

**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. 41T 30072793 BY State of Montana-Trust Lands</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On April 24, 2015, the State of Montana-Trust Lands Division (Applicant) submitted Application for Beneficial Water Use Permit No. 41T 30072793 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 43.6 acre-feet (AF) volume annually for stock use. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of July 8, 2015. An Environmental Assessment for this Application was completed on July 10, 2015.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Reservoir Addendum
- Map: Aerial photo showing location of reservoir
- Variance request from flow measurement requirements

Additional Information Received

- Revised attachments received June 16, 2015
- Request by Applicant to include calculated evaporation on permit application, received July 2, 2015

- Request by Applicant to add Richard P and Janet J Bergum as co-owners to water right, received July 7, 2015
- Request by Applicant to reduce application volume to 43.6 AF, received July 9, 2015

Information within the Department’s Possession/Knowledge

- List of existing water rights on the source

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).

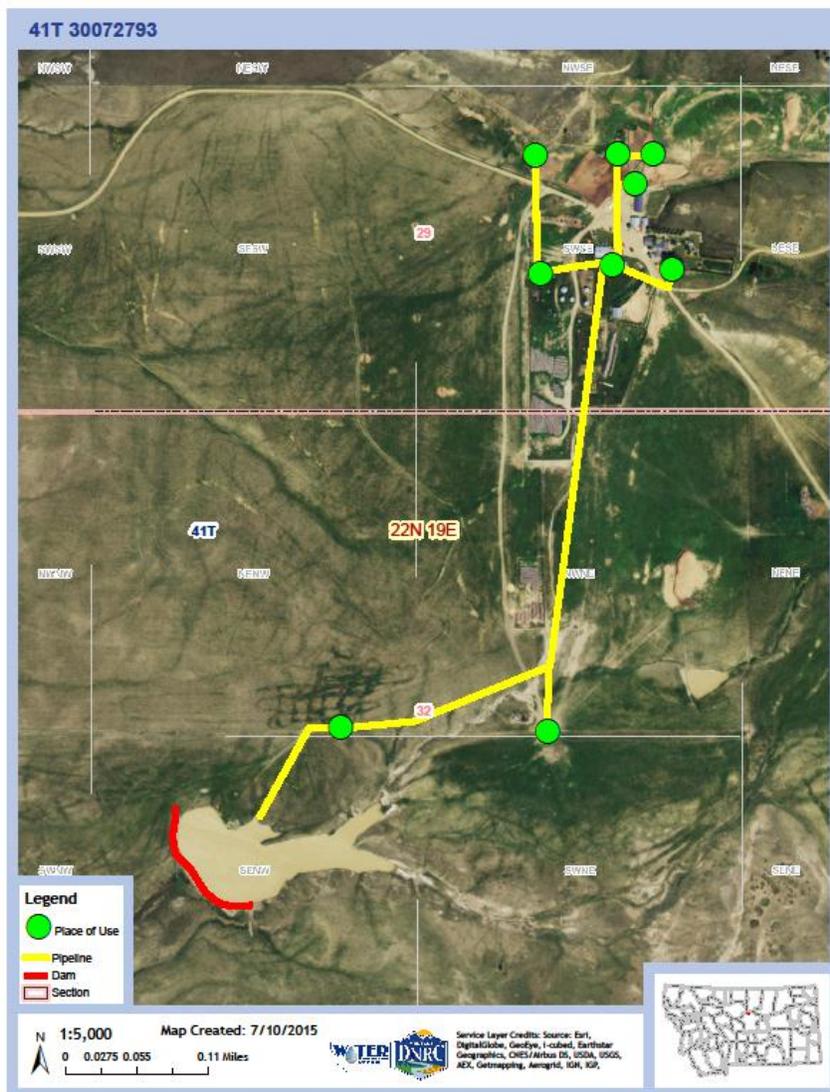
**PROPOSED APPROPRIATION**

**FINDINGS OF FACT**

1. The Applicant proposes to divert water from an Unnamed Tributary (UT) to Cutbank Creek, by means of a dam, from January 1- December 31, up to 43.6 AF per year. The initial application requested up to 58.6 AF of volume annually to account for the capacity of the reservoir as well as evaporation; however, based on the Department’s calculation of physical availability and legal demands as identified in the Technical Report the Applicant lowered the requested volume to 43.6 AF. The proposed point of diversion (POD) is in the NWSENW Section 32, T22N, R19E, Fergus County. The proposed diversion will create a reservoir for stock use from January 1-December 31. The reservoir is on-stream and has a maximum surface area of 4.5 acres, maximum depth of 23.4 feet, and total capacity of 42.1 AF. The places of use for this water right include the reservoir itself in the SENW Section 32, T22N, R19E, Fergus County, and stock watering locations as follows:

- SWNWNE Section 32, T22N, R19E, Fergus County
- SENENW Section 32, T22N, R19E, Fergus County
- NWSWSE Section 29, T22N, R19E, Fergus County
- SWSWSE Section 29, T22N, R19E, Fergus County
- SESWSE Section 29, T22N, R19E, Fergus County (2 POU’s)
- NESWSE Section 29, T22N, R19E, Fergus County (3 POU’s)

2. A pump will be installed within the reservoir as a secondary point of diversion. This pump will supply a stock watering system hooked up to a pipeline which will serve 9 places of use. The same livestock will be watered on the pipeline system and the reservoir; the pipeline system was developed to allow for better pasture management.
3. The annual consumptive use of the proposed appropriation is 25 AF. This includes stock consumptive use (8.5 AF) and evaporation from the reservoir (16.5 AF).



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

**GENERAL CONCLUSIONS OF LAW**

4. 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 . . .

5. 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.

6. 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.

7. 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).

8. 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.

9. 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

10. The source from which the Applicant plans to divert water using an on-stream dam is a UT to Cutbank Creek. The UT is an un-gauged, ephemeral stream. A variance from flow measurement requirements was requested by the Applicant and granted by the Department due to the nature of the source. To determine physical availability of water in this UT, the Orsborn procedure for estimating mean stream flow was used. This technique is listed under Administrative Rules of Montana (ARM) 36.12.1702(6) as a professionally documented hydrologic method for estimating annual runoff.

11. To apply the Orsborn method, the watershed drainage area in square miles and the mean basin precipitation in inches must be determined. The Orsborn regional equation for Eastern Montana is  $QAA=0.0222(PxA)^{0.9042}$ , where:

QAA= mean annual stream flow (cubic feet per second)

P= mean basin precipitation (inches)

A= watershed drainage area (square miles)

Mean annual basin precipitation was determined to be 14.8 inches using the NRCS PRISM Climate Map in conjunction with ArcGIS. The watershed drainage area was delineated using ArcGIS and determined to be 0.23 square miles. Once mean annual stream flow was calculated, it was converted to volume in Acre-Feet (AF). The conversion factor is 1 CFS = 724.4 AF per annum.

$$QAA= 0.0222(14.8 \times 0.23)^{0.9042}$$

$$QAA= 0.06 \text{ CFS}$$

$$0.06 \text{ CFS} \times 724.4 = 49.2 \text{ AF/year}$$

12. There are no existing water rights on this source upstream of the Applicant’s dam. The total amount of water physically available at the Applicant’s dam is 49.2 AF.

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. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

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 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 10-12)

**Legal Availability:**

**FINDINGS OF FACT**

17. The proposed diversion is on an ephemeral stream that is an Unnamed Tributary to Cutbank Creek. The area of potential impact for this application is downstream from the proposed POD to the confluence of the UT and Cutbank Creek. Since the UT is a small tributary drainage to Cutbank Creek, any new diversion of water could impact downstream users, therefore, legal availability was assessed on the source to its confluence with Cutbank Creek.

18. The DNRC water rights database shows that there is one downstream water right on the UT to Cutbank Creek. The existing water right (41T 24974 00) on the UT to Cutbank Creek is located just downstream of the requested POD and is for an on-stream dam with an impoundment capacity of 1 AF and total claimed appropriation of 5.54 AF.

19. Subtracting the downstream legal demands of 5.54 AF from the calculated physical availability of 49.2 AF leaves 43.6 AF per annum available for new appropriation. The Applicant is requesting up to 43.6 AF per annum of water. The Department finds that the Applicant's requested amount is legally available.

### 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. (FOF 17-19)

### **Adverse Effect**

#### **FINDINGS OF FACT**

23. The Department has determined that the zone of potential impact for the proposed appropriation is downstream of the proposed POD to the confluence of the UT and Cutbank Creek. There is one water right within the zone of potential impact claiming a total volume of 5.54 AF per annum.

24. This UT is an ephemeral source and only flows during significant precipitation events and during spring runoff; however if call was made on the source, the Applicant has the ability to satisfy downstream users by pumping water from the reservoir back into the creek if the reservoir was not already spilling over the spillway.

25. Aerial photos show that seepage from the Applicant’s dam likely contributes significantly to the amount of water stored in the reservoir associated with Statement of Claim 41T 24974 00, decreasing the likelihood of the Applicant’s proposed diversion to cause adverse effect.

26. Based on the Applicant’s plan to satisfy existing users and the fact that water can be found both physically and legally available in the amount requested, the Department finds that there will be no adverse effect to other users caused by the proposed appropriation.

#### **CONCLUSIONS OF LAW**

27. 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.
28. 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).
29. 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.
30. 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.
31. 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.

32. 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.

33. 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 23-26)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

34. The means of diversion is an on-stream dam with a contributing drainage of approximately 0.23 square miles. The dam is 25.6 feet tall with 2.2 feet of freeboard. The dam has a length of approximately 510 feet and crest width of 16 feet. The spillway is across natural ground on the eastern edge of the dam. The reservoir created by the dam is a maximum of 4.5 surface acres in size, has a maximum depth of 23.4 feet, and has a capacity of 42.1 AF at full pool.

35. The secondary means of diversion is a 1.75 horsepower Grundfos variable speed pump set in the reservoir. It supplies water to 9 places of use via a 1.25 inch pipeline. The stock tanks on the pipeline system use float valves which control the pump. Shut-off valves have been installed on the system so that the Applicant can divert water only to pastures being used.

36. The Department finds that the means of diversion are adequate for diverting the requested amount.

#### **CONCLUSIONS OF LAW**

37. 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.

38. 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.

39. 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 34-36)

## **Beneficial Use**

### **FINDINGS OF FACT**

40. The Applicant is proposing to divert water for stock use. Stock use is a recognized beneficial use by the State of Montana (§85-2-102(4), MCA). 42.1 AF is the amount of water required to completely fill the reservoir once during the year. Stock use of the reservoir will consume 8.5 AF annually based on 500 animal units and DNRC standards of 0.017 AF/AU/year. Evaporation will consume 16.5 AF annually. The water not consumed by stock or evaporation on an annual basis will provide carry-over water in drought years. The total requested volume of 43.6 AF will supply a combination of fill, evaporation, stock consumption, and carry-over water.

41. There is no flow rate associated with this application; the means of diversion is an on-stream dam which will capture all unappropriated runoff from the contributing drainage.

### **CONCLUSIONS OF LAW**

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

43. 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).

44. Applicant proposes to use water for stock which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 43.6 AF of diverted volume requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 40, 41)

### **Possessory Interest**

#### **FINDINGS OF FACT**

45. 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**

46. 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.

47. 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.

48. 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 45)

### **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. 41T 30072793 should be GRANTED.

The Department determines the applicant may divert water from an Unnamed Tributary to Cutbank Creek, by means of a dam, from January 1- December 31 up to 43.6 AF, from a point in the NWSNW Section 32, T22N, R19E, Fergus County, for stock use from January 1- December 31. The places of use include the reservoir itself in the SENW Section 32, T22N, R19E, Fergus County, and stock watering locations as follows:

SEnw Section 32, T22N, R19E, Fergus County  
SWNWNE Section 32, T22N, R19E, Fergus County  
SEnENW Section 32, T22N, R19E, Fergus County  
NWSWSE Section 29, T22N, R19E, Fergus County  
SWSWSE Section 29, T22N, R19E, Fergus County  
SESWSE Section 29, T22N, R19E, Fergus County (2 POU's)  
NESWSE Section 29, T22N, R19E, Fergus County (3 POU's)

**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 16<sup>th</sup> day of July, 2015.

*Original Signed by Denise Biggar*  
Denise Biggar, Regional Manager  
Glasgow Regional Office  
Department of Natural Resources and Conservation