

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 41Q 30102958)
BY MONARCH VOLUNTEER FIRE) PRELIMINARY DETERMINATION TO
DEPARTMENT) GRANT PERMIT**

On June 24, 2015, Monarch Volunteer Fire Department (Applicant or MVFD) submitted Application for Beneficial Water Use Permit No. 41Q 30102958, for 200 GPM up to 0.2 AF-YR for fire training purposes, to the Lewistown Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete on July 17, 2015. Prior to filing the application the Department met with MVFD, represented by Chris Croff, Secretary, on June 18, 2015. An Environmental Assessment for this Application was completed on September 11, 2015.

INFORMATION

The Department considered the following information in its Preliminary Determination.

Application as filed:

- Application for Beneficial Water Use Permit (Form 600), including attachments/addendums, maps, project plans, designs, and schematics

Information within the Department's Possession/Knowledge

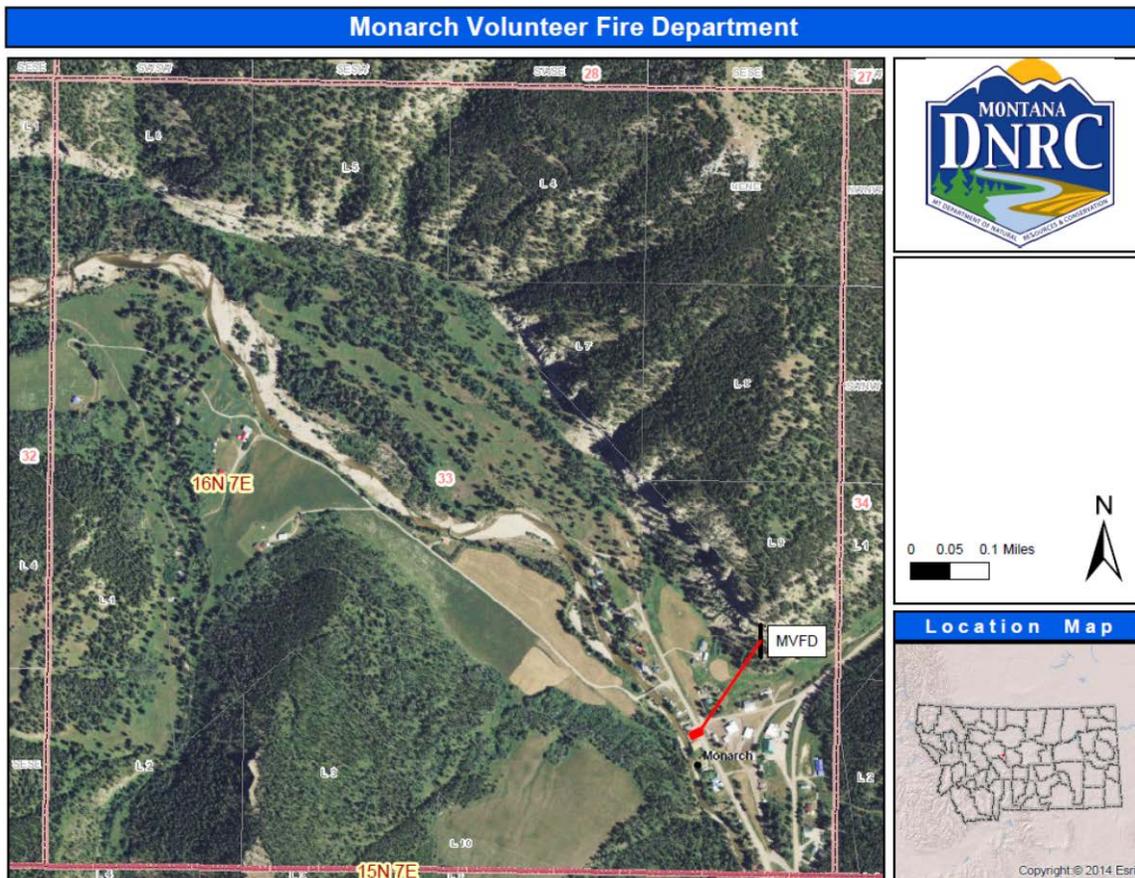
- Surface Water Permit Application Technical Report (generated by the Department)
- Water Right records
- U.S. Geological Survey (USGS) stream gauging records
- State of Montana property ownership records (Cadastral)
- Department Technical Report

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 Belt Creek by means of a pump located in the NWSESE Section 33, T16N, R7E, from April 1 through September 30. The flow rate is 200 gallons per minute (GPM), and the volume to be appropriated is 0.2 acre-feet (AF) per year. The purpose of use is fire training. The legal description of the place of use is considered the same as the point of diversion because of the purpose for which water will be used and because this is where the fire trucks will be filled. Water will be pumped from Belt Creek and used for fire training purposes, twice per month, in various and unknown locations throughout the area. The proposed appropriation is located in Cascade County in the town of Monarch. Application.



GENERAL

FINDINGS OF FACT

2. In order to protect prior water rights, Applicant has agreed to the placement of a condition for permit issuance. That condition is that Applicant will appropriate water only when the USGS stream gauge number 06090500, Belt Creek near Monarch, MT, shows a stream flow in excess of 130 cubic feet per second (CFS). The condition is outlined under the Conditions section of this document. Application; Conditions section.

MCA §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), MCA, 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 . . .¹

¹ An applicant may be required to prove additional criteria regarding water quality if a valid objection is filed. See 85-2-311(1)(f-h) and (2), MCA.

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. 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, 351 Mont. 26, 208 P.3d 868. 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, 357 Mont. 438, 240 P.3d 628.

5. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. Art. IX §3(1).

7. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with the permit criteria. § 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. Applicant requests an appropriation of 200 GPM (0.45 CFS) and 0.2 AF from Belt Creek from April 1 to September 30 annually. Application.
10. Belt Creek originates in the Little Belt Mountains of central Montana. The pattern of stream flow in Belt Creek pulses with mountain snowmelt and spring rains, peaking in May and June. USGS Stream Flow Records. Table 1 below reflects median of the mean monthly streamflow data as calculated by the Department, referencing USGS records, for gage #06090500 located approximately 10 miles downstream, and adding the amount of water appropriated by all consumptive use water rights between the gage and the proposed point of diversion. Department Technical Report.

Table 1 - Estimated Median of the Mean Monthly Streamflow Physically Available at Applicant's Point of Diversion

Month	<i>April</i>	<i>May</i>	<i>June</i>	<i>July</i>	<i>August</i>	<i>September</i>
Flow rate (CFS)	96.3	618.0	606.9	191.5	83.5	62.0
Volume (AF)	5730.2	38000.0	36112.5	11774.3	5133.6	3688.7

11. The estimated median of the mean monthly flow exceeds the proposed appropriation of 200 GPM (0.45 CFS) and 0.2 AF throughout the requested period of diversion. The Department finds that water is physically available in the amount requested. Department Technical Report.

CONCLUSIONS OF LAW

12. 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.”
13. 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).

14. 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).

15. 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 Nos. 10-11)

Legal Availability

FINDINGS OF FACT

16. Department records indicate that existing legal demands on Belt Creek between the proposed appropriation and the mouth of the stream range between 120-125.4 CFS (depending on the month), a reach in excess of 50 stream miles. Table 2 displays those legal demands as well as a comparison of the physical availability of water and legal demands.

Table 2 – Comparison of the Physical Availability of Water at the Proposed Point of Diversion and Downstream Legal Demands

<i>Month</i>	<i>Physical Availability (CFS)</i>	<i>Existing Legal Demands (CFS)</i>	<i>Physical – Legal (CFS)</i>	<i>Physical Availability (AF)</i>	<i>Existing Legal Demands (AF)</i>	<i>Physical – Legal (AF)</i>
April	96.3	120.0	-23.7	5730.2	6838.0	-1107.8
May	618.0	125.1	492.9	38000.0	7553.6	30446.4
June	606.9	125.3	481.6	36112.5	7360.7	28751.8
July	191.5	125.4	66.1	11774.3	7611.7	4162.6
August	83.5	125.4	-41.9	5133.6	7591.8	-2458.2
September	62.0	125.4	-63.4	3688.7	7222.9	-3534.2

During the months of May, June and July, median monthly streamflows exceed legal demands. During the months of April, August, and September legal demands exceed median monthly streamflows. Department Technical Report.

17. During the periods of 1951-1982 and 2012-2014, the USGS recorded stream discharge on Belt Creek near Monarch, Montana. The data show that during April, August, and September, legal demands exceed median monthly streamflows. While the data show that water is not legally available on a *median basis* during the three months, when considering the entire collective record, they do show that streamflows exceeded legal demands on occasion. During the 34-year period of record, streamflows exceeded legal demands the following number of times: April = 14; August = 7; and September = 3. USGS Streamflow Records.

18. The Applicant has agreed to permit issuance under the condition that it monitor USGS Gauge No. 06090500 and not appropriate water unless all prior water rights are satisfied. The USGS gauge must show a discharge of at least 130 CFS in order to trigger an appropriation by the Applicant. File; Conditions section.

19. The Department finds in favor of legal water availability throughout the requested period provided a condition is imposed in this Order. The condition includes monitoring the USGS gauge for discharge and adherence to a minimum stream flow of 130 CFS before appropriating water. The condition is outlined in the Conditions section in this Order. File; USGS Stream Records; Water Right Records; Department Technical Report.

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. 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.

23. In analyzing legal availability for surface water, an applicant is 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. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6. *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).

24. 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).

25. As conditioned, the 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 19)

Adverse Effect

FINDINGS OF FACT

26. Water is legally available in Belt Creek in May, June and July on a median of the mean basis. Water is sometimes legally available in April, August, and September. Finding of Fact No. 17.

27. Any Permit, if issued, will be junior in priority to all other water rights on Belt Creek. The Permit will be subject to a “*call*” if senior water rights are not satisfied.

28. In order to meet the criterion of Adverse Effect, Applicant must comply with a condition of stream monitoring and adherence to a minimum discharge of 130 CFS before appropriating water. The 130 CFS trigger flow will protect all water users on Belt Creek from the proposed appropriation to the mouth, a reach of 50 stream miles. Applicant has agreed to the condition outlined in the Conditions section of this document. File.

29. Under the circumstances of this application, as discussed above, and as conditioned below, the Department finds that no adverse effects will result from the proposed appropriation, based on the Applicant’s plan and agreement to conditions imposed in the Conditions section of this Order. Conditions section.

CONCLUSIONS OF LAW

30. 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.

31. 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).

32. 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.

33. 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.

34. 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.

35. 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.

36. Based upon Applicant's plan for operation of its permit and as conditioned, 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 29)

Adequate Diversion

FINDINGS OF FACT

37. The diversion works consist of a 6.5 horsepower, gas-powered pump, which appropriates water at a rate of 200 GPM. The pumping system supplies water via a pipeline to four fire trucks with tank capacities of 1,000 gallons, 3,000 gallons, 500 gallons, and 500 gallons (combined capacity is 5,000 gallons). The fire trucks will be filled and water transported to various locations throughout the Monarch area twice per month, throughout a six month period, for fire training purposes. Application; Department Technical Report.

38. The Department finds the proposed diversion works to be adequate.

CONCLUSIONS OF LAW

39. 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. 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. 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. §85-2-402 (2)(b), MCA. (FOF No. 38).

Beneficial Use

FINDINGS OF FACT

40. The proposed beneficial use of water is for fire training purposes in the amount of 200 GPM up to 0.2 AF per year. The Applicant determined the amount of water to be used based on requirements for fire training and emergency fire suppression efforts. The flow rate is designed for short refill times. The volume is based on the number of times fire training will occur during a 6-month period, and the tank capacity of four fire engines that will be used. Application.

41. The Department finds that water used for fire training purposes in the amount proposed is a beneficial use of water.

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).

44. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti. 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).

45. Applicant proposes to use water for training fire fighters, which the department recognizes as a beneficial use. Applicant has proven by a preponderance of the evidence fire training is a beneficial use and that an appropriation of 200 GPM up to 0.2 AF is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 41)

Possessory Interest

FINDINGS OF FACT

46. 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

47. 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.

48. 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.

49. 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 46)

CONDITIONS

1. IMPORTANT INFORMATION:

THE APPROPRIATOR MUST MONITOR USGS STREAM GAGE NO. 06090500 (BELT CREEK NEAR MONARCH, MT) AND COMPLY WITH MINIMUM STREAM FLOW CONDITIONS PRIOR TO DIVERTING WATER. THE APPROPRIATOR SHALL DIVERT WATER ONLY DURING THE PERIOD OF APPROPRIATION AND WHEN USGS GAGE NO. 06090500 INDICATES A STREAM FLOW IN EXCESS OF 130 CFS. THE APPROPRIATOR SHALL NOT DIVERT WATER UNLESS THE REFERENCED USGS STREAM GAGE IS OPERATING AND REGISTERING STREAM FLOWS. THE CURRENT WEBSITE ADDRESS FOR THE USGS STREAM GAUGING NETWORK IS:

<http://waterdata.usgs.gov/mt/nwis/current?type=flow>

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. 41Q 30102958 should be **GRANTED**. The Applicant may divert water from Belt Creek, by means of a pump. The diversion point is located in the NWSESE Section 33, T16N, R7E, Cascade County. Water may be diverted and used from April 1 through September 30, at a flow rate of 200 GPM and volume of 0.2 AF for fire training purposes. The place of use is considered to be in the following legal land description: NWSESE Section 33, T16N, R7E, Cascade County. The legal description of the Place of Use is considered the same as the point of diversion because of the purpose for

which water will be used and because this is where the fire trucks will be filled. Water will be pumped from Belt Creek and used for fire training purposes, twice per month, in various and unknown locations throughout the area.

The Permit will be subject to the conditions, limitations or restrictions outlined in the Conditions section of this document.

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 11th day of September, 2015

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Water Resources Regional Office
Department of Natural Resources and Conservation