

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30071030 BY Kenneth and Pamela Reaser</b>	) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On November 3, 2014, Kenneth and Pamela Reaser (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30071030 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 22 GPM (0.05 CFS) up to 1.42 AF annually for multiple domestic use and 0.44 acres of domestic lawn and garden. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of March 12, 2015. An Environmental Assessment for this Application was completed on December 1, 2014.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps:
  - USGS Topographic map showing place of use and point of diversion
  - Basemap showing total layout of lot including proposed homes and point of diversion

Information within the Department's Possession/Knowledge

- Independent review of legal demands on Whitefish River and Whitefish Lake
- Independent review of USGS Gage data for Whitefish River (#12366000)

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 Whitefish Lake, by means of a pump, from January 1 through December 31 at 22 GPM (.05 CFS) up to 1.42 AF for multiple domestic use (January 1 through December 31) and domestic lawn and garden for 0.44 acres (April 15 through October 15), from a point in the SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> of Section 22, Township 31N, Range 22W, Flathead County. The place of use is generally located on Lot 2B in the SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> and NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 22, Township 31N, Range 22W, Flathead County and approximately 1.5 miles northwest of Whitefish.
2. Applicant is requesting 0.53 AF annually for multiple domestic use and 0.89 AF annually for domestic lawn and garden use. Using Shaffer 2007 12% for domestic (.12 \* 0.53 AF) and the Department's standards of 70% for lawn and garden (.70 \* 0.89 AF) total consumption would be 0.69 AF.

### **§ 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. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

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); Admin. R. Mont. (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 source of water for the proposed project is Whitefish Lake, which is part of the Whitefish River system. USGS gage station on Whitefish River (station #12366000) located approximately 7.5 miles downstream from the outlet of Whitefish Lake and having data from 1929 through 2006 was used to measure water physically available in Whitefish River/Whitefish Lake. The median of the mean monthly flow rates for the river during the proposed period of diversion range from a minimum of 57.5 cubic feet per second (CFS) in February to a maximum of 583.3 CFS in June. Monthly volumes were calculated by taking the flow rate x 1.983 x days

per month. The median of the mean monthly volumes at this gage ranges from a low of 3,187.8 AF in February to a high of 34,648 AF in June. Legal monthly demands from the river and lake above this gage were added to these mean monthly flow rates to establish water physically available in the river system at the POD on Whitefish Lake. To calculate the *monthly* diverted flow rate for irrigation and lawn/garden uses it was assumed both uses diverted water April 1-October 31<sup>st</sup>. Domestic, commercial, multiple domestic, stock, industrial and other uses were analyzed as year round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of depletion, it was assumed the flow rate associated with each month is continuously in use during that month. The tables below represent what is physically available at the proposed point of diversion:

**Table 1: Median of the Mean Monthly Flows & Legal Demands used to quantify Physical Availability (CFS).**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Gage #12366000 median of mean monthly flow (CFS)	59.6	57.5	87.7	215	496	583.3	264.7	104.2	81.3	67.15	68.3	60.1
Legal Demands Whitefish Lake to gage #12366000 (CFS)	29.94	29.94	29.94	71.62	71.62	71.62	71.62	71.62	71.62	71.62	29.94	29.94
<b>Physically Available Water (CFS)</b>	89.54	87.44	117.64	286.62	567.62	654.92	336.32	175.82	152.92	138.77	98.24	90.04

**Table 2: Median of the Mean Monthly Volumes & Legal Demands used to quantify Physical Availability (AF).**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Gage #12366000 median of mean monthly flow (AF)	3,658.25	3,187.80	5,383.03	12,771.00	30,444.48	34,648.02	16,247.29	6,395.80	4,829.22	4,121.67	4,057.02	3,688.94
Legal Demands Whitefish Lake to gage #12366000 (AF)	1,840.85	1,662.71	1,840.85	4,261.60	4,403.66	4,261.60	4,403.66	4,403.66	4,261.60	4,403.66	1,781.47	1,840.85
<b>Physically Available Water (AF)</b>	5,499.10	4,850.51	7,223.88	17,032.60	34,848.14	38,909.62	20,650.94	10,799.45	9,090.82	8,525.32	5,838.49	5,529.79

10. Requested flow rate of 22 GPM (0.05 CFS) up to 1.42 AF annually is available during proposed period of diversion.

CONCLUSIONS OF LAW

11. 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.”

12. It is the applicant’s burden to produce the required evidence *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

13. 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).

14. 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. (Findings of Fact No. 9 – 10)

**Legal Availability:**

**FINDINGS OF FACT**

15. The Department assessed all surface water legal demands on Whitefish Lake and Whitefish River down to the confluence of the Stillwater River. To calculate the *monthly* diverted flow rate for irrigation and lawn/garden uses it was assumed both uses diverted water April 1- October 31<sup>st</sup>. Domestic, commercial, multiple domestic, stock, industrial and other uses were analyzed as year round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of depletion, it was assumed the flow rate associated with each month is continuously in use during that month. This assumption leads to an overestimate of legal demands for their respective periods and as a result the Department finds this an appropriate measure of legal demands.

16. The following tables list legally available water by month for Whitefish Lake/River (Tables 3 & 4). All legal demands on Whitefish Lake/River down to the confluence with the Stillwater River were subtracted from the total quantity of water found to be physically available at the proposed point of diversion showing that the requested flow rate of 22 GPM (0.05 CFS) up to 1.42 AF is available.

**Table 3: Median of the Mean Monthly Flows minus Existing Legal Demands**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Physically Available (CFS)	89.54	87.44	117.64	286.62	567.62	654.92	336.32	175.82	152.92	138.77	98.24	90.04
Legal Demands Lake to GAGE (CFS)	29.94	29.94	29.94	71.62	71.62	71.62	71.62	71.62	71.62	71.62	29.94	29.94
Legal Demands blw gage to Confluence (CFS)	3.33	3.33	3.33	50.63	50.63	50.63	50.63	50.63	50.63	50.63	3.33	3.33
Total Legal Demands (lake to confluence) CFS	33.27	33.27	33.27	122.25	122.25	122.25	122.25	122.25	122.25	122.25	33.27	33.27
Legally Available Water (CFS)	56.27	54.17	84.37	164.37	445.37	532.67	214.07	53.57	30.67	16.52	64.97	56.77

**Table 4: Median of the Mean Monthly Volumes minus Existing Legal Demands**

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
TOTAL Physical (AF)	5,499.10	4,850.51	7,223.88	17,032.60	34,848.14	38,909.62	20,650.94	10,799.45	9,090.82	8,525.32	5,838.49	5,529.79
Legal Demands WF Lake to gage (AF)	1,840.85	1,662.71	1,840.85	4,261.60	4,403.66	4,261.60	4,403.66	4,403.66	4,261.60	4,403.66	1,781.47	1,840.85
Legal Demands blw gage to Confluence (AF)	204.75	184.94	204.75	3,012.69	3,113.12	3,012.69	3,113.12	3,113.12	3,012.69	3,113.12	198.15	204.75
Total Legal Demands (lake to confluence) AF	2,045.60	1,847.65	2,045.60	7,274.29	7,516.78	7,274.29	7,516.78	7,516.78	7,274.29	7,516.78	1,979.62	2,045.60
Legally Available Water (AF)	3,453.50	3,002.86	5,178.28	9,758.31	27,331.36	31,635.33	13,134.16	3,282.67	1,816.53	1,008.54	3,858.87	3,484.19

17. There are numerous water rights out of Flathead Lake and PPL Montana LLC owns the hydropower water rights for Kerr Dam. PPL Montana LLC and the Confederated Salish and Kootenai Tribes jointly operate Kerr Dam. The two claimed water rights for Kerr Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of PPL Montana LLC's claimed water

rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

18. Kerr Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though PPL Montana LLC hydropower water rights at Kerr Dam require 1,831,306 AF, to meet the hydropower water rights claimed in the adjudication, the records show that Kerr Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

19. Pending an adjudication of PPL Montana LLC hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water above Kerr Dam can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

#### CONCLUSIONS OF LAW

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. 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. (Findings of Fact No. 15 - 19)

### **Adverse Effect**

#### **FINDINGS OF FACT**

23. In the event that valid call is made on water by senior appropriators, the pump can be shut down. Applicant will then purchase water for domestic use from the City of Whitefish.

24. Physical availability has been demonstrated by using a downstream USGS data gaging station showing that there is sufficient water available in the source throughout the proposed period of diversion exceeding the amount requested. Legal availability has been shown by

comparing what is physically available on the source through USGS records and what is legally appropriated using NRIS query system of the DNRC database. Because there is sufficient water to meet all legal demands and the requested flow rate and volume of 22 GPM (0.05 CFS) and 1.42 AF is available, there will be no adverse effect to either upstream or downstream senior appropriators.

### CONCLUSIONS OF LAW

25. 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.
26. 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).
27. 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.
28. 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.

29. 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.

30. 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.

31. In regard to senior hydropower water rights, the facts in this application are distinguishable from those In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLIC) concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production. The proposed appropriation in this case is a surface water appropriation more than 150 miles upstream of Noxon Reservoir and is located above Flathead Lake and Kerr Dam, and below the inflows from the Bureau of Reclamation's Hungry Horse Dam.

Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin, does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista's and PPL Montana's prior appropriations in this basin which has not been closed to appropriation by the

Legislature, does not include the right to prevent this appropriation where Avista and PPL Montana LLC can reasonably exercise their hydropower water rights.

32. 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. (Findings of Fact No. 23 - 24)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

33. Water will be pumped from Whitefish Lake via a pump system consisting of a Franklin 3-Wire QuickPAK 20-3WQP 1.5 which includes a 20 GPM tri-seal pump, 1.5 hp motor, monodrive variable frequency controller and a pressure sensor. The pump will be located inside a 6-inch casing on a stand out in the lake. A 1.25-inch PVC transmission main connected to the pump will convey water for approximately 330 feet to the main house and a 1.25-inch transmission main conveys water back to the lakeshore cabin. Outdoor sprinklers will deliver water for domestic lawn and garden irrigation. The total head pressure to obtain a minimum service pressure of 35 psi at the primary residence is 202 feet. The pump is capable of delivering 22 GPM at 202 feet of head pressure. Pump curve and specifications were included in the application.

#### **CONCLUSIONS OF LAW**

34. 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.

35. 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.

36. 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 (Finding of Fact No. 33).

### **Beneficial Use**

#### **FINDINGS OF FACT**

37. The proposed appropriation is for 22 GPM (0.05 CFS) up to 1.42 AF annually for multiple domestic use (0.53 AF) and domestic lawn and garden irrigation (0.89 AF).

38. Flow rate of 22 GPM is based on a total dynamic head of 202 feet (35 psi) to the main house from POD.

39. Requested volume for the domestic demand was calculated using the Flathead County Regulations for Onsite Sewage Treatment Systems (October 21, 2011) using the design flow of 425 gallons per day. This flow calculates 350 gallons per day for a typical 3-bedroom family dwelling and 75 gallons per day was used for the lakeshore cabin. Utilizing the consumptive use value of 0.12 (Shaffer, 2007) would yield a daily domestic demand of 476 gallons per day (425 gallons + 0.12 \*425 gallons) or **0.53 AF** annually.

40. Requested volume for domestic lawn and garden irrigation on 0.44 acres was calculated using the USDA's Irrigation Water Requirement (IWR) guide for turf grass for a dry year requirement of 17.05 inches with a DNRC standard efficiency of 70% for lawn and garden totaling **0.89 AF** (17.05 inches ÷ 12 inches x 0.44 acres ÷70% efficiency).

#### **CONCLUSIONS OF LAW**

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

42. 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).

43. Applicant proposes to use water for multiple domestic use (which includes garden and landscaping irrigation, also commonly referred to as 'lawn and garden irrigation') which is a recognized beneficial use § 85-2-102(4), MCA. "Domestic use" by DNRC rule means those water uses common to household including...(g) garden and landscaping irrigation up to five acres." ARM 36.12.101(21). Applicant has proven by a preponderance of the evidence domestic and domestic lawn and garden are beneficial uses and that 1.42 AF of diverted volume and 22 GPM (0.05 CFS) of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (Findings of Fact No. 37 - 40)

### **Possessory Interest**

#### **FINDINGS OF FACT**

44. The applicant signed 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

45. 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.

46. 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.

47. 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. (Finding of Fact No. 44)

### **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. 76LJ 30071030 should be GRANTED.

The Department determines the applicant may divert water from Whitefish Lake, by means of a pump, from January 1 through December 31 at 22 GPM (0.05 CFS) up to 1.42 AF, from a point in the SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> of Section 22, Township 31N, Range 22W, Flathead County, for multiple domestic use from January 1 through December 31 and domestic lawn and garden irrigation use from April 15 through October 15 on 0.44 acres. The place of use is Lot 2B in the SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub> and NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 22, Township 31N, Range 22W, Flathead 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 26th day of March 2015

/Original signed by Marc Pitman/

Marc Pitman, Manager

Kalispell Regional Water Resources Office

Department of Natural Resources and Conservation