

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41Q-30104590 BY LEE LINDEMAN))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 2, 2015, Lee Lindeman (Applicant) submitted Application for Beneficial Water Use Permit No. 41Q-30104590 to the Lewistown Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 40 gallons per minute (GPM) and 2.13 acre-feet (AF) from Little Otter Creek for domestic and lawn and garden irrigation. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of May 26, 2016. An Environmental Assessment for this Application was completed on October 6, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600 SW
- All necessary application attachments
- Maps: Aerial photo depicting the point of diversion and conveyance facilities
 USGS topo map, showing the parcel
- Approval letter from DNRC for variance, dated May 18, 2015

Information within the Department's Possession/Knowledge

- Department's Surface Water Permit Application Technical Report (Technical Report)
- Water Right records
- State of Montana property ownership records (Cadastral)

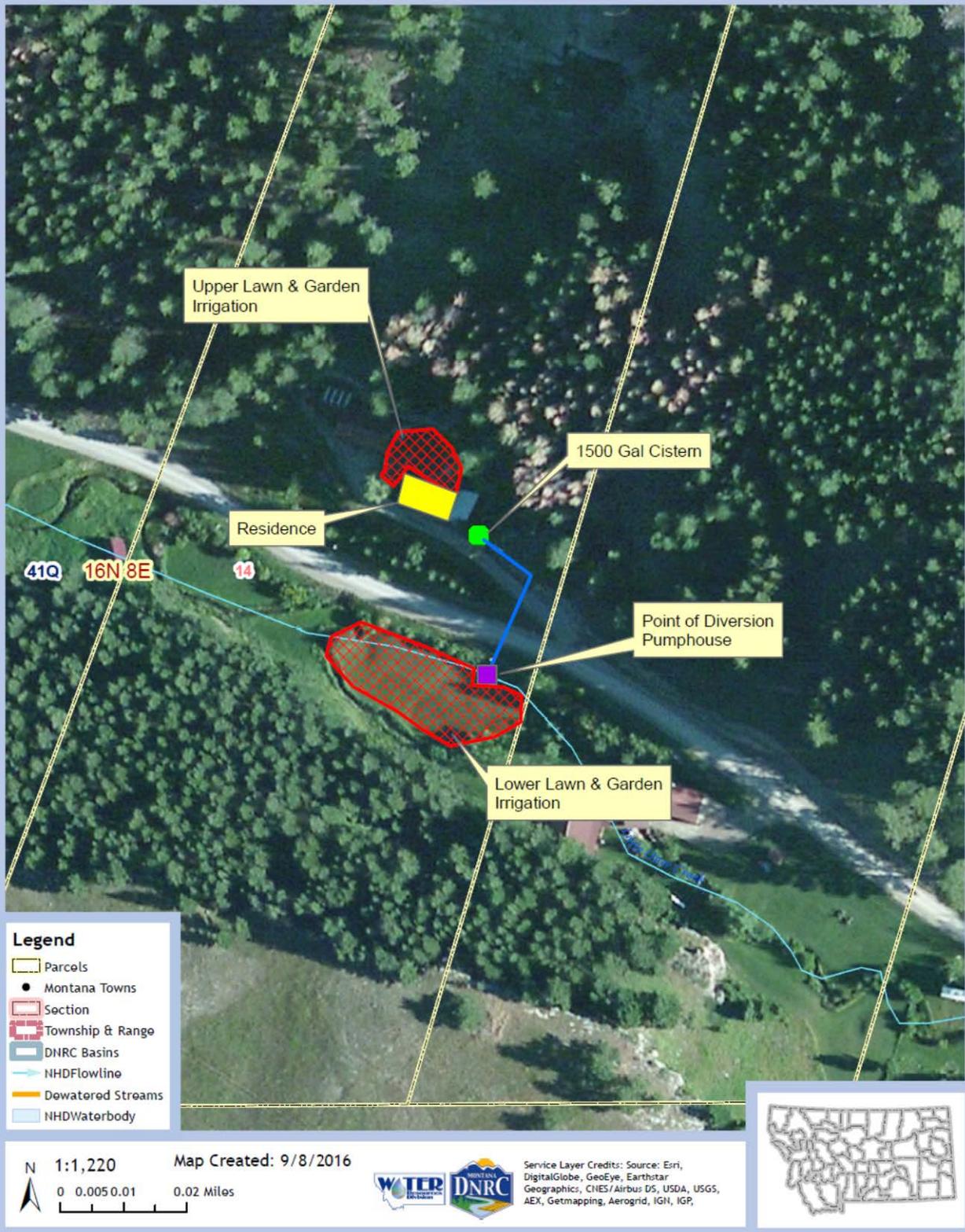
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Little Otter Creek, by means of a 1.5 HP pump at a flow rate of 40 GPM and a volume of 2.13 AF, from a point in the SENWNW Section 14, Township 16N, Range 8E, for domestic use from January 1 to December 31 annually. The Applicant proposes to irrigate 0.45 acres of domestic lawn and garden from April 1 to October 1 annually. The place of use is generally located in Tract 13, L.C. C.O.S #1, SENWNW of Section 14, Township 16N, Range 8E, Judith Basin County approximately 10.6 miles southeast of the town of Raynesford.
2. Water is conveyed from the pump through 1.5” PVC pipe to a 1500 gallon storage cistern located near the southeast portion of the Applicant’s residence. A small distribution pump is used to deliver water from the cistern to the household and to the upper lawn and garden area for irrigation.
3. Consumptive use of the proposed diversion, assuming DNRC sprinkler efficiency rating of 70% for lawn and garden and 10% consumption for domestic use, equals 0.89 AF annually.

LEE LINDEMAN



Application for Beneficial Water Use Permit No. 41Q-30104590.

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

GENERAL CONCLUSIONS OF LAW

4. 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 . . .

5. 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.

6. 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.

7. 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).

8. 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.

9. 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

10. The proposed source of appropriation is Little Otter Creek, which is tributary to Big Otter Creek in Judith Basin County. The Applicant's proposed point of diversion is located in the SENWNW of Section 14, T16N R8E, approximately 4 miles downstream of the headwaters of Little Otter Creek and roughly 12.8 miles upstream of its confluence with Big Otter Creek.

11. USGS gaging stations are not available on Little Otter Creek to calculate physical availability of water for the proposed appropriation of 40 GPM (0.09 CFS) and 2.13 AF per year. If actual stream gaging records are not available, the Applicant must provide streamflow measurements for physical availability analysis pursuant to ARM 36.12.1702(4).

12. On May 13th, 2015, the Applicant submitted a variance request (granted May 18th, 2015) to use three individual streamflow measurements collected near the point of diversion during high flow, baseflow recession, and baseflow in lieu of taking measurements during all 12 months that were proposed for diversion. The Applicant submitted three streamflow measurements collected on May 18th, June 18th, and September 3rd with a Marsh McBirney portable flowmeter (Table 1), as well as hourly flow measurements collected using a pressure transducer placed in Little Otter Creek at the point of diversion from May 18th through September 3rd, 2015. Little Otter Creek is an ungauged stream. The Department's hydrologists determined that the physical streamflow measurements provided and variance request submitted by the Applicant were reasonable in the absence of stream flow gaging station data pursuant to ARM 36.12.1702(4).

13. The Department assumed that water users upstream of the Applicant's proposed point of diversion were diverting at full capacity during measurement collection and that existing upstream legal demands were accounted for in the Applicant's streamflow data. Average daily flow values were calculated from the hourly flow measurements collected with the pressure transducer and then a monthly median for each month was established in order to produce mean monthly streamflow values for May through September. At the direction of the Department hydrologist, the low base flow measurement of 1.9 CFS was held for the months of October

through April where there were no stream flow measurements taken. The resulting pressure transducer mean monthly flow data and the physical measurements are in Table 2.

Table 1. Marsh McBirney Flow Measurements for Little Otter Creek (CFS)

	5/18/2015	6/18/2015	9/3/2015
Marsh McBirney Measurements	2.96	3.35	1.9

Table 2. Physical Availability - Pressure Transducer Streamflow and Volume Estimates for Little Otter Creek at the Applicant’s Point of Diversion

Month	Physical Availability (CFS)	Applicant Supplied Flow Measurements (CFS)	Physical Availability (AF)
January	1.9		116.8
February	1.9		109.3
March	1.9		116.8
April	1.9		113.1
BEGIN USE OF APPLICANT-SUPPLIED TRANSDUCER DATA			
May	1.6	2.96	95.3
June	2.7	3.35	157.7
July	3.4		206.0
August	2.8		174.6
September	1.4	1.9	80.3
END USE OF APPLICANT-SUPPLIED TRANSDUCER DATA			
October	1.9		116.8
November	1.9		113.1
December	1.9		116.8

14. By analyzing the streamflow measurement data provided by the Applicant, the Department determined that water is physically available in adequate quantities at the Applicant’s point of diversion for the Applicant to divert water at 40 GPM (0.09 CFS) up to 2.13 AF during the requested period of diversion.

CONCLUSIONS OF LAW

15. 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.”

16. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

17. 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).

18. 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. (Findings of Fact 10-14).

Legal Availability:

FINDINGS OF FACT

19. The department identified the potential impact area as the 1.5 mile reach of Little Otter Creek between the Applicant’s proposed point of diversion in the SENWNW of Section 14, T16N R8E and the SWNWNW of Section 10, T16N R8E. According to the most recent water right issued on the source, Little Otter Creek goes dry before it leaves Section 10, T16N, R8E, (see Application for Beneficial Water use Permit 41Q 10848500). To determine legal availability the department identified five surface water rights (Table 3) within the potentially impacted area with existing legal demands that may be affected by the proposed appropriation. Each water right listed below has a year-round period of diversion.

Table 3. Existing legal demands along the potentially affected reach of Little Otter Creek.

Water Right Number	Maximum Flow Rate (GPM)	Maximum Flow Rate (CFS)	Maximum Volume (AF)
41Q 19982 00	12	0.03	6
41Q 107357 00	15	0.03	1.5
41Q 107358 00	30	0.07	1.5
41Q 207068 00	21	0.05	34
41Q 30521 00	15	0.03	0.2

20. To determine legal demands on a monthly basis flow rates and volumes were assigned to each month based on the period of use for each purpose listed on each water right. The existing legal demands were then subtracted from the mean monthly flows and volumes that the department determined to be physically available at the proposed point of diversion to determine legal availability. Table 4 lists the physically available monthly flow rates and volumes calculated using the Applicant-supplied measurement data, the existing monthly legal demands of the five water rights listed in Table 3 and the resulting legal availabilities estimated for each month.

Table 4. Legal Availability

Month	Physical Availability at POD (CFS)	Physical Availability at POD (AF)	Downstream Legal Demands (CFS)	Downstream Legal Demands (AF)	Legally Available (CFS)	Legally Available (AF)
January	1.9	116.8	0.21	3.6	1.69	113.2
February	1.9	109.3	0.21	3.6	1.69	105.7
March	1.9	116.8	0.21	3.6	1.69	113.2
April	1.9	113.1	0.21	3.6	1.69	109.5
May	1.6	95.3	0.21	3.6	1.4	91.7
June	2.7	157.7	0.21	3.6	2.5	154.1
July	3.4	206.0	0.21	3.6	3.2	202.4
August	2.8	174.6	0.21	3.6	2.6	171

September	1.4	80.3	0.21	3.6	1.2	76.7
October	1.9	116.8	0.21	3.6	1.7	113.2
November	1.9	113.1	0.21	3.6	1.7	109.5
December	1.9	116.8	0.21	3.6	1.7	113.2

21. Based on stream measurements provided by the Applicant and departmental analysis of legal availability the department finds that water is legally available in adequate quantities to supply the Applicant’s requested flow rate of 0.09 CFS (40 GPM) and annual volume of 2.13 AF.

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. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

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

26. *In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management* (DNRC Final Order 1991)(Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

27. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

28. 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. (Findings of Fact 19-21)

Adverse Effect

FINDINGS OF FACT

29. The Applicant proposes to divert water from Little Otter Creek by means of a 1.5 hp pump, conveying water through 1.5” PVC pipe to a 1500 gallon cistern. The Applicant’s use of water can be controlled and the plan to prevent adverse effect to water rights of a prior appropriator during periods of water shortage is to rely on the storage capacity of the cistern to provide necessary household use without the need for diversion from Little Otter Creek. Water use for lawn and garden irrigation will be minimized or eliminated during times of water shortage to ensure household needs will be met from stored water. In addition, household use will be minimized during water shortages by practicing basic conservation measures. In the event of extreme water shortages that extend beyond the storage capacity of the cistern, water may be obtained from an outside source to fill the Applicant’s cistern to provide for in-house domestic use. A water filling station is available approximately 10 miles away in the town of Raynesford, and the Applicant has the capacity to haul sufficient quantities of water for household use in the event of extreme water shortages.

30. I find that water from Little Otter Creek is both physically and legally available in amounts sufficiently exceeding the requested appropriation of 40 GPM and 2.13 AF to ensure no adverse effect to senior appropriators diverting from the same source.

CONCLUSIONS OF LAW

31. 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.

32. 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).

33. 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.

34. 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.

35. 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.

36. 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.

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. (Finding of Fact 29,30)

Adequate Diversion

FINDINGS OF FACT

38. The point of diversion consists of a Red Lion Model RLSP-150 electric 1.5 hp pump in the pump house situated adjacent to Little Otter Creek. Water will be conveyed through approximately 200 feet of 1.5” PVC pipe which is buried under Limestone Canyon Road and along the north side of the Applicant’s driveway to the storage cistern. The storage cistern has a capacity of 1500 gallons and is located near the southeastern portion of the Applicant’s residence. A small distribution pump is used to deliver water from the cistern to the household for residential use and to the lawn and garden area for irrigation. There is approximately 40 feet of vertical head from the pump to the cistern, resulting in a total dynamic head of 65 feet. The Applicant submitted pump specifications indicating this model of pump will provide a flow rate of approximately 43 GPM with 65 feet of total dynamic head.

39. The department finds the proposed diversion works to be adequate and capable of appropriating the requested flow rate of 40 GPM and volume of 2.13 AF.

CONCLUSIONS OF LAW

40. 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.

41. 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.

42. 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 (Findings of Fact 38,39).

Beneficial Use

FINDINGS OF FACT

43. The proposed appropriation of 40 GPM (0.09 CFS) up to 2.13 AF per year from Little Otter Creek is for purpose of domestic and domestic lawn and garden. Water will be appropriated and used year round for domestic and from April 1 to October 1 each year for domestic lawn and garden irrigation. Domestic use will occur in one primary residence. The place of use for domestic lawn and garden will consist of 0.45 acres. Combined uses will be limited by the 40 GPM (0.09 CFS) capacity pump and diverted volume will not exceed 1.0 AF per year for domestic purposes and 1.13 AF per year for domestic lawn and garden irrigation.

44. The Applicant's requested flow rate and volume of 40 GPM up to 2.13 AF is based on the Administrative Rules of Montana ARM 36.12.115 (2)(a), allocating 1.0 AF per household for year-round domestic use and ARM 36.12.115 (2)(b), allocating 2.5 AF per acre per year for domestic lawn and garden (2.5 AF/acre x 0.45 acres = 1.13 AF).

CONCLUSIONS OF LAW

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

46. #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).

47. Applicant proposes to use water for domestic and domestic lawn and garden which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as 'lawn and garden irrigation') which is a recognized beneficial use. § 85-2-102(4), MCA. "Domestic use" by DNRC rule means those water uses common to a household including: ... (g) garden and landscaping irrigation up to five acres." ARM 36.12.101(21). Applicant has proven by a preponderance of the evidence domestic and domestic lawn and garden is a beneficial use and that 2.13 AF of diverted volume and 40 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (Findings of Fact No. 43,44)

Possessory Interest

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

49. 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.

50. 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.

51. 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. (Findings of Fact No. 48)

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. 41Q-30104590 should be GRANTED.

The Department determines the Applicant may divert water from Little Otter Creek, by means of an electric 1.5 hp pump, from January 1 to December 31 at 40 GPM up to 2.13 AF, from a point in the SENWNW of Section 14, Township 16N, Range 8E, Judith Basin County, for domestic and from April 1 to October 1 for domestic lawn and garden use. The Applicant may

irrigate 0.45 acres of lawn and garden. The place of use is located in the SENWNW of Section 14, Township 16N, Range 8E, Judith Basin County also known as Tract 13, L.C. C.O.S #1.

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 13th day of October 2016.

/Original signed by Jim Nave/

Jim Nave, Manager

Missoula Regional Office

Department of Natural Resources and Conservation