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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40EJ 30103397 BY THORNHILL RANCH PARTNERSHIP	**)** **)** **)**	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On August 11, 2015, Thornhill Ranch Partnership (Applicant) submitted Application for Beneficial Water Use Permit No. 40EJ 30103397 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 20 gallons per minute (GPM) and 16.1 acre-feet (AF) for stock use. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 3, 2016. The Applicant submitted an Amendment to this application on April 18, 2016. An Environmental Assessment for this Application was completed on May 5, 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
- Map: Topographic map showing the location of stock tanks
- Pump Information

Information Received after Application Filed

- Clarified Pipeline and Tank Map: The Applicant submitted a more detailed map (August 19, 2015)
- Field investigation: Flow rate measurement (November 9, 2015)
- Field investigation: Flow rate measurement (March 22, 2016)

- Amendment to Application: place of use, period of use & period of diversion (April 18, 2016)
- Clarified Pipeline and Tank Map: The Applicant submitted a more detailed map (April 18, 2016)

Information within the Department's Possession/Knowledge

- United State Geological Survey' (USGS) Thornthwaite Monthly Water Balance modeling software in conjunction with Western Reginal Climate Center's (WRCC) Montana Climate Summaries, USGS's StreamStats Version 3.0, and USGS gaging station records (Station # 06164615, Little Warn Creek MT) from April 1983 to September 1992.
- Department water right records of existing rights
- DNRC flow measurements from November 9, 2015 and March 22, 2016.

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 the Siparyann Creek, by means of a pump, from October 1 to March 31 at 20 GPM up to 16.1 AF, from a point in SWNWSW, Section 21, T24N, R24E, Philips County, for stock use from October 1 to March 31. The Applicant proposes to water 900 head of cattle from 9 stock tanks. The place of use is generally located in:

SWNWSW Sec 8 Twp 24N Rge 24E,
SENWSW Sec 8 Twp 24N Rge 24E,
SENWSW Sec 8 Twp 24N Rge 24E,
NENENW Sec 17 Twp 24N Rge 24E,
SENENW Sec 17 Twp 24N Rge 24E,
SESENW Sec 17 Twp 24N Rge 24E,
NENWNW Sec 17 Twp 24N Rge 24E,
NENWNE Sec 20 Twp 24N Rge 24E,
NENWNE Sec 20 Twp 24N Rge 24E,

all in Phillips County. The pump will be submerged in an existing irrigation reservoir (40EJ 30319-00, 40EJ 30321-00, & 40EJ 30322-00) so that instream flow of Siparyann Creek can be pumped during winter months when freezing is an issue. The diversion and conveyance works need to be placed below the frost line and run continuously to prevent freezing in the pipes and stock tanks. The existing reservoir will not be used to store water for this appropriation; it is used to get the pump and pipeline below the frost line so that the system can function properly during winter months.

§ 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
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> (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:
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> (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.
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> (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;
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> (d) the proposed use of water is a beneficial use;
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> (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;
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> (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
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> (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.

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, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

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

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

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

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

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 flow rate of 20 GPM up to 16.1 AF annually from Siparyann Creek. The proposed point of diversion is located on an ungauged source. The runoff volume of the Siparyann Creek drainage basin above the proposed point of diversion was estimated by using USGS Thornthwaite Model. The Thornthwaite Model estimated an annual yield of 3.17 inches/YR. The drainage area above the point of diversion was estimated to be 5888 acres using USGS StreamStats. Converting the annual yield to 0.264 feet/YR (3.17 inches/YR x 1foot/12inches = 0.264 feet/YR) and multiplying by the drainage area (5888 AC x 0.264 Feet/YR) an estimated yield of 1555.4 AF/YR was calculated. The flow rates were estimated by converting the acre-feet per year from the Thornthwaite Model to cubic-feet per second (1555.4 AF/YR ÷ 365Days/YR ÷ 1.98 = 2.15 CFS). The monthly flow rates were further refined by comparing the flow rates to Little Warm Creek so that they more accurately reflect seasonal runoff. Little Warm Creek (USGS 06164615 Little Warm Creek at Reservation Bndry nr Zortman MT) is a gauged source that originates in the same geographic area and is hydrologically comparable to Siparyann Creek.

9. Two DNRC flow measurements were taken downstream of the requested point of diversion. The first measurement was taken on November 9, 2015 downstream of a culvert that is below the irrigation reservoir where the pump will be placed. This location was selected because the stream flowing above the dam was too wide, marshy, had a beaver pond, thick willows and multiple channels that made it near impossible to obtain a good measurement. The reservoir was full during both measurements and downstream of the reservoir was determined to

be the best location to measure the base flow of Siparyann Creek. The first measurement was taken by temporarily installing a Montana Flume in the stream channel below the culvert discharging water from the irrigation reservoir. Below the dam has a large seepage area, but no moving surface water. The DNRC measured a discharge or 1.05 CFS during this measurement. The second measure was taken roughly a quarter mile downstream of the first measurement on March 22, 2016. This location was selected because the applicant felt that this portion of the stream more accurately reflected the natural flow of the stream. The measurement was again taken by temporarily installing a Montana Flume in the stream channel. The DNRC measured a discharge of 1.6 CFS on this measurement. The first measurement of 1.05 CFS was likely lower than modeled because of where the measurement was taken. Seepage from the dam was not captured at this first location. The second measurement of 1.6 CFS is only slightly lower than the modeled 1.88 CFS at the point of diversion. This is most likely due to the abnormally warm and dry winter in eastern Montana during the year of this measurement.

10. The following is a list of existing water rights in the same drainage that are above the requested point of diversion and have overlapping periods of diversion.

Water Right Numbers	Owners	Source Name	Means of Diversion	Flow Rate (CFS)	Volume (AF)	Period of Diversion
40EJ 30319 00	CHARLES E SCHWENKE	SIPARYANN CREEK	DAM	NA	44.8	01/01 to 12/31
40EJ 30321 00	CHARLES E SCHWENKE	SIPARYANN CREEK	DAM	NA	16.8	01/01 to 12/31
40EJ 30322 00	CHARLES E SCHWENKE	SIPARYANN CREEK	DAM	NA	42.0	01/01 to 12/31
40EJ 137525 00	MONTANA, STATE OF BOARD OF LAND COMMISSIONERS	SIPARYANN CREEK	LIVESTOCK DIRECT FROM SOURCE	0.08	6.5	01/01 to 12/31
40EJ 22360 00	CHARLES E SCHWENKE	SIPARYANN CREEK	LIVESTOCK DIRECT FROM SOURCE		17.1	01/01 to 12/31
40EJ 37511 00	SQUARE BUTTE GRAZING ASSN	MUD CREEK	LIVESTOCK DIRECT FROM SOURCE		2.5	05/01 to 11/01

11. The existing upstream water rights were used to evaluate the flow rate physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights, and subtracting these values. The result is the monthly mean flow rate for Siparyann Creek physically available at the point of diversion proposed by the Applicant.

Siparyann Creek Physically Availability- Flow Rate (CFS)			
Month	Mean Flow	Physical Demands	Flow Physically Available
Jan	1.96	0.08	1.88
Feb	1.96	0.08	1.88
Mar	2.19	0.08	2.11
Oct	2.34	0.08	2.26
Nov	2.11	0.08	2.03
Dec	2.04	0.08	1.96

12. The existing upstream water rights were also used to evaluate the volume physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights, and subtracting these values. The result is the monthly mean volume for Siparyann Creek is physically available at the point of diversion proposed by the Applicant.

Siparyann Creek Physically Availability- Volume (AF)			
Month	Mean Volume	Physical Demands	Volume Physically Available
Jan	120.3	10.6	109.7
Feb	108.7	10.6	98.1
Mar	134.2	10.6	123.6
Oct	143.4	11.0	132.4
Nov	125.4	10.6	114.8
Dec	124.9	10.6	114.3

13. The Department finds that the proposed flow rate and volume are 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. 27665-41I 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).

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 Siparyann Creek as approximately 9 miles downstream of the proposed point of diversion to where the creek crosses the Charles M Russell boundary. A list of existing legal demands within the area of potential impact was generated and used to compare the physical availability (mean monthly flows and volumes) of water to the amount of water already appropriated under the existing water rights.

The volume of water rights downstream of the requested point of diversion was calculated by dividing the volumes of the downstream rights by the number of months of the period of use. The Applicant is requesting a flow of 20 GPM (0.045 CFS) up to 16.1 AF per year. The legal availability is summarized in the tables below.

WR Number	Owners	Purpose	Means Of Diversion	Flow Rate (CFS)	VOLUME (AF)	Period of Diversion
40EJ 22329 00	CHARLES E SCHWENKE	IRRIGATION	DAM	NA	48.00	01/01 to 12/31
40EJ 22332 00	CHARLES E SCHWENKE	STOCK	LIVESTOCK DIRECT FROM SOURCE	0.08	16.96	01/01 to 12/31
40EJ 22333 00	CHARLES E SCHWENKE	STOCK	LIVESTOCK DIRECT FROM SOURCE		7.05	01/01 to 12/31
40EJ 22356 00	CHARLES E SCHWENKE	STOCK	LIVESTOCK DIRECT FROM SOURCE		7.05	01/01 to 12/31
40EJ 22358 00	CHARLES E SCHWENKE	STOCK	LIVESTOCK DIRECT FROM SOURCE		16.96	01/01 to 12/31
40EJ 22359 00	CHARLES E SCHWENKE	STOCK	LIVESTOCK DIRECT FROM SOURCE		16.96	01/01 to 12/31

*In order to account for the livestock direct from source water rights, it was assumed that all stock rights combined would not exceed a flow rate demand of 35 GPM (0.08 CFS).

Siparyann Creek Legal Availability- Flow Rate (CFS)			
Month	Average Flow	Downstream Legal Demands	Flow Legally Available
Jan	1.88	0.08	1.80
Feb	1.88	0.08	1.80
Mar	2.11	0.08	2.03
Oct	2.26	0.08	2.18
Nov	2.03	0.08	1.95
Dec	1.96	0.08	1.88

Siparyann Creek Legal Availability - Volume (AF)			
Month	Mean Volume	Downstream Legal Demands	Volume Legally Available
Jan	109.7	9.4	100.3
Feb	98.1	9.4	88.7
Mar	123.6	9.4	114.2
Oct	132.4	9.4	123.0
Nov	114.8	9.4	105.4
Dec	114.3	9.4	104.9

19. The comparison in the following tables shows water is legally available throughout the proposed period of diversion. The monthly volumes for the comparison are equal to the total requested volume divided by the period of use (16.1 AF/6 months =1.34 AF/month).

Siparyann Creek Legal Availability - Flow Rate (CFS)			
Month	Flow Legally Available	Requested Flow	Remaining Flow
Jan	1.80	0.045	1.76
Feb	1.80	0.045	1.76
Mar	2.03	0.045	1.98
Oct	2.18	0.045	2.13
Nov	1.95	0.045	1.91
Dec	1.88	0.045	1.83

Siparyann Creek Legal Availability - Volume (AF)			
Month	Volume Legally Available	Requested Volume	Remaining Volume
Jan	100.3	1.34	99.0
Feb	88.7	1.34	87.3
Mar	114.2	1.34	112.8
Oct	123.0	1.34	121.7
Nov	105.4	1.34	104.0
Dec	104.9	1.34	103.6

20. The Department finds that the proposed flow rate and volume are legally available during the requested period of diversion.

CONCLUSIONS OF LAW

21. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late

irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

22. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H*

23. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department.§ 85-2-311(1)(a)(ii), MCA. (FOF 18-20)

Adverse Effect

FINDINGS OF FACT

24. In the event of a water shortage, the Applicant plans to cease pumping if a valid call is made or water ceases to flow in the overflow culvert of the dam. The Applicant will not begin pumping until water becomes available again.

25. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available in Siparyann 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

26. 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.

27. 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).

28. 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.

29. 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.

30. 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.

31. 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.

32. 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 24-25)

Adequate Diversion

FINDINGS OF FACT

33. The Applicant plans to divert water from Siparyann Creek at a single diversion point using a 2 HP FPS Series Five submersible pump (Model 20FV2S4-PE). The pump will be placed into an existing irrigation reservoir but will not use any stored water, only natural flow. The system will feed 9 stock tanks via a 1.5 inch pipe travels east for about 250 years where it tees into an existing system of pipelines. The first existing pipeline travels roughly 2.5 miles north, feeding the two tanks in Sec 20 while gaining about 280 feet of elevation before splitting into other pipes that feed the seven remaining tanks via gravity flow. The pump is capable of delivering the requested flow rate of 20 GPM.

CONCLUSIONS OF LAW

34. 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.

35. 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.

36. 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 33).

Beneficial Use

FINDINGS OF FACT

37. The Applicant proposes to use water for the purpose of stock use from October 1 to March 31. Stock use is recognized by the Department as a beneficial use of water and has a water use standard of 0.017 AF per animal unit per year. The Applicant plans to water 900 head of cattle (900 AU) which equates to a required volume of 7.63 AF (900 AU x 0.017 AF/AU/year ÷ 365 days/year x 182 days). The Applicant needs the pump to run continually for this system to remain ice free during the winter. The requested volume of 20 GPM (0.045 CFS) run continually for the requested 182 days produces a volume of 16.1 AF (0.045 CFS x 1.98$\frac{AF}{Days\ x\ CFS}$ x 182 days). The pump is capable of diverting water at the requested rate of 20 GMP up to 16.1 AF annually.

38. The requested flow rate is necessary to ensure optimal operation of the pipeline during the winter and adequately supply nine stock tanks.

39. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

CONCLUSIONS OF LAW

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

41. 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).

42. Applicant proposes to use water for stock use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock use is a beneficial use and that 16.1 AF of diverted volume and 20 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 37-39)

Possessory Interest

FINDINGS OF FACT

43. The Applicant signed and had 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

44. 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.

45. 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.

46. 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 43)

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. 40EJ 30103397 should be GRANTED.

The Department determines the Applicant may divert water from Siparyann Creek, by means of a pump, from October 1- March 31 at 20 GPM up to 16.1 AF, from a point in SWNWSW Section 21, T24N, R24E, Philips County, for stock use from October 1- March 31. The Applicant may water 900 head of cattle. The place of use is located in:

SWNWSW Sec 8 Twp 24N Rge 24E,
SENWSW Sec 8 Twp 24N Rge 24E,

SENWSW Sec 8 Twp 24N Rge 24E,
NENENW Sec 17 Twp 24N Rge 24E,
SENENW Sec 17 Twp 24N Rge 24E,
SESENW Sec 17 Twp 24N Rge 24E,
NENWNW Sec 17 Twp 24N Rge 24E,
NENWNE Sec 20 Twp 24N Rge 24E,
NENWNE Sec 20 Twp 24N Rge 24E.

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 26th day of May 2016.

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