

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76K 30103655 BY PAMELA & ALAN MUSKETT)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On April 29, 2016, Pamela and Alan Muskett (Applicants) submitted Application for Beneficial Water Use Permit No. 76K 30103655 to the Missoula Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 14 gallons per minute (GPM) and 1 acre-foot (AF) for domestic use. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of June 17, 2016. An Environmental Assessment for this Application was completed on June 24, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Surveyor’s Certificate (Diamond Bar L Ranch Third Lakeshore Tracts – Lindbergh Lake) and 1” = 100’ scale map of place of use; Missoula County 4” = 1 mile scale map depicting the point of diversion and place of use; USDA aerial photograph of the point of diversion, place of use, and proposed pipe and pump location.

Information within the Department’s Possession/Knowledge

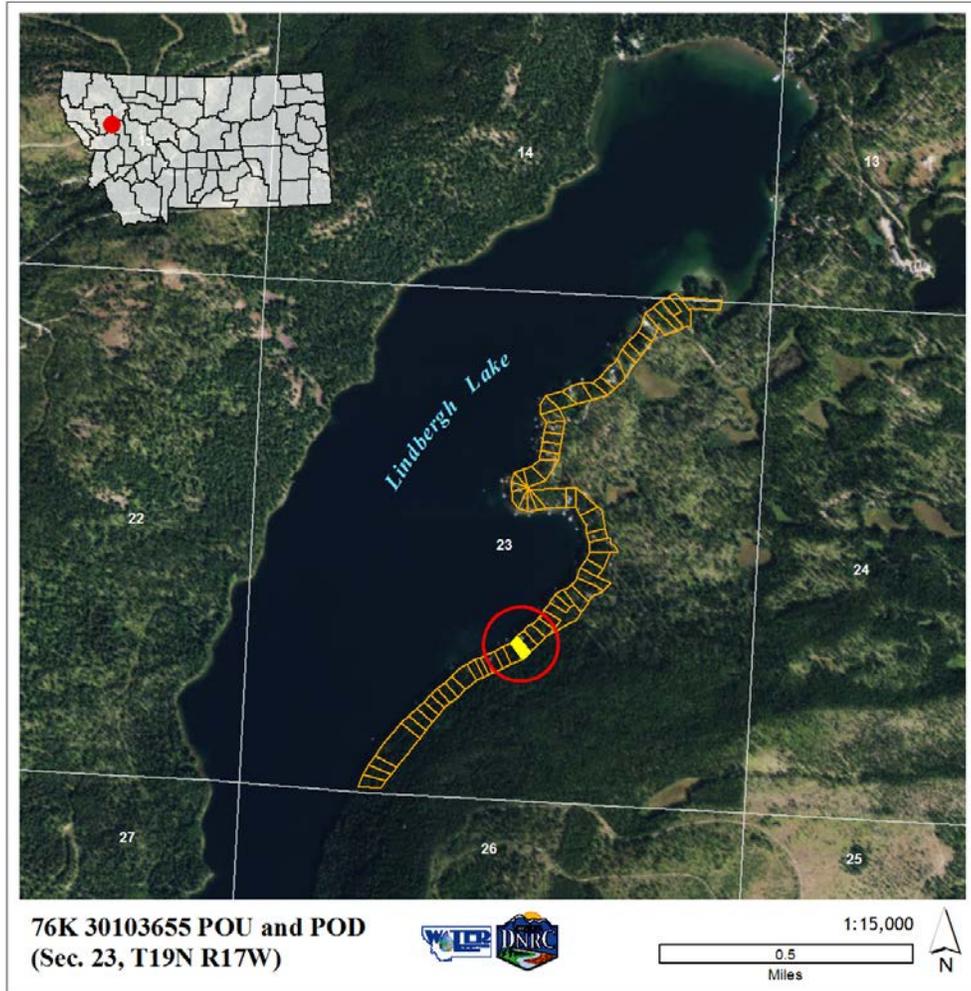
- Physical availability analysis Swan River below Lindbergh Lake
- Legal availability analysis Lindbergh Lake, Cygnet Lake and Swan River to Condon
- Report: Water Quality Evaluations of Lindbergh Lake, 1989-1993

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 for domestic use from Lindbergh Lake, tributary to the Swan River, by means of a ½ hp submersible pump from January 1 to December 31 at 14 GPM up to 1 AF, from a point in Diamond L Bar Lakeshore Tracts #3, Lot 69, in the NWSE of Section 23, T19N, R17W, Missoula County. The place of use is generally located in Diamond L Bar Lakeshore Tracts #3, Lot 69, in the NWSE of Section 23, T19N, R17W, Missoula County.
2. Lindbergh Lake is located 14 miles south of Condon, Montana, in the Seeley-Swan Valley. Lindbergh Lake becomes the Swan River after flowing through Cygnet Lake and is deposited into Flathead Lake approximately 60 miles to the north.
3. Domestic use will occur in a septic-treated single family residence with two and a half restrooms and two outdoor spigots. Water will be conveyed from the pump through a one-inch pipe to an onsite pressure tank and standard domestic plumbing.
4. Consumptive use of the proposed diversion, assuming DNRC's 90% efficiency rating for domestic use treated with a septic system, equals 0.10 AF, annually.



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

GENERAL CONCLUSIONS OF LAW

5. 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 . . .

6. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

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

(A) identification of physical water availability;

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

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

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b),

adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

7. 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.

8. 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).

9. 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.

10. 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

11. The Department calculated physical availability of water for the proposed appropriation using USGS streamflow data from the Swan River gage (No. 12369200) near Condon, Montana, by adding the existing legal demands of water rights between the gage site and the proposed point of diversion to the median of the mean monthly streamflows. Data from this gage is available for the period of record 1973 to 1992 and the gage is located approximately 5 miles downstream from the proposed point of diversion. The 19 year period of record provides an adequate representation of the amount of water flowing out of Lindbergh Lake, and the location of the gage, 5 miles downstream from the point of diversion, makes it appropriate for determining physical availability at the proposed point of diversion. Using the gaging station data, the Department calculated physically available monthly streamflows at the Applicants' proposed point of diversion, which are presented in the following table:

Water Availability Results as of June 2016			
Month	Median of the Mean (CFS)	Existing Legal Demands (CFS)	Physically Available Water at the POD (CFS)
Jan	45.00	2.69	47.69
Feb	42.00	2.69	44.69
Mar	58.00	2.73	60.73
Apr	161.00	3.03	164.03
May	388.00	3.93	391.93
Jun	421.50	4.18	425.6
Jul	292.00	4.18	296.18
Aug	96.00	4.18	100.18
Sept	60.00	4.18	64.18
Oct	52.00	4.15	56.15
Nov	56.50	3.48	59.98
Dec	47.00	2.73	49.73

The Department’s calculation of median of the mean monthly flow and volume of water at the Applicants’ proposed point of diversion demonstrates that the proposed appropriation of 14 GPM up to 1 AF is physically available in every month of the proposed appropriation.

12. To demonstrate physical availability the Department also utilized a report prepared in August, 1994 by Ken Knudson of Ecological Resource Consulting on water quality in Lindbergh Lake. In this report the volume of water in Lindbergh Lake was determined using a hydrologic map of the lake showing area and depth, which was scanned into a computer and divided into 20-foot depth intervals using Canvas 2.0 software. The volumes of water within successive 20-foot depth layers were calculated using the formula: $V=h/3(A+B+AB)$, where h is the vertical depth of the stratum, A the area of the upper surface, and B the area of the lower surface of the stratum. Using this method the volume of water in Lindbergh Lake is estimated to be 38,110 AF.

CONCLUSIONS OF LAW

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 Applicants' 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 11, 12)

Legal Availability:

FINDINGS OF FACT

16. The proposed source of appropriation is Lindbergh Lake. Lindbergh Lake is a natural water body located at the headwaters of the Swan River. Immediately downstream of Lindbergh Lake is a smaller natural lake called Cygnet Lake, the outlet of which is the beginning of the Swan River. From Cygnet Lake, the Swan River flows north for approximately 40 miles to Swan Lake and then on to Flathead Lake at the town of Big Fork. To determine legal availability the Department queried its records for all water rights originating in Lindbergh Lake, Cygnet Lake and the Swan River to the town of Condon, which is 8 miles downstream of the USGS gaging station near Condon. There are a total of 94 individual water rights in this reach of the Swan River including Lindbergh and Cygnet lakes, of which 83 are for domestic use similar to the proposed appropriation. The Department considers this to be an appropriate reach for calculating legal availability due to the large volume of water in Lindbergh Lake, the amount of water determined to be physically available using the USGS gaging station near Condon, and the limited demand for water between Lindbergh Lake and the town of Condon. The source of

appropriation and the reach of stream used for legal availability analysis are located in an area that is open to surface water appropriations and does not experience shortages or water disputes. A distance of 6 miles downstream of the gaging station, near the town of Condon, was chosen as the end of the legal availability reach because water measured at the gaging station reflects water use occurring above the gage, but not below it. The Department did not analyze water rights below the town of Condon because the Swan River picks up numerous tributaries originating from the Swan and Mission mountain ranges, and flow increases the further downstream you travel. The existing legal demands were then compared to the median of the mean monthly flow and volume to determine legal availability. The following table lists monthly physical availability in flow rate and volume compared to monthly existing legal demands in flow rate and volume:

Water Availability Results as of June 2016						
Month	Median of the Mean (CFS)	Existing Legal Demands (CFS)	Physically Available Water (CFS)	Median of the Mean (AF)	Existing Legal Demands (AF)	Legally Available Water (AF)
Jan	45.00	3.13	48.13	2,761.9	9.20	2,752.68
Feb	42.00	3.13	45.13	2,328.3	9.20	2,319.08
Mar	58.00	3.18	61.18	3,560.2	9.30	3,550.86
Apr	161.00	22.59	183.59	9,563.3	18.21	9,545.04
May	388.00	23.17	411.17	23,815.4	23.90	23,791.50
Jun	421.50	23.49	444.99	25,036.9	29.81	25,007.08
Jul	292.00	23.66	315.67	17,923.3	30.49	17,892.77
Aug	96.00	23.66	119.67	5,892.8	29.81	5,862.97
Sept	60.00	23.49	83.49	3,563.8	25.66	3,538.13
Oct	52.00	4.40	56.40	3,191.5	12.09	3,179.40
Nov	56.50	3.65	60.15	3,356.1	11.85	3,344.22
Dec	47.00	3.22	50.22	2,885.0	9.47	2,875.50

The Department’s calculation of median of the mean monthly flow and volume of water as measured by the stream gage located in the Swan River five miles below the Applicant’s proposed point of diversion compared to existing legal demands on the source of supply between the proposed point of diversion and a location 6 miles downstream of the gage demonstrates that

the proposed appropriation of 14 GPM up to 1 AF is legally available in every month of the proposed appropriation.

17. Water flowing from Lindbergh Lake enters into the Swan River which flows into Flathead Lake. There are numerous water rights out of Flathead Lake and Confederated Salish & Kootenai Tribes (CSKT) owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

18. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF to meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

19. Pending an adjudication of Confederated Salish & Kootenai Tribes hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in Flathead River, Flathead Lake and the Stillwater River can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This

finding is based on the information and on the records of the Department and other evidence provided to the Department.

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. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

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.

Adverse Effect

FINDINGS OF FACT

24. Applicant proposes to divert water directly from Lindbergh Lake using an electric pump, and the Department has determined that water is physically and legally available for the proposed appropriation. In times of extreme shortage or in the event that a call for water is made, the Applicant plans to prevent adverse effect to other water users by turning the pump off and ceasing diversion entirely until conditions improve to the point when diversion can resume.

25. I find water from Lindbergh Lake and the Swan River downstream of Lindbergh Lake to be both physically and legally available in amounts sufficiently exceeding the requested appropriation of 14 GPM and 1 AF to ensure no adverse effect to senior appropriators diverting from the same source.

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 point of diversion consists of an electric ½ hp submersible pump installed on a PVC stand in Lindbergh Lake approximately 15 feet from the shoreline. The pressure tank will be located at the family residence into which water will flow from the pump through a one-inch submersible pipe. The Department reviewed a pump chart for a ½ hp pump and determined that it is capable of diverting the requested 14 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 proposed appropriation of 14 GPM up to 1 AF per year from Lindbergh Lake is for purpose of year-round domestic water use in one primary residence. Total water use will be limited by the 14 GPM pump and diverted volume will not exceed 1.0 AF per year for domestic purposes.

38. The Applicant's requested flow rate and volume of 14 GPM up to 1 AF is based on the Applicant's plan of operation, allocating 14 GPM up to 1.0 AF for year-round domestic use.

CONCLUSIONS OF LAW

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

40. #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).

41. Applicant proposes to use water for domestic and domestic lawn and garden which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as "lawn and garden irrigation") which is a recognized beneficial use. § 85-2-102(2), MCA. "Domestic use" by DNRC rule means those water uses common to a household including...(g) garden and landscaping irrigation up to five acres." ARM 36.12.101(21). Applicant has proven by a preponderance of the evidence domestic and domestic lawn and garden use is a beneficial use

and that 1 AF of diverted volume and 14 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 37, 38)

Possessory Interest

FINDINGS OF FACT

42. 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

43. 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.

44. 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.

45. 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 No. 42)

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. 76K 30103655 should be GRANTED.

The Department determines the applicant may divert water for domestic purposes from Lindbergh Lake (Swan River), by means of a ½ hp electric pump, from January 1 to December 31 at 14 GPM up to 1 AF, from a point in the NWSE of Section 23, T19N, R17W, Missoula County. The place of use is located in Diamond L Bar Lakeshore Tracts #3, Lot 69 in the NWSE of Section 23, T12N, R17W, Missoula 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 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 24th day of June 2016.

/Original signed by Jim Nave/

Jim Nave, Manager

Missoula Regional Office

Department of Natural Resources and Conservation