

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 42J 30072589
BY GERALD AND MARY DELL ELLIS**) **PRELIMINARY DETERMINATION TO
GRANT PERMIT**

On March 2, 2015, Gerald and Mary Dell Ellis (Applicant) submitted Application for Beneficial Water Use Permit No. 42J 30072589 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 2780 GPM and 914 AF for sprinkler irrigation. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of April 13, 2015. An Environmental Assessment for this Application was completed on March 16, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps:
 - USDA Farm Service Agency aerial photograph showing place of use, point of diversion and conveyance pipeline.
 - Montana DNRC GWRAT aerial photograph place of use, point of diversion and conveyance pipeline.

Information Received after Application Filed

- Fax from Gerald Ellis, Applicant, to Mark Elison, Department Hydrologist/Specialist, dated March 13, 2015, detailing the proposed flow meter and describing proposed use schedule.

Information within the Department's Possession/Knowledge

- USGS gage #06326500 Powder River near Locate, Montana.

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

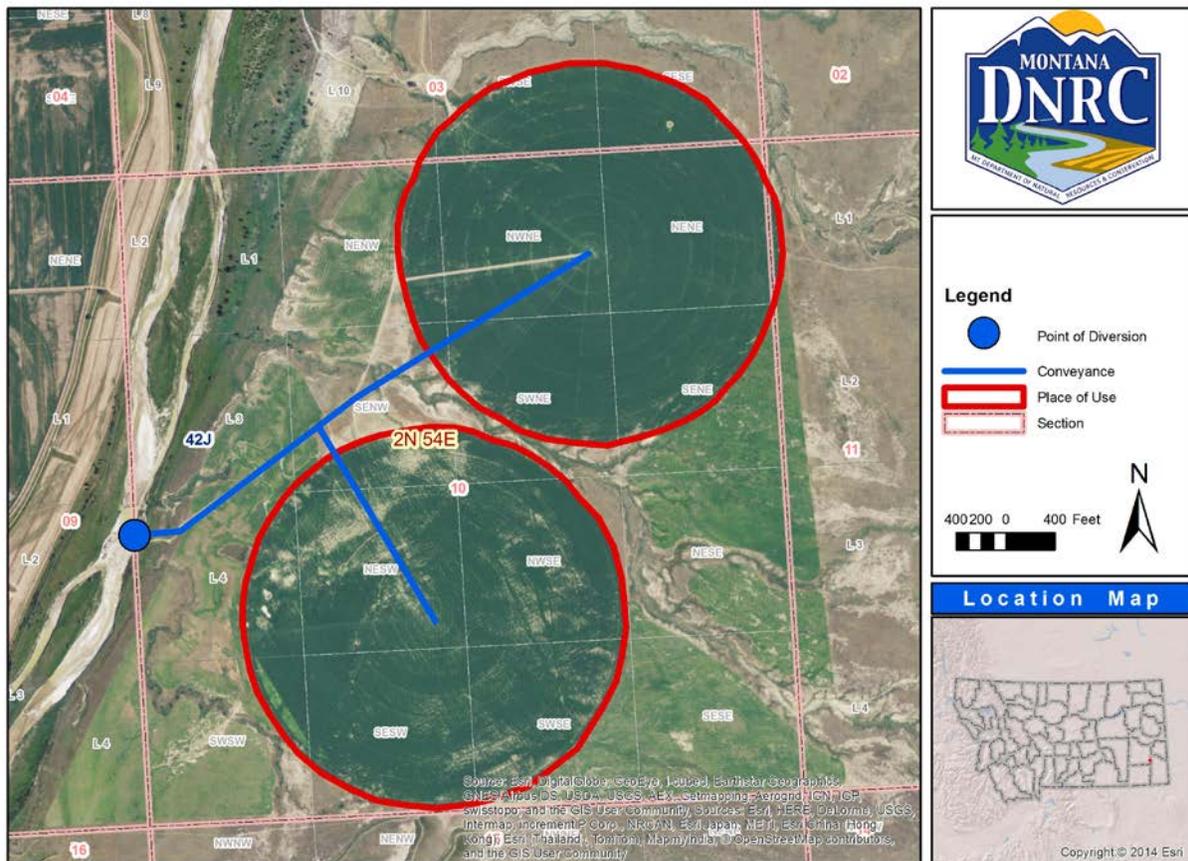
NOTE: Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; AU means animal unit; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The applicant proposes to divert water from the Powder River, by means of a pump, from April 15 to October 31 at 2780 GPM (6.2 CFS) up to 914 AF, from a point in the NWNWSW Section 10 T2N R54E Custer County, for center pivot sprinkler irrigation use from April 15 to October 31. The applicant proposes to irrigate 340 AC. The place of use is generally located in Section 10, S2 Section 3 and W2NWNW Section 11, T2N R54E Custer County. The place of use is approximately 13 miles northeast of Powderville, Montana.

Figure 1. Map Showing Place of Use, Point of Diversion and Conveyance for 42J 30072589



2. Based on 70% on-farm efficiency for sprinkler irrigation, the proposed consumptive use is 639.8 AF (914 AF * .70).

§ 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, 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).

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

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

Physical Availability

FINDINGS OF FACT

9. The Applicant is requesting 2780 GPM (6.2 CFS) up to 914 AF.

10. The nearest USGS gaging station, Powder River near Locate Montana (06326500) was used for the physical availability analysis. This gage is located approximately 40 miles downstream of the proposed point of diversion and has a 76 year period of record.

11. There are 53 legal demands between the proposed point of diversion and the downstream gage. In order to determine the amount of water physically available at the point of diversion, the Department added the existing legal demands to the median of the mean monthly flow rate recorded at the USGS gage on the Powder River near Locate, Montana (Table 1).

Table 1. Physical Availability (CFS)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Median of monthly discharge at gage	579.5	991.8	1339.5	443.5	167.7	93.7	188.3
Legal demands* between gage and POD	385.6	426.5	430.9	430.9	420.7	382.8	279.6
Physically Available at POD (Median plus demands)	965.1	1418.3	1770.4	874.4	588.4	476.5	467.9

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

12. 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 the median monthly

flow at the gage by 1.98 and by the number of days in the month. Legal demands between the gage and the point of diversion were added to determine the physically available volume at the point of diversion.

Table 2. Physical Availability (AF)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Median of monthly discharge at gage	34422.3	60876.7	79566.3	27222.0	10293.4	5562.8	11554.8
Legal demands* between gage and POD	1426.0	1936.4	1886.0	1948.8	1910.7	1611.4	1133.3
Physically Available at POD (Median plus demands)	35848.3	62813.0	81452.3	29170.9	12204.1	7174.2	12688.1

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

CONCLUSIONS OF LAW

13. 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.”

14. 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).

15. 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).

16. The Applicant has proven by a preponderance of the evidence that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9 -12).

Legal Availability

AREA OF POTENTIAL EFFECT

17. The Powder River Basin, basin 42J, has been issued a final decree by the Montana Water Court. The Department identified an area of effect extending 40 miles downstream from the

proposed point of diversion. This area is appropriate because the gage used to determine physical availability of water is located approximately 40 miles downstream of the proposed point of diversion. Because the gage will reflect the water contribution of tributaries, the area of effect should extend past the tributaries to ensure all existing water rights are considered. The extensive area of effect was also appropriate because the Applicant's pivots are already installed and operating illegally.

FINDINGS OF FACT

18. The source of water for this appropriation is the Powder River, a perennial flowing stream. All water rights and reservations located between the proposed point of diversion and the gage, approximately 40 miles downstream were included in the legal availability analysis.

19. There are 53 water rights and the Montana Department of Fish Wildlife and Parks instream reservation below the proposed point of diversion within the area of effect. Monthly volumes for irrigation legal demands were calculated by multiplying maximum acres by the standard of 45% efficiency in climate region 2 (3.58 AF/AC) and distributing that volume evenly across the number of days in the period of use. Legal demands for livestock were calculated using the Department standard of 0.017 AF/AU/YR and the number of AU claimed.

Table 3. Comparison of Physical Availability and Legal Demands (CFS)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Physical Availability	965.1	1418.3	1770.4	874.4	588.4	476.5	467.9
Legal Demands	732.6	850.5	614.9	500.9	435.2	391.7	289.1
Physical Availability minus Legal Demands	232.5	567.8	1155.5	373.5	153.2	84.8	178.8

Table 4. Comparison of Physical Availability and Legal Demands (AF)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Physical Availability	35848.3	62813.0	81452.3	29170.9	12204.1	7174.2	12688.1
Legal Demands	22069.0	28000.4	12832.0	6251.8	2801.7	2138.4	1712.4
Physical Availability minus Legal Demands	13779.3	34812.6	68620.3	22919.1	9402.4	5035.8	10975.7

20. The amount of water physically available exceeds the legal demands by a minimum of 84.8 CFS and 5035.8 AF in any month. The Applicant is requesting 2780 GPM (6.2 CFS) up to 914 AF/YR.

CONCLUSIONS OF LAW

21. 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).

22. 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.

23. 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.

24. 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.

25. *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).

26. 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);

27. 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 18 - 20).

Adverse Effect

FINDINGS OF FACT

28. The Applicant’s plan to not create adverse effect is to shut down their diversion if call is made. The pump can be turned off and/or removed from the river.

29. The flow rate and volume physically available at the point of diversion exceed the legal demands throughout the proposed period of diversion.

30. The Department also looked specifically at the instream flow held by the Montana Department of Fish, Wildlife and Parks (DFWP) to determine is there could be adverse effect to that right. DFWP has not made a call on the Powder River. The Department looked at all four gages on the Powder River, Moorhead, Locate, Mizpah and Broadus. Mizpah is 1928-1933 and Broadus is 1982-1992. The other two have continuous records back to the late twenties (Moorhead) or late thirties (Locate). The research found the following information. The Department determined DFWP water right will not be adversely affected in most months and a constant call will not have to be made by DFWP on the Powder River.

Gage Name	Months of Record	Months DFWP Water Right Not Met	Percentage of Months DFWP Not Met
Moorhead	996	75	7.53
Locate	912	62	6.80
Mizpah	54	2	3.70
Broadus	88	11	12.50

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. 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.

37. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992)(applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

38. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in

legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See In re Application No. 72948-G76L by Cross, (DNRC Final Order 1991); see also In re Application No. 75997-G76L by Carr, (DNRC Final Order 1991).

39. 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 28 - 30)

Adequate Diversion

FINDINGS OF FACT

40. The proposed means of diversion is a 6-inch Cornell trailer mounted pump powered by an 8.1 L John Deere diesel engine. From the pump there is approximately 1775 feet of 12 inch buried PVC pipe to where the pipe splits. From the split there is approximately 2600 feet of 12 inch buried PVC pipe to the north pivot and 1850 feet of 12 inch buried PVC pipe to the south pivot (Figure 1).

41. The pivots are Valley Standard 8000 9-span pivots covering 170 AC each and operating at 45 psi to deliver 1390 GPM. The entire irrigation system was designed by Agri Industries, a known irrigation design company, in Miles City, Montana. The Applicant proposes to measure water use with a totalizing McPropeller Flowmeter.

42. The pivots have been operated for three years. Although that operation was illegal under the Montana Water Use Act, the operation demonstrates that the diversion and conveyance facilities are adequate.

CONCLUSIONS OF LAW

43. 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.

44. 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.

45. 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).

46. 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 40 - 42)

Beneficial Use

FINDINGS OF FACT

47. The proposed use is irrigation which is a recognized beneficial use under the Montana Water Use Act.

48. The proposed flow rate of 2780 GPM (6.2 CFS) is based upon the specifications of the pivots. Each pivot is designed to operate at 1390 GPM and the requested flow rate is for both pivots operating simultaneously (8.2 GPM/AC).

49. The requested volume of 914 AF (2.7 AF/AC) is within Department rules for sprinkler irrigation in climatic region 1 (2.63 – 3.04 AF/AC).

CONCLUSIONS OF LAW

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

51. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to

sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

52. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 2780 GPM up to 914 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA (FOF 47 - 49)

Possessory Interest

FINDINGS OF FACT

53. 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

54. 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.

55. 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.

56. 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 53)

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. 42J 30072589 should be **GRANTED**.

The Department determines the applicant may divert water from the Powder River, by means of a pump, from April 15 through October 31 at 2780 GPM up to 914 AF, from a point in the NWNWSW Section 10 T2N R54E, Custer County, for irrigation on 340 acres from April 15 through October 31. The place of use is located in Section 10, S2 Section 3 and W2NWNW Section 11, all in T2N R54E, Custer 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 Preliminary Determination to Grant Application for Beneficial Water Use Permit No. 42J 30072589

deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 31st day of August 2015.

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