

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 43QJ 30069568)
BY RORY AND TONI ANDERSON) PRELIMINARY DETERMINATION TO
GRANT PERMIT**

On May 27, 2014, Rory and Toni Anderson (Applicant) submitted Application for Beneficial Water Use Permit No. 43QJ 30069568 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 6 gallons per minute (GPM) and 2.5 acre-feet (AF) for lawn and garden. The Department met with the Applicant May 12, 2014. The Department published receipt of the Application on its website. A deficiency letter under § 85-2-302, Montana Code Annotated (MCA), was not required. An Environmental Assessment for this Application was completed on August 7, 2014. The Application was determined to be correct and complete as of August 18, 2014.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed

- Application for Beneficial Water Use Permit, Form 600
- Attachments – Honda pump information brochure
- Maps
 - Undated aerial photo from ArcMap World Imagery overlain with point of diversion and place of use.
 - Plat map showing general project location

Information received after Application Filed

- Email exchange between Applicant, Rory Anderson, and Water Resource Specialist, Christine Smith, dated August 18, 2014 clarifying pump information.

Information within the Department’s Possession/Knowledge

- Montana DNRC water right database

- USGS Stream gaging records for the Yellowstone River at Billings, MT, station number 06214500 with a period of record from October 1, 1928 through September 30, 2013.

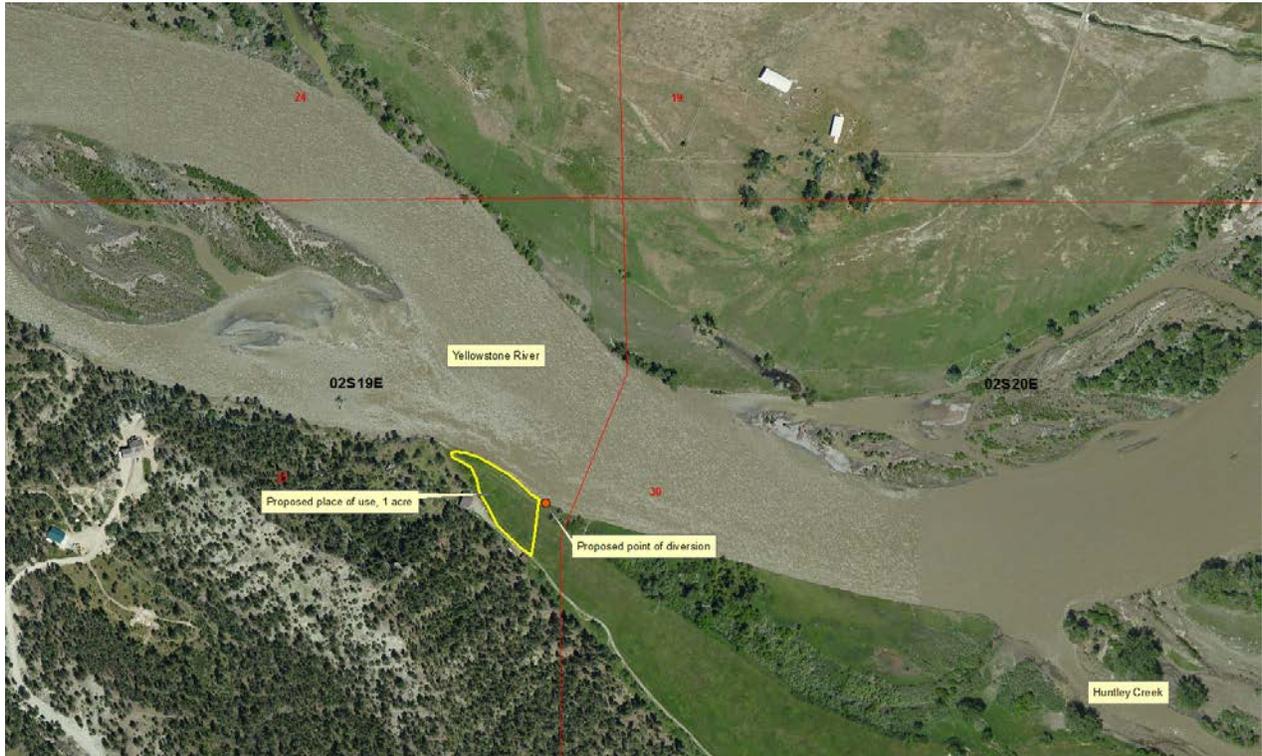
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The applicant proposes to divert water from Yellowstone River, by means of a 4 HP pump, from June 1 to October 1 at 6 GPM up to 2.5 AF, from a point in the SENENE Sec. 25, T2S, R19E, for lawn and garden use from June 1 to October 1. The applicant proposes to irrigate one acre of lawn and garden. The place of use is located in the SENENE Sec. 25, T2S, R19E, Stillwater County. The Applicant will use two $\frac{3}{4}$ inch garden hoses that are each 100 ft. long to convey water from the point of diversion. Each garden hose will have a sprinkler on the end with a $\frac{1}{8}$ inch opening which will allow up to 2.8 GPM. Sprinklers will be moved by hand to irrigate up to one acre of lawn, garden and trees.
2. The proposed diversion is located in the Yellowstone River drainage between Bridger Creek and the Clarks Fork Yellowstone River (basin 43 QJ). The basin is not subject to a water right basin closure or controlled groundwater area restriction.
3. No conditions were proposed after the application was filed or as a result of informal meetings.

4. The image below shows the general project area, proposed point of diversion and place of use. The project area is approximately 3 river miles upstream (west) of the town of Columbus.



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

GENERAL CONCLUSIONS OF LAW

5. 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 . . .

6. 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 to 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.

7. 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.

8. 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).

9. 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.

10. 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

11. The Applicant is requesting 6 GPM up to 2.5 AF.

12. The nearest USGS gaging station, Yellowstone River at Billings, MT (6214500) was used for the physical availability analysis. This gage is located approximately 50 miles downstream of the proposed point of diversion.

13. There are 111 legal demands between the proposed point of diversion and the downstream gage. In order to determine the flow rate physically available at the point of diversion, the Department added the 111 legal demands to the median of the mean monthly flow rate recorded at the USGS gage on the Yellowstone River at Billings. Table 1 below shows the flow rate physically available at the proposed point of diversion for the proposed period of diversion.

Table 1 Physical Availability - Flow Rate (CFS)

Column	Month	Jun	Jul	Aug	Sep	Oct
A	Mean of monthly discharge at gage (CFS)	25,100.00	13,500.00	5,040.00	3,940.00	3,970.00
B	Median of mean monthly discharge at gage (CFS)	23,200.00	12,450.00	4,578.00	3,721.00	3,848.00
C	Legal demands between POD and Gage* (CFS)	3,039.31	3,039.31	3,039.31	3,077.95	3,032.80
D	Physically available at POD (Median plus demands) (CFS)	26,239.31	15,489.31	7,617.31	6,798.95	6,880.80

*Does not include FWP instream flow, as it is never diverted.

14. Table 2 below shows the volume physically available at the proposed point of diversion for the proposed period of diversion. Volume was calculated by multiplying column D in Table 1 by 1.98 by the number of days in the month.

Table 2 Physical Availability - Volume (AF)

	Jun	Jul	Aug	Sep	Oct
Physically available at POD (Median plus demands) (CFS)	26,239.31	15,489.31	7,617.31	6,798.95	6,880.80
Days per month	30	31	31	30	31
Physically available at POD (AF)	1,558,615.01	950,733.85	467,550.49	403,857.63	422,343.50

CONCLUSIONS OF LAW

15. 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.”

16. 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).

17. 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).

18. 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).

19. 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 11-14)

Legal Availability

AREA OF AFFECT

The area of affect is one mile downstream of the point of diversion. This area was selected because the requested flow rate of 6 GPM is significantly less than the flow rate physically and legally available on the source. The proposed point of diversion is approximately four tenths of a mile upstream of the mouth of Huntley Creek and approximately 1.7 miles upstream of the mouth of the Stillwater River. The Yellowstone River is not in a basin closure area, there are no downstream hydropower projects and it is not connected to any lakes or non-hydropower reservoirs.

FINDINGS OF FACT

20. The source of water for this appropriation is Yellowstone River, a perennial flowing stream. The Yellowstone River from Bridger Creek to the Clarks Fork Yellowstone, basin 43QJ, has been issued a preliminary decree by the Montana Water Court.

21. All water rights located within the area from the point of diversion to the end of the area of affected reach were included in the legal demands analysis.

22. There are two FWP Statements of Claim (Murphy rights) in the area of affect within the proposed period of diversion. There is one stock water right for livestock direct from source. The maximum total legal demand for flow rate in any month throughout the proposed period of diversion is 2,200.08 CFS and the maximum total legal demand for volume in any month

throughout the proposed period of diversion is 130,680.81 AF. There is one tributary to Yellowstone River within one mile below the point of diversion, Huntley Creek.

23. Monthly volume for irrigation legal demands between the gage and point of diversion was calculated by multiplying the maximum number of acres for each water right by the standard for 45% efficiency in the Climate Area (4.1 AF/AC for Climate Area 1 and 3.58 AF/AC in Climate Area 2) and dividing by the number of months in the period of use. Legal demands for livestock were calculated using the Dept. standard of 0.017 AF/AU per year and the number of livestock claimed.

24. The physical amount of water available exceeds the existing water rights throughout the proposed period of diversion. See tables 3 and 4 below. The comparison shows that water is legally available at the proposed point of diversion, in the amount requested, throughout the proposed period of diversion.

Table 3 Comparison of the physical water supply (table 1) to the existing water rights (CFS)

	Jun	Jul	Aug	Sep	Oct
Flow Rate Physically available at POD (CFS)	26,239.31	15,489.31	7,617.31	6,798.95	6,880.80
Existing WR's within area of affect (CFS)**	2,200.08	2,200.08	1,800.08	1,800.08	1,800.08
Flow Rate Legally Available at POD (CFS)	24,039.23	13,289.23	5,817.23	4,998.87	5,080.72

**Includes FWP instream flow

Table 4 Comparison of the physical water supply (table 2) to the existing water rights (AF)

	Jun	Jul	Aug	Sep	Oct
Volume Physically available at POD (AF)	1,558,615.01	950,733.85	467,550.49	403,857.63	422,343.50
Existing WR's within area of affect (AF)	130,680.81	135,036.81	110,484.81	106,920.81	110,484.81
Volume Legally Available at POD (AF)	1,427,934.20	815,697.04	357,065.68	296,936.82	311,858.69

CONCLUSIONS OF LAW

25. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

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

(A) identification of physical water availability;

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

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

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

26. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order

2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

27. 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);

28. 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 20-24)

Adverse Effect

FINDINGS OF FACT

29. The Applicants' plan to not create adverse effect is to shut down their diversion. The pump can be turned off or the hose can be removed from Yellowstone River.

30. There are three legal demands within the area of affect. The flow rate and volume physically available exceeds the legal demands throughout the period of diversion.

CONCLUSIONS OF LAW

31. 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.

32. 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).

33. 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.

34. 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.

35. 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.

36. 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 29-30)

Adequate Diversion

FINDINGS OF FACT

37. The proposed means of diversion is a 4 HP Honda WB20, self-priming dewatering pump. A two inch hose in Yellowstone River will be attached to the pump. From the pump, water will be conveyed with 40 psi to the place of use via two 100 ft. long ¾” garden hoses. Each hose will have a single sprinkler with a 1/8 inch orifice that will deliver 2.8 GPM. The hoses will be moved by hand around the one acre place of use to water lawn, garden and trees.

38. The performance curve for the pump shows that it is capable of pumping 6 GPM at 40 psi. The flow rate is limited by the size of the hose, the orifice on the sprinkler and the distance water needs to be pumped.

CONCLUSIONS OF LAW

39. 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.

40. 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.

41. 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).

42. 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).

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 37-38).

Beneficial Use

FINDINGS OF FACT

44. The proposed appropriation will be used for lawn and garden irrigation. Irrigation is a beneficial use under § 85-2-102(4), MCA.

45. The proposed flow rate of 6 GPM was calculated based on the size and length of hose and the type of sprinklers that will be used to convey water to the place of use.

46. The proposed volume of 2.5 AF is the DNRC standard for 1 acre of lawn and garden under ARM 36.12.115.

CONCLUSIONS OF LAW

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

48. 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).

49. 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.

50. Applicant proposes to use water for lawn and garden which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence lawn and garden is a beneficial use and that the 6 GPM flow rate and 2.5 AF diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 44-46)

Possessory Interest

FINDINGS OF FACT

51. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

52. 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.

53. 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.

54. 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 51)

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. 43QJ 30069568 should be GRANTED.

The Department determines the applicant may divert water from Yellowstone River, by means of a pump, from June 1 to October 1 at 6 GPM up to 2.5 AF, from a point in the SENENE Sec. 25, T2S, R19E, for lawn and garden use from June 1 to October 1. The applicant may irrigate lawn and garden on 1 acre. The place of use is located in the SENENE Sec. 25, T2S, R19E, Stillwater 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 24th day of October 2014.

/Original signed by Kimberly Overcast/
Kimberly Overcast, Manager
Billings Water Resources Regional Office
Department of Natural Resources and Conservation