

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41K 30072520 BY CHASE A. BRADY)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On February 26, 2015, Chase A. Brady (Applicant) submitted Application for Beneficial Water Use Permit No. 41K 30072520 to the Havre Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 425 gallons per minute (GPM) up to 58.00 acre-feet (AF) for pivot sprinkler irrigation use on 29.00 acres. The expected amount of water that is expected to be consumed is 46.4 AF based on an efficiency rating of 80% that could be obtained by the proposed pivot irrigation system. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of August 4, 2015. An Environmental Assessment for this Application was completed on November 16, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Basin Closure Area Addendum, Form 600-BCA
- Attachments
- Maps and aerial photos depicting the point of diversion, conveyance facilities, place of storage and place of use
- Flow Data compiled by Kim Hershberger, Montana State University Extension Water Quality and Alan Rollo, Coordinator Muddy Creek Task Force

Information within the Department's Possession/Knowledge

Department Hearings Orders

Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 41K 30072520.

Final Order No. 41K-30049120 by Power-Teton County Water and Sewer District (Final Order 2014)

- Final Order Application No. 41K-30045713 by Nicholas D Konen (DNRC Final Order 2011)
- Final Order Application No. 41K-30043385 by Marc E. Lee (DNRC Final Order 2011)

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 Muddy Creek, by means of a pump, from May 15 to September 15 at 425 GPM up to 58.00 AF, from a point in the NWSESE of Section 26, Twp. 23N, Rge. 2W, Teton County, for sprinkler irrigation use from May 15 to September 15. The Applicant proposes to irrigate crops on 29.00 acres. The place of use is generally located SESE of Section 26, Twp. 23N, Rge. 2W, Teton County. The map located on the following page depicts the location of the proposed project:



2. This application faces three obvious hurdles. First, the application seeks to overcome the upper Missouri Legislative Closure by utilizing the exception for appropriations which would reduce erosive flows in Muddy Creek. Second, The US Fish and Wildlife Service holds a large diversionary right on Muddy Creek below the Applicant’s proposed point of diversion. The Applicant provides specific information found in a previous Department decision describing USFWS exercise of this right to demonstrate that the right does not render water legally unavailable. Last, the Upper Missouri Closure was enacted to protect the rights of downstream hydropower producers, specifically the PPL dams at Great Falls. Through the reduction of flows in Muddy Creek, erosion occurring within the Muddy Creek drainage will be reduced. The Applicant proposes to mitigate the effects of the proposed appropriation by not diverting water when US Fish and Wildlife Service is diverting water from Muddy Creek in addition to purchasing contract water from the Bureau of Reclamation at Canyon Ferry Dam.

BASIN CLOSURE

FINDINGS OF FACT

3. Muddy Creek is in the Upper Missouri Basin Closure which provides that the Department may not grant an application for a permit to appropriate water in Upper Basin until the final decrees for all basins within the Upper Basin have been issued, subject to certain exceptions. Muddy Creek has a specific exception applying to it. That exception states that the closure does not apply to “an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage.” (§ 85-2-434, MCA).
4. The proposed irrigation use will reduce flows in Muddy Creek, therefore, reducing the amount of erosion occurring within the Muddy Creek drainage.

CONCLUSIONS OF LAW

5. DNRC cannot grant an application for a permit to appropriate water within the upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin. § 85-2-343(1), MCA. The upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA).
6. This Application is for irrigation using water diverted from Muddy Creek. The Application falls under the exceptions for the basin closure, § 85-2-343, MCA.

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

GENERAL CONCLUSIONS OF LAW

7. 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 . . .

8. 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

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

9. 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.

10. 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).

11. 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.

12. 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

13. As part of the ongoing studies conducted by Department of Land Resources and Environmental Sciences, Montana State University, Extension Water Quality and Alan Rollo, Coordinator Muddy Creek Task Force, flows in Muddy Creek at Cordova have been measured daily from April through October one mile upstream of Applicant's point of diversion from 2005-2007. These measurements provide the basis for Applicant's physical availability analysis and median of the mean flow in Muddy Creek for April 15 through September 15 which is the

Applicant’s proposed period of diversion. There are no intervening water uses of record with the Department. As such, the gaged flow records are unadjusted.

14. These flow measurements and studies also establish that flows in Muddy Creek routinely exceed the monthly median of the mean during the irrigation season due to significant amounts of waste water and return flows from the Greenfields Irrigation District Project that discharge into Muddy Creek.

15. The following presents the amounts of water found in Table 1 the Department finds to be physically available at the Applicant’s proposed point of diversion based on the measured flow data taken from Muddy Creek at the Cordova site:

TABLE 1

<i>PHYSICAL FLOW RATE ANALYSIS (IN CFS)</i>	Apr	May	Jun	Jul	Aug	Sep
Median of Mean Flow at Gage	16.00	17.00	25.00	22.00	18.00	17.00
<i>PHYSICAL VOLUME ANALYSIS (IN AF)</i>						
Volume Physically Available at Gage	493.77	1130.31	1427.76	1401.98	1062.88	543.34

16. The Department finds that water is physically available for the proposed flow rate of 425 GPM, or .95 CFS, up to 58.00 AF for the entire proposed April 15 – September 15 period of diversion.

CONCLUSIONS OF LAW

17. 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.”

18. 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).

19. 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).

20. 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 13-16)

Legal Availability:

FINDINGS OF FACT

21. Consistent with recent Department hearings orders, this Application also presents two primary issues regarding legal availability. The first issue is whether water is legally available on the impacted reach of Muddy Creek. The second issue is whether water is legally available on the impacted reach of the Missouri River from the confluence of the Sun River with the Missouri River downstream to the PPL dams under the ownership of Northwestern Energy at Great Falls.

Muddy Creek

22. The Department defined the potential area of impact as the area downstream of the proposed point of diversion approximately 6 miles to the Power gaging site because within this reach inflows to Muddy Creek begin to significantly exceed diversions. The Department provided a listing of the existing water rights including the appropriation proposed in this Application.

23. The Department then compared the physical water availability to the amount of water already appropriated under the identified existing water rights. The volume of water rights downstream of the requested point of diversion was calculated by dividing the claimed volumes of the downstream rights by the number of months of the claimed period of use.

24. The comparison of physically available water found subtracting the existing legal demands in order to determine the flow and volume legally available are presented in the following Table 2:

TABLE 2

<i>LEGAL FLOW RATE ANALYSIS (IN CFS)</i>	Apr	May	Jun	Jul	Aug	Sep
Median of Mean Flow at Gage	16.00	17.00	25.00	22.00	18.00	17.00
Diverted Legal Demand Flow	14.50	14.50	14.50	14.50	14.50	14.50
Flow Legally Available	1.50	2.50	10.50	7.50	3.50	2.50
<i>LEGAL VOLUME ANALYSIS (IN AF)</i>						
Volume Physically Available at Gage	493.77	1130.31	1427.76	1401.98	1062.88	543.34
Intervening Legal Demand Volume	242.24	256.82	256.82	256.82	256.82	256.82
Volume Physically Available	251.53	873.49	1170.94	1145.16	806.06	286.52

*** It should be noted that the USFS Benton Lake Statement of Claim No. 41K 188174 00 is not included in the tabulation of legal demands in Table 2. This water right will be discussed the following findings of fact.*

25. In order to determine legal availability within remaining reaches of Muddy Creek, flow measurement data for Muddy Creek at Power was also provided for the months of May through September for the years 2005-2008 and for the year 2013. Similar to the Cordova gage site, flows at the Power site are monitored as a part of the ongoing studies regarding erosion and sediment loads. There were only four days of measurement data available for the year 2007. Therefore, the month of April was excluded from this analysis due to a lack of sufficient data necessary to determine a longer term monthly median flow.

26. These flow measurements identify additional contributions to Muddy Creek between the Cordova and Power gage sites. The flow data from both gage sites establish that flows in Muddy Creek routinely exceed the monthly median of the mean during the irrigation season due to significant amounts of waste water and return flows from the Greenfields Irrigation District Project that discharge into Muddy Creek. The following Table 3 presents the median flow and volumes based on the aforementioned flow data taken at the Power site:

TABLE 3

Muddy Creek at Power

<i>FLOW RATE ANALYSIS (IN CFS)</i>	May	Jun	Jul	Aug	Sep
Median of Mean Flow at Gage	31.00	47.00	50.00	49.00	17.00
<i>VOLUME ANALYSIS (IN AF)</i>					
Median Volume at Gage	1844.19	2796.03	2974.50	2915.01	1011.33

27. Median of the mean monthly flows at the Applicant’s point of diversion are sufficient to satisfy the legal demands of the water rights on the reach of Muddy Creek to Spring Coulee which is the next major contributor of flows to Muddy Creek.

28. The Department has previously found that the median of the mean monthly flows at the Power site are sufficient to satisfy the legal demands of the water rights on the six-mile reach of Muddy Creek to Spring Coulee with the exception of Statement of Claim No. 41K 188174 00 (see *In the Matter of Application For Beneficial Water Use Permit No. 41K-30049120 by Power-Teton County Water and Sewer District* (DNRC Final Order 2014).

29. Approximately three miles below the Power site, the U.S. Fish and Wildlife Service (USFWS) has a large pump station which diverts water from Muddy Creek to the Benton Lakes National Wildlife Refuge nearly 15 miles to the east pursuant to Statement of Claim No. 41K 188174 00, (the Benton Lake Right). This right claims a flow rate of 50 CFS, a volume of 14,600 AF, and a yearlong period of use.

30. Based upon this evidence presented in the matter of Power-Teton County Water and Sewer District in addition to the additional flow data collected at the Power site, water may reasonably be considered legally available when USFWS is not diverting water from Muddy Creek pursuant to Statement of Claim No. 41K 188174 00.

31. Nothing in this preliminary determination shall be construed to prevent the USFWS from exercising the Benton Lake Water Right subject to the terms of the Decreed Right and the historic beneficial use of the right.

32. Applicant shall communicate with Benton Lake Refuge staff and ascertain the probable pumping schedule prior to April 15 of each year.

33. Based on the analysis comparing physical water availability and existing downstream demands, the Department finds that water is legally available for the proposed flow rate of 425 GPM up to 58.00 AF of volume for the entire proposed April 15 – September 15 period of diversion when the following condition is applied as described :

USFWS BENTON LAKE REQUIREMENT

THE APPROPRIATOR MAY ONLY DIVERT DURING PERIODS WHEN THE APPROPRIATOR OBTAINS CONFIRMATION FROM USFWS THAT IT IS NOT DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF CLAIM NO. 41K 188174 00. APPROPRIATOR SHALL KEEP A RECORD OF THE NAME OF THE

INDIVIDUAL AT THE USFWS CONTACTED AND DATES FOR WHICH CONFIRMATION WAS OBTAINED THAT THE USFWS WOULD NOT BE DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF CLAIM NO. 41K 188174 00 WHEN THE APPROPRIATOR IS DIVERTING WATER PURSUANT TO THIS CONDITION.

MEASUREMENT CONDITION

THE APPLICANT SHALL ALSO INSTALL A FLOWMETER/TOTALIZER IN THE DIVERSION PIPE WHICH CONVEYS WATER TO THE PLACE OF USE. WATER WILL NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HAVRE WATER RESOURCES REGIONAL OFFICE.

MISSOURI RIVER

34. In addition to the reach of Muddy Creek identified by the Applicant in the Applicant's legal demands analysis, PPL Montana, now Northwestern Energy has large senior water rights on the main-stem of the Missouri River which are only rarely satisfied. These rights constitute a legal demand upon the water in Muddy Creek which the Department must consider. (See *In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713* by Nicholas D. Konen (DNRC Final Order 2011), *In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385* by Marc E. Lee (DNRC Final Order 2011) and *In the Matter of Application For Beneficial Water Use Permit No. 41K-30049120* by Power-Teton County Water and Sewer District (DNRC Final 2014)

35. The Applicant has agreed to offset the depletion to the Missouri River caused by the proposed Muddy Creek depletion by purchasing a water service contract from the Bureau of Reclamation (BOR) at Canyon Ferry Dam as a condition to granting this Application. Based upon the condition that the Applicant secures a contract with BOR for the expected amount of

water that is expected to be consumed by the Applicant's irrigation use which is 46.4 AF per year. Mitigating the volume depleted from the Missouri River as a result of the Applicant's use, the Department finds that water can be considered legally available in the Missouri River based upon the Applicant's plan to prevent adverse effect to hydropower rights located near Great Falls. This condition is described in detail in FOF 44 in the adverse effect section of this document.

CONCLUSIONS OF LAW

36. 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).

37. 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.

38. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

39. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

40. *In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management* (DNRC Final Order 1991)(Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

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 21-35)

Adverse Effect

FINDINGS OF FACT

41. This preliminary determination addresses the issue of whether the proposed new irrigation use will create an adverse effect to impacted reach of Muddy Creek and impacted reach of the

Missouri River from the confluence of the Sun River with the Missouri River downstream to the PPL dams at Great Falls.

42. The Applicant has a plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of a prior appropriator will be satisfied. The Applicant proposes to cease diverting water completely upon call of water. This proposed appropriation will divert water with an electric pump, and therefore, in the event a call is made, this appropriation can be stopped by turning off the electricity to the pump.

43. In addition to the condition set forth in FOF 33 in the legal availability section of this document, the Applicant shall purchase a Water Service Contract from the U.S. Bureau of Reclamation for the Applicant's consumed volume in order to off-set surface water depletions and adverse effects to the mainstem of the Missouri River. The Department finds that the expected amount of water that is expected to be consumed is 46.4 AF based on an efficiency rating of 80% that could be obtained by the proposed pivot irrigation system.

44. The following condition shall also be applied in order to prevent an adverse effect:

MISSOURI RIVER MITIGATION PLAN

PRIOR TO COMMENCING DIVERSIONS UNDER THIS PERMIT THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE FULL VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL REPLACE AN EQUIVALENT AMOUNT OF WATER TO THE MAINSTEM OF THE MISSOURI RIVER ABOVE RAINBOW DAM IN THE FOLLOWING MANNER: THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATER AND PROVIDE FOR LEGAL AVAILABILITY OF SURFACE WATER UNDER THIS PERMIT THROUGH THE PURCHASE OF A U.S. BUREAU OF RECLAMATION (BOR) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE EQUAL TO THE VOLUME THAT THE APPROPRIATOR CONSUMES FROM MUDDY CREEK IN THE AMOUNT OF UP TO 46.6 ACRE FEET FROM APRIL 15 TO SEPTEMBER 15 INCLUSIVE OF EACH YEAR. DELIVERIES OF

WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATORS CONTRACT WITH THE BOR MAY PROVIDE THAT IN THE CALENDAR YEARS SUBSEQUENT TO THE FIRST CALENDAR YEAR IN WHICH WATER IS TO BE PUT TO BENEFICIAL USE, THE CONTRACT VOLUME DELIVERED MAY BE EQUAL TO BUT NOT LESS THAN THE VOLUME OF WATER ACTUALLY CONSUMED BY THE APPROPRIATOR IN THE PREVIOUS CALENDAR YEAR. A DELIVERY SCHEDULE ALLOWED BY THE BOR AND WHICH RESULTS IN THE FULL REPLACEMENT OF THE PRIOR CALENDAR YEARS CONSUMED VOLUME DURING THE FOLLOWING CALENDAR YEAR SHALL BE DEEMED SUFFICIENT UNDER THIS PERMIT. APPROPRIATOR SHALL SUBMIT TO THE HAVRE REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH BOR AS DESCRIBED ABOVE. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES.

CONCLUSIONS OF LAW

45. 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.
46. 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).

47. 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.

48. 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.

49. 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.

50. 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.

51. 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 41 - 44)

Adequate Diversion

FINDINGS OF FACT

52. Water will be diverted from Muddy Creek via a pumping system capable of delivering 425 GPM. The means of diversion will use a Cornell 3WH 25 HP pump. The pump, with total

dynamic head of 160 feet, is connected to 780 feet of 6” PIP pipe which will convey water to a Reinke brand center pivot.

53. The data sheet for the proposed pump shows that water can be diverted at the rate requested. The irrigation system was designed by a local dealer who specializes in the installation of pivot irrigation systems.

CONCLUSIONS OF LAW

54. 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.

55. 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.

56. 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 52 - 53).

Beneficial Use

FINDINGS OF FACT

57. Irrigation is a recognized beneficial use. The flow rate of 425 GPM requested is necessary to operate the sprinkler system accounting for elevation difference from the river bank to the place of use and friction losses associated with the pipe length and type. The requested flow rate equates to 14.65 GPM per acre. This is more than the 6-8 GPM per acre the Department typically recognizes as used for sprinkler irrigation. The Applicant states that it is their intention to irrigate the place of use in a shorter duration of time as water may only be available for a short period.

58. Total requested volume is 58.00 AF or 2 AF per acre is slightly less than the water use standards set forth in ARM 36.12.115(2)(e) for sprinkler irrigation use with 70% efficiency located in Climatic Area III (*ARM 36.12.115 (2)*). The Applicant plans on irrigation of small grains such as barley. As such, 2 AF per acre or 58 AF volume of water will meet the irrigation requirements on the 29 acre place of use. The requested April 15- September 15 period of use is less than the DNRC standards for Climatic Area III, Type Moderate (*ARM 36.12.112 (1)(c)(iii)*).

CONCLUSIONS OF LAW

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

60. 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).

61. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. The Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 58.00 AF of diverted volume and 425 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 57 - 58)

Possessory Interest

FINDINGS OF FACT

62. 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

63. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

64. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the

authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

65. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 62)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41K 30072520 should be **GRANTED.**

The Department determines the applicant may divert water from Muddy Creek, by means of a pump, from May 15 to September 15 at 425 GPM up to 58.00 AF, from a point in the NWSESE of Section 26, Twp. 23N, Rge. 2W, Teton County, for sprinkler irrigation use from May 15 to September 15. The Applicant proposes to irrigate crops on 29.00 acres. The place of use is generally located SESE of Section 26, Twp. 23N, Rge. 2W, Teton County. The application will be subject to the following conditions, limitations or restrictions.

1. USFWS BENTON LAKE REQUIREMENT

THE APPROPRIATOR MAY ONLY DIVERT DURING PERIODS WHEN THE APPROPRIATOR OBTAINS CONFIRMATION FROM USFWS THAT IT IS NOT DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF CLAIM NO. 41K 188174 00. APPROPRIATOR SHALL KEEP A RECORD OF THE NAME OF THE INDIVIDUAL AT THE USFWS CONTACTED AND DATES FOR WHICH CONFIRMATION WAS OBTAINED THAT THE USFWS WOULD NOT BE DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF

CLAIM NO. 41K 188174 00 WHEN THE APPROPRIATOR IS DIVERTING WATER PURSUANT TO THIS CONDITION.

2. MEASUREMENT CONDITION

THE APPLICANT SHALL ALSO INSTALL A FLOWMETER/TOTALIZER IN THE DIVERSION PIPE WHICH CONVEYS WATER TO THE PLACE OF USE. WATER WILL NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HAVRE WATER RESOURCES REGIONAL OFFICE.

3. MISSOURI RIVER MITIGATION PLAN

PRIOR TO COMMENCING DIVERSIONS UNDER THIS PERMIT THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE FULL VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL REPLACE AN EQUIVALENT AMOUNT OF WATER TO THE MAINSTEM OF THE MISSOURI RIVER ABOVE RAINBOW DAM IN THE FOLLOWING MANNER: THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATER AND PROVIDE FOR LEGAL AVAILABILITY OF SURFACE WATER UNDER THIS PERMIT THROUGH THE PURCHASE OF A U.S. BUREAU OF RECLAMATION (BOR) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE EQUAL TO THE VOLUME THAT THE APPROPRIATOR CONSUMES FROM MUDDY CREEK IN THE AMOUNT OF UP TO 46.6 ACRE FEET FROM APRIL 15 TO SEPTEMBER 15 INCLUSIVE OF EACH YEAR. DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE

COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATORS CONTRACT WITH THE BOR MAY PROVIDE THAT IN THE CALENDAR YEARS SUBSEQUENT TO THE FIRST CALENDAR YEAR IN WHICH WATER IS TO BE PUT TO BENEFICIAL USE, THE CONTRACT VOLUME DELIVERED MAY BE EQUAL TO BUT NOT LESS THAN THE VOLUME OF WATER ACTUALLY CONSUMED BY THE APPROPRIATOR IN THE PREVIOUS CALENDAR YEAR. A DELIVERY SCHEDULE ALLOWED BY THE BOR AND WHICH RESULTS IN THE FULL REPLACEMENT OF THE PRIOR CALENDAR YEARS CONSUMED VOLUME DURING THE FOLLOWING CALENDAR YEAR SHALL BE DEEMED SUFFICIENT UNDER THIS PERMIT. APPROPRIATOR SHALL SUBMIT TO THE HAVRE REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH BOR AS DESCRIBED ABOVE. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES.

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 30th day of November 2015

/s/ Matt Miles

Matt Miles, Deputy Regional Manager
Havre Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 1st day of December, 2015 by first class United States mail.

CHASE A. BRADY
341 4TH LN NE
FAIRFIELD, MT 59436

/S/ MIKE MAHOWALD

12/1/15

NAME

DATE