

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

**APPLICATION FOR BENEFICIAL)
WATER USE PERMIT NO. 43Q 30104551)
BY UNITED STATES DEPARTMENT OF) PRELIMINARY DETERMINATION TO
THE INTERIOR – BUREAU OF LAND) GRANT PERMIT
MANAGEMENT)**

On December 7, 2015, the United States Department of the Interior – Bureau of Land Management (BLM) (Applicant) submitted Application for Beneficial Water Use Permit No. 43Q 30104551 to the Billings Regional Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 11 GPM flow rate and 1.55 AF volume for wildlife habitat. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 23, 2016. The Department met with the Applicant for a pre-application meeting on November 24, 2015. The Department was represented by Christine Schweigert and Mark Elison. Jay Parks and Fran Rieman represented the Applicant. An Environmental Assessment for this Application was completed on February 23, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600

Information Received after Application Filed

- Facsimile from Craig Drake, BLM Acting Field Office Manager, Billings, to Mark Elison, Department Hydrologist, dated January 22, 2016, providing pump curves.

Information within the Department’s Possession/Knowledge

- Environmental Assessment dated February 23, 2016

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from an unnamed tributary (UT) to the Yellowstone River, by means of a solar powered pump, from May 1 through September 30 at 11 GPM up to 1.55AF, from a point in the NESESE section 21 T3N R30E, Yellowstone County for wildlife habitat use from May 1 through September 30. The Applicant proposes to create a brooding pod on 0.092 AC. The place of use is generally located in NESESE section 21 and NWSWSW section 22 T3N R30E, Yellowstone County. The place of use is approximately 0.8 miles SE of Pompey's Pillar National Monument.

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

GENERAL CONCLUSIONS OF LAW

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

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

Location Map - 43Q 30104551 - BLM



(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

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

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

(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.

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

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

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

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

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

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

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

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

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

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

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

Physical Availability

FINDINGS OF FACT

8. The only available method of determining flow rate and volume in the UT is by direct measurement. No method that estimates flow rates based on natural streams is appropriate to this situation. The unnamed tributary receives water from natural drainage, groundwater recharge, and unused water and return flow from an irrigation district. The irrigation district diverts 750 CFS from the Yellowstone River to irrigate approximately 30,000 acres of agricultural land. The unnamed tributary is a collector for unused water and return flows from that irrigation as well as natural sources. The flow rate and volume of water in the UT are dependent primarily on diversions to the irrigation district and not on a natural stream hydrograph.

9. Monthly measurements of flow in the UT by the Department and the Applicant are shown below.

Date	Water Depth (ft)	Cross-sectional Area (ft ²)	Velocity (ft/sec)	Flow Rate (CFS)	Monthly Volume (AF)
May ¹	> 6.39	> 104.16	1.59	> 175.8	> 10787.6
June 30,	----	34.86	----	61.45	3650.1

2015 ²					
July 31, 2015 ³	2.75	43.26	1.59	68.78	4221.7
Aug. 28, 2015 ³	3.24	51.22	1.60	81.95	5030.1
Sept. 23, 2015 ³	3.47	55.00	1.40	77.00	4573.8

¹See explanation below

²Marsh-McBirney measurement by Department

³Float Area Method by Applicant (velocities corrected for depth)

10. On June 30, 2015, the Department measured the UT at 61.5 CFS using a Marsh-McBirney flow meter. The average depth of water was 2.22 feet and the water line was 4.17 feet below the top of a vertical metal culvert located at the measuring site.

11. On July 31, August 28, and September 23, 2015, the Applicant measured the distance from the top of the culvert to the water line and measured velocity by the float method. The UT is approximately trapezoidal with bottom width of 15.4 feet. The top width on June 30, 2015 was 15.9 feet. Based on the shape of the UT, the top width increases approximately 0.31 feet for each 1.0 foot increase in water depth. Cross-sectional area was calculated as average depth x ½ x (top width + bottom width). Velocities reported by the Applicant from the time a tennis ball took to float 50 feet were corrected for the difference between average velocity and surface velocity.

12. No quantitative measurement was taken in May; however, the Applicant visited the site in May and observed that the water level was over the top of the culvert. This gives a water depth of greater than 6.39 feet and a cross-sectional area greater than 104.16 ft². Assuming average velocity of 1.59 ft/sec, the flow rate in May was over 175.8 CFS and the monthly volume was in excess of 10,787.6 AF.

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. Visual observations are insufficient without estimation of flow. *In the Matter of Application for Beneficial Water Use Permit No. 43D 10220900 by Sam McDowell* (DNRC Final Order 2007).

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 8 – 12)

Legal Availability:

FINDINGS OF FACT

18. The area of potential impact for this application is the unnamed tributary from the point of diversion to the confluence with the Yellowstone River and one mile downstream.

19. The diverted flow rate and volume requested are very small with respect to the flows in both the UT and the Yellowstone River over the period of diversion. Flow in a river as dynamic as the Yellowstone River would change over any given one mile reach more than the diverted flow rate and volume requested.

20. There are no water rights in the area of potential impact.

21. A comparison of the physically available water and the legal demands for both flow rate (CFS) and volume (AF) are given in the tables below.

Source: Unnamed tributary to the Yellowstone River

Month	Physical Availability (CFS)	Existing Legal Demands (CFS)	Physical – Legal (CFS)
May	175.8*	0.0	175.8
June	61.45	0.0	61.45

July	68.78	0.0	68.78
August	81.95	0.0	81.95
September	77.00	0.0	77.00

Month	Physical Availability (AF)	Existing Legal Demands (AF)	Physical – Legal (AF)
May	10,790.6*	0.0	10,790.6
June	3,650.1	0.0	3,650.1
July	4,221.7	0.0	4,221.7
August	5,030.1	0.0	5,030.1
September	4,573.8	0.0	4,573.8

* Minimum flow and volume based upon height of water in unnamed tributary.

CONCLUSIONS OF LAW

22. 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).

23. 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.

24. 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 - 21)

Adverse Effect

FINDINGS OF FACT

25. The Applicant's plan to prevent adverse effect is to reduce or cease diversion. The conveyance is equipped with a valve that can be closed. In addition, the solar panels can be covered and the pump can be shut down.

26. There are no water rights between the point of diversion on the UT and the main stem of the Yellowstone River. There are no water rights on the Yellowstone River for at least one mile downstream.

27. The requested flow rate and volume of water are less than the difference between physically available water and legal demands.

CONCLUSIONS OF LAW

28. 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.

29. 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).

30. 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.

31. 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.

32. 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.

33. 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.

34. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant’s burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial

District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source.").

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

35. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992)(applicant must show that at least in some years no legitimate call will be made); *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

36. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12 ("DNRC properly determined

that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See In re Application No. 72948-G76L by Cross, (DNRC Final Order 1991); see also In re Application No. 75997-G76L by Carr, (DNRC Final Order 1991).

37. 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 25 – 27)

Adequate Diversion

FINDINGS OF FACT

38. Applicant proposes to divert water from the UT by means of a CAP Solar M-series solar powered pump rated to provide 11 GPM with a 220 watt solar panel given the 15 foot lift required. The pump is rated to provide 3300 gallons per day.

39. A buried, perforated 30-inch spring box concentrates flow and settles debris from the pump intake.

40. Approximately 130 feet of 2-inch diameter pipe conveys water to the place of use where perforations in the pipe distribute water to the plot.

CONCLUSIONS OF LAW

41. 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.

42. 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.

43. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

44. 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 38 - 40).

Beneficial Use

FINDINGS OF FACT

45. The Applicant proposes to maintain consistent soil moisture required to provide habitat for aquatic insects that serve as a food source for pheasants and other wildlife.

46. The volume requested is the minimum amount of water to maintain required habitat conditions according to Jay Parks, wildlife biologist with the Bureau of Land Management.

47. The requested flow rate is the flow rate required to produce the requested volume over the period of diversion. Because the pump is solar powered, the maximum flow rate of 11 GPM is not maintained throughout the day and is zero at night. The average flow rate is estimated at 3300 gallons per day which provides 1.55 AF over a 153 day period of diversion.

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 wildlife habitat which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence wildlife habitat is a beneficial use and that 11 GPM flow rate 1.55 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 45 - 47)

Possessory Interest

FINDINGS OF FACT

52. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

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. 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 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. 43Q 30104551 should be **GRANTED**.

The Department determines the Applicant may divert water from an unnamed tributary to the Yellowstone River, by means of a pump, from May 1 through September 30 at 11 GPM up to 1.55 AF, from a point in the SESESE Section 21 T3N R30E, Yellowstone County, for wildlife habitat use from May 1 through September 30. The place of use is located NESESE Section 21 T3N R30E and NWSWSW Section 22 T3N R30E, Yellowstone 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 6th day of April 2016.

Kimberly Overcast, Manager
Billings 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 _____ day of _____ 2016, by first class United States mail.

United States Department of the Interior
Bureau of Land Management, Billings Field Office
c/o Craig Drake, Acting Field Office Manager
5001 Southgate Drive
Billings, MT 59101

NAME

DATE