are two legal demands within the area of potential impact. Those rights are permit no. 43Q 4331-00 for 1.34 CFS up to 369.5 AF for irrigation of 110 acres and statement of claim no. 43Q 40776-00 for 8.9 CFS and an estimated 7626 AF (based on the Dept. standard of 4.1 AF/AC for 45% efficiency in climate area 1) for irrigation of 1,860 acres.

19. Because the permit (43Q 4331-00) is between the gage and the POD and the Dept. added it to the amounts at the gage to determine physical availability, it does not need to be subtracted from the gage to determine legal availability. The Dept. subtracted the monthly flow rate of 8.9 CFS from the gage record to determine the flow rate legally available. The Dept. then divided the total volume by the number of months in the period of diversion to determine the monthly legal demand below the gage. Because the period of diversion begins on the 15th of April and ends on the 19th of October, the monthly volume for those months is half of the volume assigned to the other months.

Table 4. Legally available at the POD (CFS)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of Mean Monthly Discharge (CFS)	6.41	10.7	10.7	13.7	39.4	57.5	37.4	40.6	59.8	15.3	9.04	6.38
Legal Demand Below the Gage	0	0	0	8.9	8.9	8.9	8.9	8.9	8.9	8.9	0	0
Legal Availability at the POD in CFS	6.41	10.7	10.7	4.8	30.5	48.6	28.5	31.7	50.9	6.4	9.04	6.38

(gage minus legal demand)												

Table 5 Legally available at the POD (AF)

Month	**Jan**	**Feb**	**Mar**	**Apr**	**May**	**Jun**	**Jul**	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**
Median Monthly Volume* (AF)	393.45	593.21	656.77	813.78	2,418.37	3,415.50	2,295.61	2,492.03	3,552.12	939.11	536.98	391.60
Legal Demand Below Gage (AF)	0	0	0	635.5	1271	1271	1271	1271	1271	635.5	0	0
Legal Availability (AF) (gage minus demand)	393.45	593.21	656.77	178.28	1,147.37	2,144.50	1,024.61	1,221.03	2,281.12	303.61	536.98	391.6

***Volume calculated as mean monthly flow times 1.98 times the number of days each month**

CONCLUSIONS OF LAW

20. 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).

21. 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.

22. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

23. 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 17 - 19)

Adverse Effect

FINDINGS OF FACT

24. The Applicant's plan to prevent adverse effect is to shut down the pump if call is made on the source.

25. The flow rate and volume of water physically available exceeds the legal demands in all months throughout the proposed period of diversion in the amount the applicant proposes to divert.

CONCLUSIONS OF LAW

26. 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.

27. 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).

28. 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.

29. 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.

30. 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.

31. 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.

32. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-*

G76L by Cross, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

33. 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 24, 25)

Adequate Diversion

FINDINGS OF FACT

34. The Applicant proposes to divert up to 4 CFS from Fly Creek using a fuel powered 100 HP pump that will be purchased from Billings Pipe and Pump as advised by Big Sky Irrigation. Water will be conveyed to existing turnouts in the present irrigation system, a 12-inch pipeline will be used to divert water to 4 stockwater ponds. The ponds were constructed on old turns of the Huntly Project Highline Canal that were cut off and deepened when the ditch was straightened.

35. These acres have been flood irrigated with Huntly Project water for several years. Huntley Project notified the Applicant this January that he would no longer be receiving surplus water from the irrigation district to irrigate the acres proposed in this application. The Applicant proposes to use existing irrigation ditches to service the fields but will pump water from Fly Creek into the ditches rather than use Huntly Project water.

36. The 4 stock reservoirs will be filled with Fly Creek water via the 100 HP pump and a pipeline. Reservoir #1 has a surface area of 0.19 acres, maximum depth of 24 ft. and a capacity of 1.8 AF. Reservoir #2 has a surface area of 0.13 acres, maximum depth of 11 ft. and a capacity of 0.57 AF. Reservoir #3 has a surface area of 0.04 acres, maximum depth of 6.75 ft. and a capacity of 0.11 AF. Reservoir #4 has a surface area of 0.2 acres, maximum depth of 11.5 ft. and a capacity of 0.92 AF. With a moveable pump, the maximum distance water will be piped is approximately 0.39 miles.

CONCLUSIONS OF LAW

37. 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.

38. 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.

39. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

40. Collection of snowmelt and rain in lined ponds considered adequate means of diversion. *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989).

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

42. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989)(design did not include ability to pass flows, permit denied).

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 34-36).

Beneficial Use

FINDINGS OF FACT

44. The proposed flow rate of 4 CFS equates to 6.77 GPM/AC on 265.2 acres and was the flow rate recommended by the project designers, Big Sky Irrigation and Billings Pump and Pipe. The requested flow rate is less than the Dept. standard for flood irrigation but is in the typical range for sprinkler irrigation and would provide some benefit to the crop.

45. The requested volume of 951.55 AF includes 944.3 AF for irrigation, 1.7 AF for stock, 3.4 AF for an initial fill of each the stock ponds and 2.15 AF for annual evaporation off the surfaces of the ponds.

46. The 944.3 AF requested for irrigation is 3.55 AF/AC and was based on the Dept. standard for 60% efficient graded border irrigation in climatic area 1.

47. The requested volume of 1.7 AF for stock was calculated using the Dept. standard of 0.017 AF/AU per year for 100 animal units.

48. The 3.4 AF for the initial fill of the ponds is the total capacity of the four ponds (1.8 + 0.57 + 0.11 + 0.92 = 3.4).

49. The evaporation was calculated using the formula outlined in SCS 1974 where evaporation in acre-feet equals the surface area in acres times the number of inches of evaporation divided by 12. The evaporation rate for the project area is approximately 46 inches. With a combined surface area of 0.56 acres (0.19 + 0.13 + 0.04 + 0.2 = 0.56), the evaporation is 2.15 AF (0.56 * 46 / 12 = 2.15).

CONCLUSIONS OF LAW

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

51. 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).

52. 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.

53. Applicant proposes to use water for irrigation and stock which are recognized beneficial uses. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation and stock are beneficial uses and that 4 CFS of flow rate and 951.55 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 44-49)

Possessory Interest

FINDINGS OF FACT

54. The Applicant signed the affidavit on the application 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

55. 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.

56. 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.

57. 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 54)

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. 43Q 30116484 should be GRANTED.

The Department determines the Applicant may divert water from Fly Creek, by means of a pump, from January 1 through December 31 at 4 CFS up to 951.55 AF, from a transitory diversion in the S2S2 Sec.4, NE Sec. 9 and W2W2W2 Sec. 10, T2N, R30E, Yellowstone County. Water may be diverted from March 15 through November 15 for irrigation of 265.2 acres of alfalfa with 19.8 acres in the SWSW Sec. 3, 70 acres in the S2SE and 13.2 acres in the SESW Sec.4, 114.3 acres in the NW and 31.2 acres in the E2NE Sec. 9 and 16.7 acres in the W2NWNW Sec. 10, T2N, R30E, Yellowstone County. Water may be diverted from January 1 through December 31 for stock water for 100 animal units to be stored in four reservoirs located in the N2NWNW, SENESW, NWSENW SWSENW Sec. 9, T2N, R30E, Yellowstone County.

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 31st day of May 2018.

/Original signed by Mark Elison/
Mark Elison, Deputy Regional Manager
Billings 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 31st day of May 2018, by first class United States mail.

WILLIAM AND LAURIS BYXBE
3927 KILLDEER LANE
BILLINGS, MT 59102

_____ _____

CHRISTINE SCHWEIGERT DATE