

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

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**APPLICATION FOR BENEFICIAL )  
WATER USE PERMIT NO. 42M 30102859 ) PRELIMINARY DETERMINATION TO  
BY USA (DEPARTMENT OF INTERIOR ) GRANT PERMIT  
BUREAU OF LAND MANAGEMENT) )**

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On October 2, 2015, USA (Department of Interior Bureau of Land Management) (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30102859 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 121.38 acre-feet (AF) for fisheries use. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated March 29, 2016. The Applicant responded with information dated April 11, 2016. The Application was determined to be correct and complete as of May 5, 2016. An Environmental Assessment for this Application was completed on May 11, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Signed Pre-Application meeting form
- Attachments
- Reservoir Schematics

Information Received after Application Filed

- Clarified Map definitively identifying the point of diversion (April 11, 2016)
- Deficiency response (April 11, 2016)

- Montana FWP stocking report for Rattlesnake Reservoir (6/3/2016)

Information within the Department's Possession/Knowledge

- United States Geological Survey' (USGS) Thornthwaite Monthly Water Balance modeling software in conjunction with Western Regional Climate Center's (WRCC) Montana Climate Summaries, USGS's StreamStats Version 3.0, and USGS gaging station records (Station # 06336600, Beaver Creek Nr Trotters, ND) from October 1977 to September 2015.
- Department water right records of existing rights.

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 Unnamed Tributary of Cedar Creek, by means of an existing (built on October 20, 1962) earthen dam from January 1 to December 31 up to 121.4 AF, from a point in NESENE, Section 17, T13N, R56E, Dawson County, for fisheries use from January 1 to December 31. The place of use is generally located in the E2NE Section 17 Township 13N Range 56E Dawson County. Rattlesnake Reservoir is an on-stream reservoir with a surface area of roughly 9 acres and a total capacity of 89.1 AF.

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

**GENERAL CONCLUSIONS OF LAW**

2. 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 . . .

3. 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.

4. 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.

5. 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).

6. 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.

7. 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**

8. The Applicant is requesting a maximum volume of up to 121.4 AF annually from Unnamed Tributary of Cedar Creek. The proposed point of diversion is located on an ungauged source. The annual runoff volume of Unnamed Tributary to Cedar Creek drainage basin above the proposed point of diversion was estimated by using USGS Thornthwaite Model. The Thornthwaite Model estimated an annual yield of 89.2 mm/YR. The drainage area above the point of diversion was estimated to be 2300 acres using USGS StreamStats. Converting the

annual yield to 0.293 FT/YR (89.2 mm/YR x 0.00328 feet/mm = 0.293 FT/YR) and multiplying by the drainage area (2300 AC x 0.293 FT/YR) an estimated yield of 674 AF/YR was calculated.

9. The following is a list of existing water rights in the same drainage located above the requested point of diversion.

<b>Upstream Physical Demands</b>						
Water Right Numbers	Owners	Source Name	Means of Diversion	Flow Rate (CFS)	Volume (AF)	Period of Diversion
42M 163677 00	CEDAR CREEK GRAZING ASSN	STOCK	DAM	NA	0	01/01 to 12/31
42M 80779 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80780 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	50.5	01/01 to 12/31
42M 80804 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	8.9	01/01 to 12/31
42M 80805 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80802 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	FLOOD CONTROL	DAM	NA	80.1	01/01 to 12/31
42M 80783 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80781 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	14.5	01/01 to 12/31
42M 80782 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	11.6	01/01 to 12/31
42M 80784 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80778 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80777 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	24.5	01/01 to 12/31

10. Unnamed Tributary of Cedar Creek is an ephemeral stream. That means that water does not flow in this source for most of the year. The only times in the year that this source has a

surface flow is when there is snow melt and during storm events. This application and all other water rights on this source are reservoirs that have been built to store water when it is available. In cases like this, it is more important to consider the total volume per year rather than how much water is available each per month.

11. There are no water rights on this source that have flow rates associated with them as they are all reservoirs.

12. The existing upstream water rights were used to evaluate if the volume is physically available at the point of diversion.

<b>Unnamed Tributary of Cedar Creek Physically Availability-Volume (AF)</b>			
	Mean Volume	Physical Demands	Volume Physically Available
Annual	674.3	362.1	312.2

13. The Department finds that the proposed volume is physically available during the requested period of diversion.

CONCLUSIONS OF LAW

14. 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.”

15. 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).

16. 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).

17. 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 8-13)

**Legal Availability:**

**FINDINGS OF FACT**

18. The Department determined the area of potential impact on Unnamed Tributary of Cedar Creek is approximately one half mile downstream of the proposed point of diversion to the confluence of Unnamed Tributary and Cedar Creek. The Department determined that this was an expectable reach because the unnamed tributary identified represents 2.7 percent of the total drainage area at its confluence with Cedar Creek. The only water right on Cedar Creek below the confluence is a livestock direct claim and it is located roughly 8 river miles downstream of the confluence. The unnamed tributary contributes to 2.2 percent of the drainage area above the furthest upstream place of use on the claim. Therefore the area of potential impact was determined to only include water rights downstream of proposed point of diversion that are on the same source.

19. A list of existing legal demands within the area of potential impact was generated and used to compare the legal availability. The combined volume of the Downstream Legal Demands was calculated by adding the volumes of the four water rights within the area of potential impact. The Applicant is requesting a volume of 121.4 AF per year. The legal availability is summarized in the tables below.

<b>Downstream Legal Demands</b>						
Water Right Numbers	Owners	Source Name	Means of Diversion	Flow Rate (CFS)	Volume (AF)	Period of Diversion
42M 80808 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80809 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	10.1	01/01 to 12/31
42M 80810 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	DAM	NA	0.5	01/01 to 12/31
42M 80811 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	WILDLIFE	DAM	NA	27.5	01/01 to 12/31

<b>Unnamed Tributary of Cedar Creek Legal Availability- Volume (AF)</b>			
	Mean Volume	Downstream Legal Demands	Volume Legally Available
Annual	312.2	38.6	273.6

20. There are no water rights within the area of potential of impact that have flow rates associated with them as they are all reservoirs.

21. The comparison in the following tables shows water is legally available during the proposed period of diversion.

<b>Unnamed Tributary of Cedar Creek Legal Availability Volume (AF)</b>			
	Volume Legally Available	Requested Volume	Remaining Volume
Annual	273.6	121.4	152.2

22. The Department finds that the proposed volume is legally available during the requested period of diversion.

## CONCLUSIONS OF LAW

23. 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).

24. 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*

25. 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 18-22)

## Adverse Effect

### FINDINGS OF FACT

26. If there is a water shortage and call is made, the Applicant plans to place a temporary pump into the reservoir and pump the water flowing into the reservoir past the dam. The Applicant's plan is to mark the water level of the reservoir with stakes to monitor the shoreline so that the reservoir's level does not increase or decrease while pumping. The Applicant will cease pumping once the natural flow of the stream stops.

27. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available in Unnamed Tributary of Cedar Creek at the point of diversion and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

### CONCLUSIONS OF LAW

28. 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.

29. 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).

30. 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.

31. 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.

32. 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.

33. 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.

34. 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 26-27)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

35. The Applicant plans to divert water from Unnamed Tributary of Cedar Creek at a single diversion point using an existing on-stream reservoir. The reservoir was built on October 20, 1962 by the Applicant. The dam is 13.5 feet high, 10 feet wide at the top and 133 feet 6 inches at the base. The as-built drawing submitted by the Applicant shows a reservoir capacity of 89.13 AF with a maximum depth of 22.3 feet and surface area of about 9 acres at the spillway.

36. When the dam was initially constructed it had a drop pipe structure and an auxiliary spillway. The Applicant does not have record as to when, but sometime during the operation of the dam the drop pipe was plugged and is no longer functional. The auxiliary spillway has been the primary spillway for at least 30 years. The Applicant has plans of reinstalling the drop pipe structure to the current level of the spillway next time they repair or do maintenance on the spillway. There will be no increase to the storage capacity of the reservoir when this is done.

37. The Department finds that the means of diversion is adequate and capable of diverting the requested volume.

### CONCLUSIONS OF LAW

38. 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.

39. 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.

40. 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 35-37).

### Beneficial Use

### FINDINGS OF FACT

41. The Applicant proposes to use water for the purpose of fisheries use from January 1 to December 31. Montana Fish Wildlife & Parks (FWP) has record of stocking this reservoir with Largemouth Bass in 1987 and 1989 and Smallmouth Bass in 1982. The reservoir is currently listed on FWP's website as having Black Crappie as the primary game fish. Fathead minnows are also listed as present. A windmill was installed in 2006 and in the years following root wad

stumps where placed throughout the reservoir to provide better habit for the fishery. Fisheries use is recognized by the Department as a beneficial use of water.

42. The requested volume is the sum of the capacity of the reservoir and the evaporation loss of the reservoir. The reservoir has a storage capacity of 89.1 AF. The evaporation losses were estimated using the USDA Soil and Conservation Service Evaporation Pond Design for Agriculture Wastewater Disposal Technical Note: Environmental No. 7, February 1974. The evaporation loss was estimated to be 32.3 AF per year based on a surface area of 9 acres and a mean annual evaporation of shallow lakes and reservoirs of 43". The diversion is capable of diverting of 89.1 AF and the evaporation loss of 32.3 for a total of 121.4 AF. No flow rate will be assigned to this permit application because it consists of an on-stream reservoir.

43. The Department finds that the volume requested is reasonable and necessary for the proposed beneficial use.

#### CONCLUSIONS OF LAW

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

45. 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).

46. Applicant proposes to use water for fisheries use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence fisheries use is a beneficial use and that 121.38 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 41-43)

### **Possessory Interest**

#### **FINDINGS OF FACT**

47. 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**

48. 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.

49. 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.

50. 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 47)

### **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. 42M 30102859 should be GRANTED.

The Department determines the Applicant may divert water from Unnamed Tributary of Cedar Creek, by means of a dam, from January 1- December 31 up to 121.4 AF, from a point in NESENE Section 17, T13N, R56E, Dawson County, for fisheries use from January 1- December 31. The place of use is located in E2NE Sec 17 Twp 13N Rge 56E, Dawson County.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the

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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 15<sup>th</sup> day of June 2016.

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