

**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. 76C 30104141 BY State of Montana Board of Land Commissioners, Trust Lands Management Division</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On April 6, 2016, the State of Montana Board of Land Commissioners, Trust Lands Management Division (Trust Lands) (Applicant) submitted Application for Beneficial Water Use Permit No. 76C 30104141 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 350 gallons per minute (GPM) up to 1.02 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 June 9, 2016. An Environmental Assessment for this Application was completed on June 10, 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: Topographic overview map showing locations of all requested PODs  
Small scale topographic maps (5) showing transitory helicopter PODs

Information Received after Application Filed:

- Modified application attachments, received June 7, 2016

Information within the Department's Possession/Knowledge

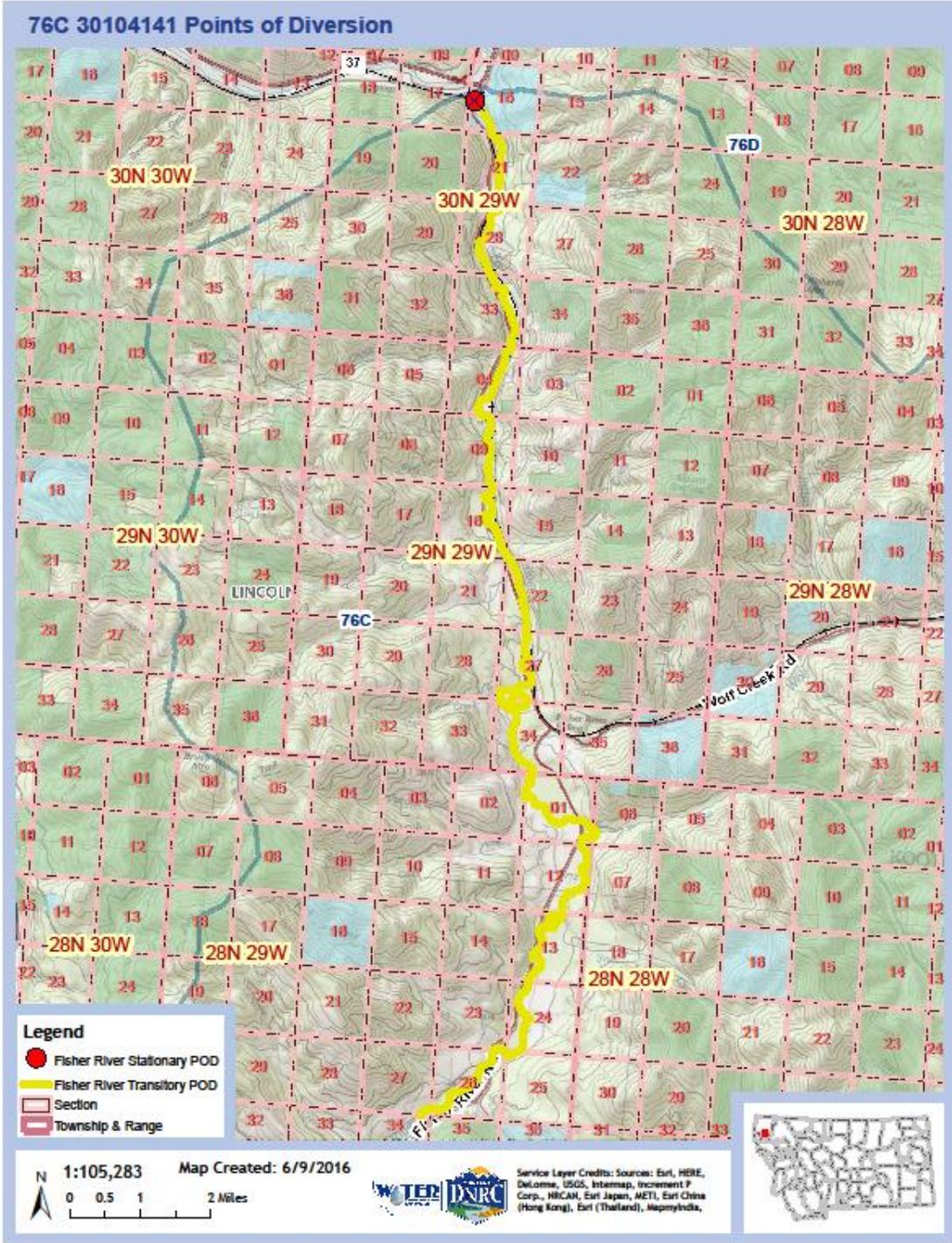
- Department water right records of existing water rights
- USGS records for gaging station #12302055, Fisher River near Libby, MT

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 Fisher River, by multiple means of diversion, from May 1-October 31 at 350 GPM up to 1.02 AF, from multiple locations on the Fisher River for industrial purposes. Water will be diverted using a 350 gallon bucket suspended from a helicopter as well as onboard pumps of wildland fire engines and tenders, dust suppression trucks, and portable pumps associated with weed spraying. The main point of diversion (POD) will be located in the NWNWSW Section 16, Township 30N, Range 29W, Lincoln County, and will be used for industrial use associated with weed spraying, dust abatement, and fire training. The Applicant is also proposing to divert water using a transitory POD between their downstream-most and upstream-most requested PODs. This transitory POD will be used by helicopter only; the helicopter will withdraw water from the Fisher River using a bucket for fire training purposes. Because water use is for fire training, weed spraying, and dust abatement and is not tied to a specific location, and because water use relies on helicopters, fire engines, tenders, dust abatement trucks, and portable pumps for taking possession of the water at the points of diversion, the places of use for this application are considered to be the same as the points of diversion.
2. Water diverted for the proposed industrial use of fire training, dust suppression, and weed spraying is considered to be 100% consumed.



Preliminary Determination to Grant  
 Application for Beneficial Water Use Permit No. 76N 30104141.

**§ 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 350 GPM up to 1.02 AF annually from the Fisher River. The Applicant is proposing to divert water from multiple points of diversion. The main diversion, where all dust abatement, weed spraying, and fire training diversion using a pump will occur, is located in the NWNWSW Section 16, Township 30N, Range 29W, Lincoln County. The other diversion will occur using a helicopter bucket. This diversion will be transitory along the Fisher River between the main diversion location and a point in the SESESE Section 27, Township 28N, Range 29W, Lincoln County.

10. In order to analyze physical availability of water at the proposed points of diversion, flow measurements from USGS Station #12302055 (Fisher River near Libby, MT), were obtained. The period of record for the gage is October 1967- 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. Next, the DNRC record of existing water rights was searched to identify any water rights on the source between the uppermost requested POD and the USGS gaging station. The Department has no record of any existing water rights between the uppermost requested POD and the USGS gaging station on the Fisher River. Therefore, the physical availability of water is defined by the records for USGS gaging station #12302055.

12. The following table shows median of mean monthly flow and volume used to quantify physical availability of surface water at the most upstream requested POD. Median of the mean volume was calculated by multiplying the median of mean monthly flow rate (CFS) by the number of days in the month by 1.98 AF/CFS/day.

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

	May	Jun	Jul	Aug	Sep	Oct
Flow (CFS)	1232	772	248	130	119	120
Volume (AF)	75620	45836	15247	7998	7042	7356

13. The Applicant is requesting 350 GPM up to 1.02 AF from May 1-October 31. The above table confirms that the flow and volume the Applicant seeks to divert is physically available.

#### CONCLUSIONS OF LAW

14. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

15. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 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).

16. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

17. The Applicant has proven by a preponderance of the evidence 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 9-13)

#### Legal Availability:

#### FINDINGS OF FACT

18. An area of potential impact from the uppermost requested POD down to the confluence of the Fisher River and Kootenai River was determined for this application as any new water use has the potential to affect existing water users. In order to determine legal availability of water on the Fisher River, the Department assessed all surface water legal demands on the Fisher River

from the Applicant’s uppermost requested POD down to the confluence of the Fisher River and Kootenai River. There are no water rights on this stretch of river. Because there are no existing water rights between the Applicants’ uppermost requested POD and the confluence of the Fisher River and Kootenai River, any water physically available can also be deemed legally available. The following table shows the legal availability of water on the Fisher River during the proposed period of appropriation.

**Table 2. Fisher River legal availability of water**

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
May	1,232	0.0	1,232	75,620
June	772	0.0	772	45,836
July	248	0.0	248	15,247
August	130	0.0	130	7,998
September	119	0.0	119	7,042
October	120	0.0	120	7,356

19. The Applicant is requesting 350 GPM up to 1.02 AF from May 1-October 31. The above table confirms that the flow and volume the Applicant seeks to divert is legally available.

**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. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 18, 19)

### **Adverse Effect**

#### **FINDINGS OF FACT**

23. The Applicant is proposing to divert water using a 350 gallon capacity helicopter bucket, tanker trucks, portable pumps, and wildland fire engine/tender pumps. If a shortage of water on the Fisher River occurs, the Applicant has the ability to stop diverting water until water becomes available again.

24. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available on the Fisher River at the requested points of diversion and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

#### CONCLUSIONS OF LAW

25. 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.

26. 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).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 23, 24)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

32. The Applicant is proposing to divert water from the Fisher River using either 350 gallon helicopter buckets, onboard pumps on tanker trucks, wildland fire engines, tender trucks, and portable pumps. The maximum proposed diversion rate is 350 GPM, which is based on the helicopter bucket size. Tender trucks have a maximum diversion rate of 300 GPM using a Hale model HPX 300 B23 pump. Each tender has a maximum capacity of 3,000 gallons. Tanker trucks will have similar pump capacities to the tenders and will not exceed a flow rate of 300 GPM. Mark III pumps with a maximum diversion rate of 98 GPM will be used by fire engines, allowing the Applicant to fill up to 3 engines simultaneously. Each engine is capable of storing up to 500 gallons. Portable pumps will be used for filling tanks for weed spraying. The pumps used will divert water at a rate of less than 100 GPM. Most weed spraying will utilize an ATV mounted sprayer with a tank of less than 50 gallons.

CONCLUSIONS OF LAW

33. 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.

34. 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.

35. 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 32)

**Beneficial Use**

FINDINGS OF FACT

36. The Applicant is requesting 350 GPM up to 1.02 AF per annum for industrial use. Water used under the industrial purpose will specifically be used for fire training (0.26 AF), dust suppression (0.75 AF), and weed spraying (0.003 AF). Dust abatement and weed spraying practices will be put into use as part of timber sale management in the Libby Unit of the DNRC.

37. Helicopters with 350 gallon capacity buckets will divert water from the Fisher River at a maximum flow rate of 350 GPM. Wildland fire engines, tanker trucks, and tenders will divert water from the Fisher River at a maximum flow rate of 300 GPM. Water diverted for weed spraying will be diverted at a maximum flow rate of less than 100 GPM.

38. The Applicant provided the following anticipated water use calculations.

Fire Training

Engines: 10 engines x 2 fills of 500 gallons per month x 6 months = 60,000 gallons

Tender: 1 tender x 1 fill of 3000 gallons per month x 6 months = 6,000 gallons

Helicopter Buckets: Maximum of 20 buckets per fire season (350 gallons/bucket x 20) = 7,000 gallons

### Dust Abatement

The Applicant estimates it takes approximately 4,100 gallons of water per mile per day to adequately control dust during tree harvest operations. This amount would apply the equivalent of 0.1 inches of water (the amount commonly referred to as a “wetting rain”) on the road surface. Estimating that dust abatement would be applied daily on up to 2 miles of road for a maximum of 30 days during the proposed period of use, the amount of water required is determined to be 246,000 gallons (4,100 x 2 miles x 30 days).

### Weed spraying

The Applicant anticipates a need of up to 1,000 gallons of water annually during the proposed period of use for weed spraying on the Libby Unit of the DNRC.

### 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 industrial use. Applicant has proven by a preponderance of the evidence industrial use is a beneficial use and that 1.02 AF of diverted volume and 350 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 36-38)

### **Possessory Interest**

#### **FINDINGS OF FACT**

42. 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**

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 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. 76C 30104141 should be GRANTED.

The Department determines the Applicant may divert water from the Fisher River, by means of a pump or helicopter bucket, from May 1-October 31 at 350 GPM up to 1.02 AF, for industrial use from May 1-October 31. The industrial use will include fire training, dust abatement, and weed spraying. The points of diversion and places of use authorized under this permit are a stationary location in the NWNWSW Section 16, Township 30N, Range 29W, Lincoln County, and a transitory POD used by a helicopter between the stationary POD and a location in the SESESE Section 27, Township 28N, Range 29W, Lincoln 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 22<sup>nd</sup> day of June, 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 22<sup>nd</sup> day of June, 2016, by first class United States mail.

MONTANA, STATE OF BOARD OF LAND COMMISSIONERS  
C/O DENNIS MEYER  
PO BOX 201601  
HELENA, MT 59620-1601

*/Original Signed by Nathaniel T. Ward/*

*6/22/2016*

NAME

DATE