

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40C 30104097 BY MATTHEW MCCLEARY</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On October 19, 2015, Matthew and Jeralee McCleary (Applicants) submitted Application for Beneficial Water Use Permit No. 40C 30104097, for irrigation 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 Department sent Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated November 19, 2015. Applicants responded with information dated January 28, 2016. The Application was determined to be correct and complete as of May 12, 2016. Prior to filing the application, the Department met with Applicants on October 7, 2015. An Environmental Assessment was completed on May 31, 2016.

**INFORMATION**

The Department considered the following information in its decision.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600 and Attachments
- Aerial photo of the proposed project (point of diversion, conveyance system, and place of use)

Information Received after Application Filed

- Applicants deficiency letter received 1/28/2016

Information within the Department's Possession/Knowledge

- Water Right records
- U.S. Geological Survey (USGS) stream gauging records
- Irrigation Water Requirements Crop Data Summary
- State of Montana property ownership records

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. Applicants propose to divert water from the Musselshell River, by means of an existing pumping system, from April 1 through June 30, at 1.56 cubic feet per second (CFS) up to 76.0 acre-feet (AF) annually. The purpose of use is irrigation (center pivot system), and the requested period of use is the same as the period of diversion. The pumping system currently supplies the proposed center pivot with water purchased from the Deadmans Basin Water Users Association (contract water). Additionally, the pumping system supplies two additional center pivots that use a combination of Deadmans Basin contract water and private water rights. The point of diversion is located in the NWNWSW Section 2, T9N, R30E, Musselshell County. The proposal includes irrigation of alfalfa on 76.0 acres, generally located in the SW1/4 Section 2, T9N, R30E. File.
2. Applicants propose to measure appropriations to the center pivot. Applicants deficiency letter response.
3. The Department imposes conditions of water measurement and assignment of minimum streamflows (trigger flows) before the appropriation of water can occur, in order to protect existing water rights. Conditions section.



BASIN CLOSURE

FINDINGS OF FACT

4. This application is for irrigation purposes. The proposed period of appropriation is April 1 through June 30. The Musselshell River is closed to new consumptive appropriations during the

period of July 1 through September 30, except applications for supplemental irrigation during the period of September 1 through September 30 may be accepted. Since the proposed appropriation period lies outside the closure period, the application is not subject to the basin closure rule.

#### CONCLUSIONS OF LAW

5. The application for permit lies outside the period of the Musselshell River Closure, therefore the application is not subject to closure requirements. ARM 36.12.1016. (FOF 4).

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

#### GENERAL CONCLUSIONS OF LAW

6. 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 . . .

7. 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.

8. 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.

9. 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).

10. 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.

11. 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**

12. The analysis of stream flows and water management on the Musselshell River is complex because the basin includes three large storage projects, all owned by the State of Montana (a fourth large, off-stream storage project is scheduled to be constructed in the future in the lower Musselshell River region by another party). Bair Reservoir is an on-stream reservoir located in Meagher County, and Martinsdale Reservoir and Deadmans Basin are off-stream reservoirs located in Wheatland County. Collectively the reservoirs store in excess of 106,000 AF. Water is released from the reservoirs during the irrigation season to individual contract owners (primarily irrigators) when natural stream flows are insufficient to meet existing demands. These released waters are referred to as *contract water*. As such, USGS gaging records of stream flows are often heavily influenced during the irrigation season by releases of stored or contract water, and do not reflect natural stream conditions. However, for purposes of the Department’s physical water availability statutory criteria analysis, contract water will not be distinguished from natural stream flows, because the water physically exists in the river.

13. The Department compiled and analyzed USGS stream gauging data from a total of two locations near the proposed project. The stream gages are: 1) USGS 06127500 Musselshell River near Musselshell MT (Calculation Period: 1928-09-01 to 2015-10-31); and 2) USGS 06130500 Musselshell River at Mosby MT (Calculation Period: 1930-10-01 to 2016-1-31). The following data reflect median of the mean monthly flow for these two gauges:

USGS 06127500 Musselshell River near Musselshell MT (Calculation Period: 1928-09-01 to 2015-10-31) (Seasonal Gage)

Month (Requested months of diversion)	April	May	June
Median Flow Rate (CFS)	88	159.9	288.5
Median Volume (AF)	5236.4	9831.9	17166.9

USGS 06130500 Musselshell River at Mosby MT (Calculation Period: 1930-10-01 to 2016-1-31) (Annual Gage)

Month (Requested months of diversion)	April	May	June
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<b>Median Flow Rate (CFS)</b>	<b>137.5</b>	<b>287.8</b>	<b>452.7</b>
<b>Median Volume (AF)</b>	<b>8181.8</b>	<b>17693.1</b>	<b>26937.5</b>

USGS 06127500 Musselshell River gage is located near the town of Musselshell, Montana. USGS 06130500 Musselshell River gage is located near the town of Mosby, Montana. The data from the Musselshell and Mosby gages indicate water in the requested amounts of 1.56 CFS up to 76 AF is physically available during the requested period of use.

14. Both of the gages analyzed by the Department reflect that median of the mean monthly stream flows in the requested amounts of 1.56 CFS up to 76 AF are physically available during the requested period of use. One of the gauges is located upstream of the proposed diversion, and the other gauge is located downstream.

15. As a further check on physical water availability, the Department considered the data collected at the Mosby gage site, and added in the sum total of claimed appropriations (claimed water rights). An assumption was made that all water rights listed in the Department database are diverted simultaneously and monthly to their maximum extent, based on their claimed flow rate and volume. The Mosby gage was used in the analysis because it is the only gauge that reflects a full period of record for the April through June proposed diversion period.

The analysis (adding in) of claimed water right data implies water is physically available in amounts exceeding those described in Findings of Fact 13-14 (USGS records). The comparison of physically-available water in this finding to actual stream flows measured by USGS gages likely reflects that water is not appropriated in the amounts shown in water right records, or all water rights are not diverted simultaneously. However, the calculations provide an option in analyzing streamflows, and the method employed shows water is physically available at the proposed point of diversion in the amount sought.

16. USGS 06127500 gage near Musselshell, MT and USGS 06130500 gage at Mosby, MT, indicate water in the requested amounts of 1.56 CFS up to 76 AF is physically available during the requested period of use. USGS stream gage records.

## CONCLUSIONS OF LAW

17. 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.”

18. 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).

19. 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).

20. 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 No. 16)

## Legal Availability

### FINDINGS OF FACT

21. Stream conditions in the Musselshell River are heavily influenced by the storage and release of contract water, therefore the complexity of determining legal demands is high. Releases from Deadmans Basin influence the lower two-thirds of the Musselshell River, including the reach of river subject to this application. For purposes of this Order, it is necessary that the Department’s Legal Availability determination consider the influence on stream flows due to water stored and subsequently released by the Deadmans Basin project. Deadmans Basin contract water releases inflate USGS gaging records after May 1 (when contract water can legally be released) and are difficult to distinguish from natural stream flows in the records. While insightful, the exclusive comparison of USGS records to Department water right records

to determine legal availability in the Musselshell River does not provide a sufficient basis to make a finding on the statutory criterion.

22. The Department also analyzed information from a hydrologic study that was published in 1998 – the Musselshell River Basin Water Management Study (Study). The Study was co-authored by the Department, U.S. Bureau of Reclamation, Upper Musselshell Water Users Association and Deadmans Basin Water Users Association. The Study included a water availability analysis which estimated the volume of water legally available at various points in the river, after accounting for existing water use. Reservoir operations and contract water releases from Bair Reservoir, Martinsdale Reservoir and Deadmans Basin were factored into the analysis. Professional hydrologists and/or engineers employed by the Department and U.S. Bureau of Reclamation collected data and utilized computer modeling to obtain results (the computer model used is known as HYDROSS). The Study’s analysis and methods vary from a typical legal availability analysis using Department water right records because contract water is not present in most water courses, and the Study considered other factors such as consumptive water use, actual acres irrigated in the basin, and return flows from inefficient irrigation practices. Return flows are a vital component of water use/reuse in nearly any stream course where flood irrigation is present.

The Study’s HYDROSS model computed legal availability on a median basis (volume in AF) considering water rights filed on the Musselshell River through the year 1989. For purposes of this application the Department added into the results all water rights issued on the river since 1989 in order to make the results more current (although water right records were added to the results, gaged streamflow or hydrologic data were not added). The results of the Study and further Department input data are as follows:

**1998 Musselshell Study - Legal Availability at Mosby, Montana**

	April	May	June
Volume Available on a Median Basis	14,012 AF	31,979 AF	37,954 AF
Water Rights Issued Since 1989	5,905.9 AF	5,928.5 AF	5,905.9 AF
Volume Legally Available	8,106.1 AF	26,050.5 AF	32,048.1 AF

The Study concludes that water is legally available on a volume basis in the months of April through June. The Study only identifies legal water availability in terms of volume, however, per USGS gauging data, there are times when the flow rate in the river exceeds legal demands as well. Musselshell River Basin Water Management Study, 1998; USGS Records.

Based on water availability results represented in the 1998 Musselshell River Basin Water Management Study, USGS records, and other data analyzed in this Order, the Department finds that water can be considered legally available in the Musselshell River during the months of April through June. This determination is contingent on minimum stream flow conditions that must exist before appropriation can occur. The conditions are outlined in the Conditions section in this Order. Musselshell River Basin Water Management Study; Conditions section; File.

### CONCLUSIONS OF LAW

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

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

(A) identification of physical water availability;

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

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

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

24. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water

Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

25. 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.

26. 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.

27. *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).

28. 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);

29. Applicants have 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, when conditions are imposed. §85-2-311(1)(a)(ii), MCA. (FOF No. 22)

### **Adverse Effect**

#### **FINDINGS OF FACT**

30. In most years the Musselshell River cannot meet all of the water demands placed on it. The mainstem of the river is administratively closed to new consumptive uses of water during the months of July through September, except that applications for supplemental irrigation during September may be filed with the Department. The Musselshell River is designated a chronically dewatered stream. The Fourteenth Judicial District Court administers a water right enforcement program on the river, known as the Musselshell River Distribution Project. The State of Montana owns three large storage reservoirs located in the basin that impound early season or winter stream flows for release to contract holders later in the irrigation season, when natural flows cannot meet demand. Musselshell River Basin Water Management Study, 1998. 36.12.1016, ARM; 85-2-150, MCA.

31. Applicants can control the appropriation and they have plans for water measurement.

32. Water right appropriations on the Musselshell River are currently enforced during the irrigation season by the Fourteenth Judicial District Court. All water users that divert water from the Musselshell River are subject to the project. Enforcement starts each season when stream flows are insufficient to meet demand, and when the bulk of irrigation begins, typically in late April or early May. Water users can only divert water during this time when their priority date is senior enough to do so. The proposed appropriation will be part of the enforcement project, and therefore will be subject to district court control.

33. During any period when the enforcement project is not in operation the permittee will be junior to all other water rights, and will be subject to “calls” on water. During the non-enforcement period the Department further finds it reasonable to establish trigger flows that can be monitored through the USGS gage so that senior appropriators are protected. When the enforcement project is not in operation, and when stream flows are less than the prescribed trigger flow, the appropriator cannot divert water. When stream flows exceed the trigger flows,

the appropriator can divert water. Applicants will be required to monitor a USGS stream gage to meet its obligation. Conditions section.

34. The Department finds that no adverse effects will result from the proposed appropriation, based on the Applicants plan, control over appropriations by the Fourteenth Judicial District Court, and conditions imposed in the Conditions section of this Order.

#### CONCLUSIONS OF LAW

35. 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.

36. 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).

37. 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.

38. 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.

39. 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.

40. 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.

41. 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, provided conditions are applied to the Permit. § 85-2-311(1)(b) , MCA. (FOF No. 34)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

42. The point of diversion is located in the NW1/4 NW1/4 SW1/4 of Section 2, in TWP 9N, RGE 30E, on the Musselshell River. Water will be diverted from the river via a pump with a meter to measure appropriations. The water is pumped through an underground pipe to the center pivot. Water can also be pumped from the same diversion system to two other center pivots that share the point of diversion. Applicants can control appropriations to all three irrigation systems by an underground valve. Applicants agree to monitor and document water usage under the proposed permit, and maintain a separate accounting of appropriations from contract water received from Deadmans Basin, or private water rights that supply the other two center pivot systems. The pump used to divert the water is a model 6RB-CC with a variable frequency drive motor capable of supplying up to a combined 3500 GPM for three pivots. The motor can also be “dialed-down” to only provide the requested 1.56 CFS (700 GPM) required to operate this 76-acre pivot.

43. The Department finds the proposed diversion and operation of the appropriation works to be adequate.

## CONCLUSIONS OF LAW

44. 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. 43).

## **Beneficial Use**

### FINDINGS OF FACT

45. The proposed beneficial use is irrigation of agricultural crops at a flow rate of 1.56 CFS and a volume of 76 AF. 76.0 acres are to be irrigated in the SW1/4 Section 2, T9N, R30E, Musselshell County. Application. Irrigation is identified as a beneficial use of water in § 85-2-102(4)(a), MCA.

46. The per-acre appropriation of water for the proposed permit is about 9 gallons per minute up to 1.0 AF. The flow rate is within the range of standard design plans for center pivot irrigation in Montana. The per-acre volume figure is less than irrigation water use standards defined in the Department's administrative rules (approximately 2.8 AF for an irrigation system with 80% efficiency), but the appropriation is for only 3 months of an 8-month growing season, and will be supplemented by contract water from Deadmans Basin. File; ARM 36.12.1902; Technical Report.

47. The Department finds that center pivot irrigation of agricultural crops is a beneficial use, and that a flow rate of 1.56 CFS and diverted volume of 76.0 AF are reasonable for the proposed system.

## CONCLUSIONS OF LAW

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

49. 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).

50. 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.

51. Applicant proposes to use water for irrigation, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 76.0 AF of diverted volume and 1.56 CFS of flow rate are the amounts needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF No. 47)

## **Possessory Interest**

### **FINDINGS OF FACT**

52. Applicants signed the affidavit on the application form affirming they have 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**

53. 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.

54. 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.

55. Applicants have proven by a preponderance of the evidence that they have 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. 52)

## **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. 40C 30104097 should be GRANTED. Applicants may divert and use water from the Musselshell River, by means of an existing pumping system, from April 1 through June 30, at 1.56 cubic feet per second (CFS) up to 76.0 acre-feet (AF) annually from the point of diversion located in the NWNWSW Section 2, T9N, R30E, Musselshell County. The purpose for which water may be used is irrigation and the place of use consists of 76.0 acres, generally located in the SW1/4 Section 2, T9N, R30E.

The application will be subject to the following conditions, limitations or restrictions.

### **Conditions**

1. **WATER MEASUREMENT RECORDS REQUIRED:**  
THE APPROPRIATOR SHALL INSTALL A DEPARTMENT-APPROVED WATER USE MEASURING DEVICE AT THE FOLLOWING POINT:
  - A. IN THE MEANS OF CONVEYANCE (PIPELINE) BETWEEN THE PUMP AND THE CENTER PIVOT, IN ORDER TO MEASURE APPROPRIATIONS FROM THE MUSSELHELL RIVER. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE DEVICE TYPE AND LOCATION MUST BE APPROVED BY THE DEPARTMENT BEFORE WATER IS DIVERTED UNDER THIS PERMIT. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS MUST ACCOUNT SEPARATELY FOR ANY APPROPRIATIONS UNDER THIS PERMIT FROM APPROPRIATIONS UNDER ANY OTHER WATER RIGHT (INCLUDING WATER ACQUIRED FROM DEADMANS BASIN).

RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE LISTED BELOW. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:  
LEWISTOWN WATER RESOURCES OFFICE  
613 NE MAIN ST, SUITE E  
LEWISTOWN, MT

PHONE: 406-538-7459  
FAX: 406-538-7012

2. **IMPORTANT INFORMATION:**

THE APPROPRIATOR IS SUBJECT TO ENFORCEMENT OF WATER RIGHTS ADMINISTERED BY THE FOURTEENTH JUDICIAL DISTRICT COURT. AT TIMES WHEN THE ENFORCEMENT PROJECT IS NOT OCCURRING, THE APPROPRIATOR MUST MEET CERTAIN MINIMUM STREAM FLOW CONDITIONS PRIOR TO DIVERTING WATER. ALTHOUGH THE FOLLOWING CONDITION SPECIFIES CERTAIN STREAM FLOW LEVELS, IT IS THE APPROPRIATORS RESPONSIBILITY TO ENSURE THAT ALL SENIOR WATER RIGHTS ARE BEING MET AT ALL TIMES. IT IS THE RESPONSIBILITY OF THE APPROPRIATOR TO CEASE DIVERSIONS WHEN ITS WATER RIGHT IS "CALLED" BY SENIOR WATER USERS.

THE APPROPRIATOR SHALL NOT DIVERT WATER UNLESS THE REFERENCE USGS STREAM GAGES ARE OPERATING AND REGISTERING STREAM FLOWS. THE APPROPRIATOR SHALL DIVERT WATER ONLY DURING THE PERIOD OF APPROPRIATION WHEN THE FLOW RATE AT USGS GAGE SITE 06127500 MUSSELSHELL RIVER NEAR MUSSELSHELL MT, INDICATES A FLOW OF AT LEAST 80 CUBIC FEET PER SECOND AND USGS GAGE SITE 06130500 MUSSELSHELL RIVER AT MOSBY MT, INDICATES A FLOW OF AT LEAST 70 CUBIC FEET PER SECOND. STREAM FLOWS AT THE REFERENCE USGS GAGES MUST BE CHECKED DAILY TO ENSURE CONDITIONS ARE APPROPRIATE FOR DIVERSIONS. THE CURRENT USGS STREAM GAGING WEBSITE IS: <http://waterdata.usgs.gov/mt/nwis/current?type=flow>.

**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 1st day of June 2016.

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