

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30104140 BY State of Montana Board of Land Commissioners, Trust Lands Management Division)))))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On January 8, 2016, the State of Montana Board of Land Commissioners, Trust Lands Management Division (Trust Lands) (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30104140 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 300 gallons per minute (GPM) up to 0.3 acre-feet (AF) annually. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 18, 2016. An Environmental Assessment for this Application was completed on February 22, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Fishing access site use agreement for requested points of diversion (PODs)
- Maps: Topographic overview map showing locations of all requested PODs
 Aerial photos showing location of each individual requested POD

Information within the Department’s Possession/Knowledge

- Department water right records of existing water rights
- USGS records for gaging station #12363000, Flathead River at Columbia Falls

- USGS records for gaging station #12372000, Flathead River near Polson

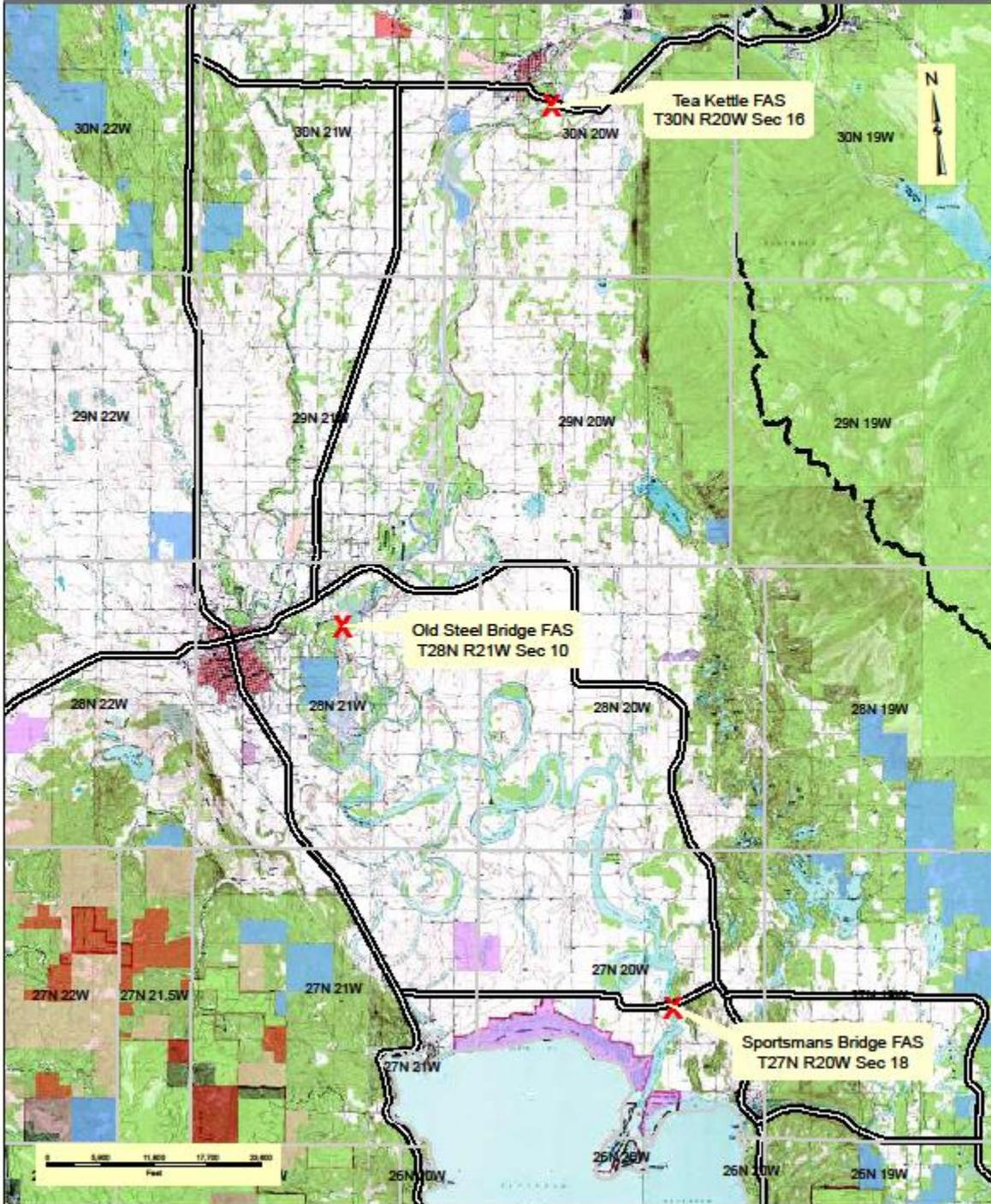
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Flathead River, by means of a pump, from January 1-December 31 at 300 GPM up to 0.3 AF, from three locations (Fishing access sites), for fire training use from January 1-December 31. The points of diversion (PODs) will be located in the NESWNW Section 16, Township 30N, Range 20W, Flathead County (Tea Kettle FAS), the NENENW Section 10, Township 28N, Range 21W, Flathead County (Old Steele Bridge FAS), and the SWNWNW Section 23, Township 27N, Range 20W, Flathead County (Sportsman's Bridge FAS). Diversion of water will occur using the onboard pumps of wildland fire engines and tenders. The places of use are located in the NESWNW Section 16, Township 30N, Range 20W, Flathead County (Tea Kettle FAS), the NENENW Section 10, Township 28N, Range 21W, Flathead County (Old Steele Bridge FAS), and the SWNWNW Section 23, Township 27N, Range 20W, Flathead County (Sportsman's Bridge FAS). Due to the nature of the fire training use, water will be trucked from each point of diversion. Because water use is not tied to a specific parcel within the service area and water use relies on fire engines and tenders taking possession of the water at the point of diversion, the places of use for this application are considered to be the same as the points of diversion.
2. Water diverted for fire training use is considered to be 100% consumed.

Flathead River Proposed Points of Diversion



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 76LJ 30104140.

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

GENERAL CONCLUSIONS OF LAW

3. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

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

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

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

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

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

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

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

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

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

7. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

8. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

9. The Applicant is requesting a maximum flow rate of 300 GPM up to 0.3 AF annually from the Flathead River. The proposed PODs are located in the NESWNW Section 16, Township 30N, Range 20W, Flathead County (Tea Kettle FAS), the NENENW Section 10, Township 28N, Range 21W, Flathead County (Old Steele Bridge FAS), and the SWNWNW Section 23, Township 27N, Range 20W, Flathead County (Sportsman’s Bridge FAS). The most upstream and most downstream of the requested PODs are separated by a total of 31.6 river miles. The Department has determined that analysis of physical availability on the Flathead River should be based on the most upstream POD requested; the Flathead River is a gaining reach from the USGS gage in Columbia Falls to Flathead Lake and as such the most conservative estimate of physical availability would be at the uppermost requested POD.

10. In order to analyze physical availability of water at the proposed points of diversion, flow measurements from USGS Station #12363000 (Flathead River at Columbia Falls) were obtained. The period of record for the gage is October 1951- September 2015. The gaging station records were used to calculate median of mean flow rates (CFS) for each month during the proposed period of diversion as well as median of mean volumes, which were calculated by converting CFS to Acre-Feet (CFS x 1.98 x days per month =AF).

11. There are no intervening water rights between the most upstream point of diversion (Tea Kettle FAS) and the gaging station at Columbia Falls.

12. The following table shows the physical availability of water in the Flathead River at the most upstream point of diversion throughout the proposed period of diversion.

Table 1. Physical availability of water at the Applicant’s uppermost requested POD.

	Jan	Feb	Mar	Apr	May	Jun
Flow (CFS)	5,714.0	4,887.0	4,805.0	10,680.0	22,630.0	24,720.0
Volume (AF)	350,725.3	270,935.3	294,930.9	634,392.0	1,389,029.4	1,468,368.0
	Jul	Aug	Sep	Oct	Nov	Dec
Flow (CFS)	11,450.0	5,705.0	4,953.0	5,133.0	4,565.0	5,995.0

Volume (AF)	702,801.0	350,172.9	294,208.2	315,063.5	271,161.0	367,973.1
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CONCLUSIONS OF LAW

13. 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.”

14. 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).

15. 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).

16. 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 9-12)

Legal Availability:

FINDINGS OF FACT

17. The Department assessed all surface water legal demands on the Flathead River from the gaging station at Columbia Falls (#12363000) down to the confluence of the Flathead River and Flathead Lake, and Flathead Lake downstream to USGS gage #12372000 on the Flathead River near Polson, MT. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st. This is done because all of the legal demands exist within irrigation climatic area three which has a standard period of use from April 1st to October 31st. All other water uses were analyzed as year-round uses. Due to the difficulty

of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users. The Applicant is requesting a flow of 300 GPM up to 0.3 AF annually, with a maximum anticipated monthly appropriation of 0.05 AF (16,000 gallons). The legal availability of water is summarized in the tables below.

Table 2: Flathead River at Columbia Falls USGS Gage # 12363000 minus legal demands on Flathead River to inlet of Flathead Lake.

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	5,714.0	3,506.6	2,207.4	135,491.4
February	4,887.0	3,506.6	1,380.4	76,530.5
March	4,805.0	3,506.6	1,298.4	79,697.0
April	10,680.0	6,772.3	3,907.7	232,114.4
May	22,630.0	8,247.3	14,382.7	882,807.1
June	24,720.0	8,247.3	16,472.7	978,475.4
July	11,450.0	5,524.3	5,925.7	363,716.4
August	5,705.0	3,622.3	2,082.7	127,833.1
September	4,953.0	3,622.3	1,330.7	79,040.6
October	5,133.0	3,622.3	1,510.7	92,723.7
November	4,565.0	3,506.6	1,058.4	62,870.1
December	5,995.0	3,506.6	2,488.4	152,739.2

Table 3: Flathead River near Polson USGS Gage # 12372000 minus legal demands on Flathead Lake

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
January	10,380.0	104.7	10,275.3	630,699.9
February	9,234.0	104.7	9,129.3	506,130.2
March	7,778.0	104.7	7,673.3	470,989.1
April	9,223.0	172.1	9,050.9	537,621.3
May	18,570.0	172.1	18,397.9	1,129,260.9

June	25,720.0	172.1	25,547.9	1,517,543.1
July	13,570.0	172.1	13,397.9	822,360.9
August	6,312.0	172.1	6,139.9	376,864.9
September	6,076.0	172.1	5,903.9	350,689.5
October	7,369.0	172.1	7,196.9	441,743.5
November	8,838.0	104.7	8,733.3	518,759.9
December	10,070.0	104.7	9,965.3	611,672.1

18. Confederated Salish & Kootenai Tribes 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.

19. 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.

20. 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 the Flathead River and Flathead Lake 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

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 30023457 by Utility Solutions, LLC (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

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 17-20)

Adverse Effect

FINDINGS OF FACT

24. The means of diversion is a pump located on a wildland fire engine or tender. If a shortage of water on the Flathead River occurs, the Applicant has the ability cease 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 on the Flathead River 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 is proposing to pump water from the Flathead River using onboard pumps on wildland fire engines and tender trucks. The maximum proposed diversion rate is 300 GPM and is achieved using a Hale model HPX 300 B23 pump. Mark III pumps with a maximum diversion rate of 98 GPM will also be used, allowing the Applicant to fill up to 3 engines simultaneously. Each engine is capable of storing up to 500 gallons and each tender has a maximum capacity of 3,000 gallons.

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 is requesting 300 GPM up to 0.3 AF per annum for fire training use. Wildland fire engines and tenders will divert water from the Flathead River at a maximum flow rate of 300 GPM and will use water on State Trust Lands within an approximate service area of 15 miles from each point of diversion. Fire training occurs throughout the year but mainly during fire season. The Applicant provided the following anticipated schedule of water use throughout the year.

Month	Engines Filled (500 gallons each)	Tenders Filled (3,000 gallons each)	Total gallons used
January	4	0	2,000
February	4	0	2,000
March	10	1	8,000
April	20	2	16,000
May	20	2	16,000
June	20	2	16,000
July	10	1	8,000
August	10	1	8,000
September	10	1	8,000
October	10	1	8,000
November	4	0	2,000
December	4	0	2,000
Total			96,000
96,000 gallons equals approximately 0.3 acre-feet			

CONCLUSIONS OF LAW

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

39. 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).

40. Applicant proposes to use water for fire training use. Applicant has proven by a preponderance of the evidence fire training use is a beneficial use and that 0.3 AF of diverted volume and 300 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 37)

Possessory Interest

FINDINGS OF FACT

41. The Applicant signed 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

42. 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.

43. 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.

44. 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 41)

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. 76LJ 30104140 should be GRANTED.

The Department determines the Applicant may divert water from the Flathead River, by means of a pump, from January 1-December 31 at 300 GPM up to 0.3 AF, from points in the NESWNW Section 16, Township 30N, Range 20W, Flathead County (Tea Kettle FAS), the NENENW Section 10, Township 28N, Range 21W, Flathead County (Old Steele Bridge FAS),

and the SWNWNW Section 23, Township 27N, Range 20W, Flathead County (Sportsman's Bridge FAS), for fire training use from January 1-December 31. The places of use are located in the NESWNW Section 16, Township 30N, Range 20W, Flathead County (Tea Kettle FAS), the NENENW Section 10, Township 28N, Range 21W, Flathead County (Old Steele Bridge FAS), and the SWNWNW Section 23, Township 27N, Range 20W, Flathead County (Sportsman's Bridge FAS).

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 March, 2016.

/Original signed by Kathy Olsen/

Kathy Olsen, Deputy Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 1st day of March, 2016, by first class United States mail.

MONTANA, STATE OF BOARD OF LAND COMMISSIONERS
% TRUST LANDS MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620-1601

/Original signed by Nathaniel T. Ward/

3/1/2016

NAME

DATE