

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

APPLICATION TO FOR BENEFICIAL WATER USE PERMIT NO. 41R 30067308 BY ALLEN, WAYNE AND BETH GIFT TRUST)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On September 9, 2013, Allen, Wayne and Beth Gift Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 41R 30067308 to the Havre Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 5.00 gallons per minute (GPM) up to 2.00 acre feet (AF) of volume for Stock use. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of 2/28/2014. An Environmental Assessment for this Application was completed on 06/16/2014.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments: Pump specifications and performance data
- Maps: Aerial photo showing location of the proposed project including property boundaries, place of use, and location of pump, pipelines and tanks

Information within the Department’s Possession/Knowledge

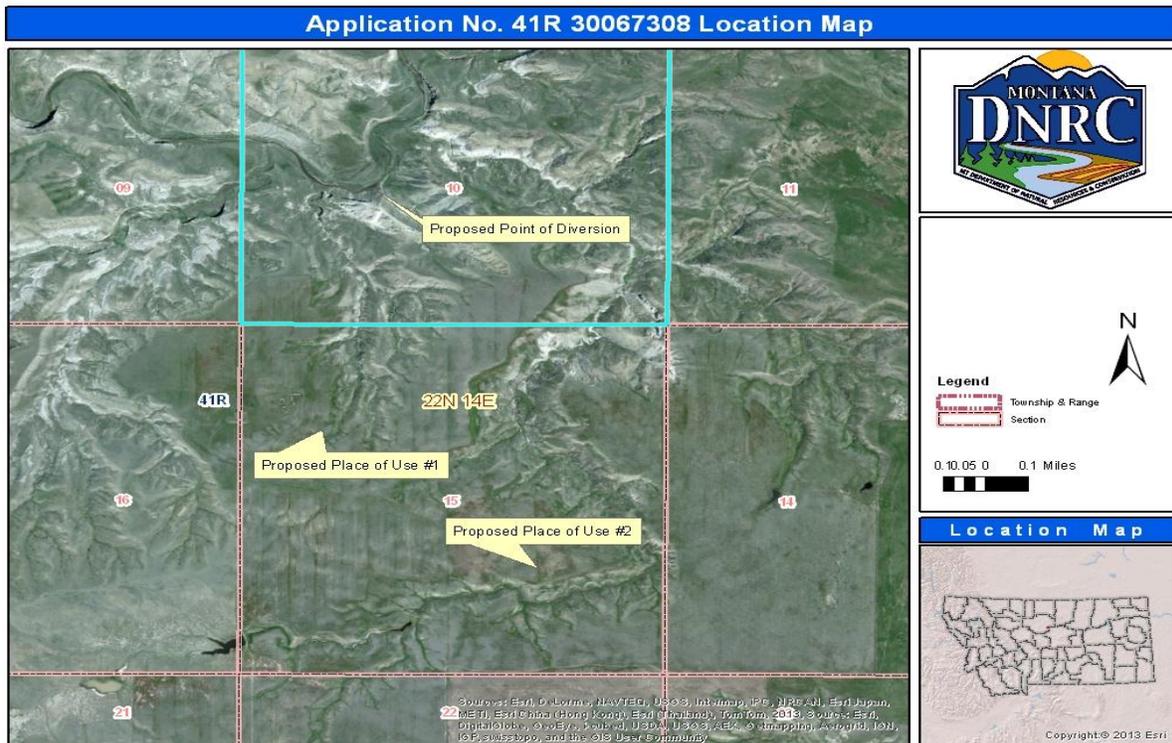
- USGS gaging station records from the USGS website
- Department water right records of existing rights
- USGS Water Resources Investigation Report 84-4143 (“A Method for Estimating Mean Annual Runoff of Ungaged Streams Based on Characteristics in Central and Eastern Montana”)

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 Flat Creek, by means of a pump, from January 1 to December 31 at 5.00 GPM up to 2.00 AF, from a point in the SWNESW, Section 10, T22N, R14E, Chouteau County, for stock use from April 1 to October 31. The Applicant proposes to provide water to 240 AU of stock. The places of use are generally located in the NESWNW and the SENWSE of Section 15, T22N, R14E, Chouteau County. The Department considers the stock use to be 100% consumptive.
2. The flowing map depicts the location of the proposed project:



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

GENERAL CONCLUSIONS OF LAW

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

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

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

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

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

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

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

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 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.

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

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

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); ARM 36.12.207.

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

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

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

Physical Availability

FINDINGS OF FACT

9. The Applicant is requesting a maximum flow rate of 5.00 GPM up to 2.00 acre-feet annually from Flat Creek. Flat Creek is an ungaged, non-perennial creek and a tributary to Arrow Creek and is depicted as being perennial by the United States Geologic Survey (USGS) topographic map.

10. The Applicant requested and the Department granted a variance from taking stream flow measurements from Flat Creek. The variance was granted on the basis that Flat Creek does not qualify as a perennial flowing stream meaning that the stream historically has not flowed continuously during all seasons of the year, during dry as well as wet years. This decision was based on Department's local knowledge of flows typically associated with Flat Creek and periods of zero flows noted in gaged data from Arrow Creek which is considered to be a more prolific source in nature due to its alpine qualities. Evidence submitted by the Applicant was also considered by the Department which includes photos and the need to include a storage tank to the stock water system.

11. It is reasonable to use the most applicable estimation method set forth in ARM 36.12.1702(6). To determine the physical water availability in Flat Creek the method described in USGS Water Resources Investigation Report 84-4143 ("A Method for Estimating Mean Annual Runoff of Ungaged Streams Based on Characteristics in Central and Eastern Montana") was used. The proposed project is located within Region 2 of the report so the equation $Q = 0.039 \times A^{0.94}$ was used, where Q is average daily flow rate and A is drainage area in square miles.

12. The average daily flow from USGS gaging station 0094201, Arrow Creek near Coffee Creek, was calculated from the 3 year of record (period of record 1968-1971) for this gaging station (See table below calculating average daily flow by month). Based on the USGS data, the average annual flow rate for Arrow Creek is 51.21 CFS producing an annual volume of 37050.93 AF. The monthly flows are presented in the following Table 1:

Table 1

Average Daily Flow by Month for Arrow Creek (CFS)											
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
26.06	24.4	45.06	118.96	187.76	108.54	11.58	11.58	12.33	19.15	26.05	23.1
Average Daily Flow = 51.21											

13. A monthly percentage was calculated based on the contribution of each month's volume to the total annual volume to determine the changes in flow patterns in the region throughout the year (total monthly volume divided by the total annual volume). The following information found in Table 2 summarizes the monthly calculations:

Table 2

Average Monthly Volume for Arrow Creek (AF) and Monthly Percentage											
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1599.77	1352.74	2766.19	7066.22	11524.71	6447.28	2948.29	710.88	732.10	1175.43	1547.37	1417.88
4.07%	3.44%	7.04%	17.99%	29.33%	16.41%	7.50%	1.81%	1.86%	2.99%	3.94%	3.61%
100% Total Measured Annual Volume = 37050.93											

14. Using the method described in USGS Water Resources Investigation Report 84-4143, the average daily flow rate and yearly volume for the Arrow Creek drainage area above the gage site is calculated as follows.

Arrow Creek

$$Q = 0.039 \times A^{0.94}$$

$$Q = 0.039 \times 380^{0.94}$$

$$Q = 0.039 \times 266$$

$$Q = 10.37 \text{ CFS}$$

$$10.37\text{cfs} \times 1.98 \times 365 \text{ days} = 7494.94 \text{ AF/year}$$

15. The Arrow Creek gage site location differs in elevation and aspect due to the alpine nature of the Highwood Mountains which is heavily influenced by high spring flows during the months of March through June. The gage site is also limited to 3 years of record form 1968

through 1971. A review of climatic records taken at US National Oceanic and Atmospheric Administration's (NOAA) weather station (Shonkin-USC00247540) period of record (1953-2013) indicate that the years 1968 and 1969 were considerably wetter than normal whereas the years 1970 and 1971 were close to long term averages for the region.

16. The qualitative differences in the gaged flows on Arrow Creek and the calculated flows on both Arrow Creek and Flat Creek using the USGS Water Resources Investigation Report 84-4143 is considered in this comparative analysis. These differences are reconciled as Flat Creek being characterized as a more typical prairie stream found in eastern Montana. Whereas, the upper portions of the Arrow Creek drainage is more alpine in nature with the influence of the Highwood Mountains. However, there is no comparative flow data in the region identified that compares well to Flat Creek other than the limited Arrow Creek flow data. Flat Creek flows into Arrow Creek therefore, the geographical locations of the two streams are very similar. Late summer baseflows in Arrow Creek correspond well to the expected flow provided by the equation.

17. The equation found in the USGS Water Resources Investigation Report 84-4143 was then used to estimate the average daily flow rate and yearly volume for Flat Creek. The area was calculated using the drainage basin above the point of diversion.

Flat Creek

$$Q = 0.039 (A)^{0.94}$$

$$Q = 0.039 (364)^{0.94}$$

$$Q = 0.039 (255.5)$$

$$Q = 9.96 \text{ CFS or } 4470.05 \text{ GPM}$$

$$9.96 \times 1.98 \times 365 = 7198.09 \text{ AF/year.}$$

18. The following information found in Table 3 summarizes the estimated monthly volume derived from the calculated total volume of 7198.09 AF and monthly percentages calculated in Arrow Creek. Monthly flow expressed in CFS necessary to achieve the monthly volume was then calculated (total annual volume x percent = monthly volume then monthly volume / days per month / 1.98 = average monthly flow rate).

Table 3

Monthly Flow and Volume by Month for Flat Creek and Monthly Percentage Based from Arrow Creek Data												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Average Monthly Flow (CFS)	4.77	4.47	8.26	21.80	34.40	19.89	8.80	2.12	2.25	3.51	4.62	4.23
Monthly Volume (AF)	292.96	247.61	506.75	1294.94	2111.20	1181.21	539.86	130.29	133.88	215.22	283.60	259.85
Percentage From Arrow Creek Data	4.07%	3.44%	7.04%	17.99%	29.33%	16.41%	7.50%	1.81%	1.86%	2.99%	3.94%	3.61%
	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09	7198.09
100% Calculated Total Annual Volume = 7198.09												

19. The Department finds that water is physically available in Flat Creek from January 1 to December 31 in the amount of 0.01 CFS or 5.00 GPM up to 2.00 AF.

CONCLUSIONS OF LAW

20. 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.”

21. 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).

22. 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).

23. The Department finds 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 9-19)

Legal Availability:

FINDINGS OF FACT

24. The Department defined the potential area of impact as the area downstream of the proposed point of diversion to the confluence with Arrow Creek, approximately 5 miles, and finds this to be a reasonable area of assessment. The Department provided a listing of the existing water rights and compared the physical water availability to the amount of water already appropriated under the identified existing water rights. The volume of the single water right for instream stock use downstream of the requested point of diversion was calculated by dividing the claimed volumes based on the animal units times 30 gal/day. The Applicant is requesting a flow rate of 5 GPM (0.01 cfs) up to 2.00 AF. The legal availability is summarized in Table 4 below.

Table 4

Flow Rate Legally Available (CFS)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Physically Available	4.77	4.47	8.26	21.80	34.40	19.89	8.80	2.12	2.25	3.51	4.62	4.23
Existing Water Rights	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02
Flow Rate Legally Available	4.75	4.45	8.24	21.78	34.38	19.87	8.78	2.10	2.23	3.49	4.60	4.21
Volume Legally Available (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Physically Available	292.96	247.61	506.75	1294.94	2111.20	1181.21	539.86	130.29	133.88	215.22	283.60	259.85
Existing Water Rights	10.95	10.95	10.95	10.95	10.95	10.95	10.95	10.95	10.95	10.95	10.95	10.95
Volume Legally Available	282.01	236.66	495.80	1283.99	2100.25	1170.26	528.91	119.34	122.93	204.27	272.65	248.90

25. The comparison in the aforementioned Table 3 shows water is legally at the requested flow rate of 5 GPM (0.01 cfs) up to 2.00 AF throughout the proposed period of diversion.

CONCLUSIONS OF LAW

26. 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).

27. 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.

28. The Department finds 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 24-25)

Adverse Effect

FINDINGS OF FACT

29. During times of water shortage, the Applicant's plan is to reduce or discontinue pumping water from Flat Creek and rely on water stores in the 10,000 gallon tank that is proposed to be part of the system. In the event of a call being placed on water, the Applicant will discontinue

diverting water until such time that diverting water will no longer have an adverse impact on downstream water right holders.

30. Water is legally available in all months of the proposed period of diversion.

31. The Department finds there will be no adverse effect, because the amount of water requested is legally available at this point on Flat Creek and the Applicant's plan to curtail their appropriation during times of water shortages is adequate.

CONCLUSIONS OF LAW

32. 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.

33. 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).

34. 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.

35. 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.

36. 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.

37. 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.

38. 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 29-31)

Adequate Diversion

FINDINGS OF FACT

39. Water will be diverted from Flat Creek via a pumping system capable of delivering 5.00 GPM. The diversion from Flat Creek will use a Gould model 1sv-20 pump. The pump, with total dynamic head of 457 feet, is capable of approximately 5.00 GPM . A 2.0" PVC pipe 5,280 feet long will convey water from the pump to a 10,000 gallon storage tank. Water will then be conveyed via gravity-fed pipelines to two 1,100 gallon stock tanks. The storage tank along with each stock tank will be equipped with a float system to prevent overfilling and waste.

40. The data sheet for the proposed pump shows that water can be diverted at the rate requested.

CONCLUSIONS OF LAW

41. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

42. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

43. The Department finds that the 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. (FOF 39-41).

Beneficial Use

FINDINGS OF FACT

44. The stock use is a recognized beneficial use. The 5.00 GPM flow rate requested is necessary to operate the stock watering system accounting for elevation from the creek bank and the 5,280 feet of pipe to the storage tank. The 2.00 AF of volume requested is based on DNRC standards of 15 gallons per day per AU x 240 head of cattle over the 183 day period of use which is April 1 to October 31 (*ARM 36.12.115 (2)*).

45. The Department finds the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

CONCLUSIONS OF LAW

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

47. 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).

48. Applicant proposes to use water for stock use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 2.00AF of diverted volume and 5.00 GPM of water requested is the amount needed to sustain the beneficial use. (FOF 44-45)

Possessory Interest

FINDINGS OF FACT

49. The applicant signed and had the affidavit on the application form notarized 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

50. 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.

51. 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.

52. The Department finds that by a preponderance of the evidence that 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. § 85-2-311(1)(e), MCA. (FOF 49)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that Application for Beneficial Water Use Permit No.41R 30067308 should be GRANTED. The Department determines the applicant may divert water from Flat Creek, by means of a pump, from January 1 to December 31 at 5.00 GPM up to 2.00 AF, from a point in the SWNESW, Section 10, T22N, R14E, Chouteau County, for stock use from April 1 to October 31. The Applicant proposes to provide water to 240 AU of stock. The places of use are generally located in the NESWNW and the SENWSE of Section 15, T22N, R14E, Chouteau 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 23rd day of June, 2014.

/Original signed by Kraig VanVoast/

Kraig Van Voast, Deputy Regional Manager
Havre Water Resource Office
Department of Natural Resources and Conservation