

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30104788 BY ASI CONSTRUCTORS)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 21, 2015, ASI Constructors (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30104788 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 300 GPM and 12 AF for industrial use. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of December 28, 2015. An Environmental Assessment for this Application was completed on January 7, 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: Applicant generated aerial photo site maps of the point of diversion and place of use

Information within the Department's Possession/Knowledge

- USGS gaging station records from the USGS website.
- Department water right records of existing rights.

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 a temporary diversion of water from the Missouri River, by means of a pump, from March 1 – November 1 at 300 GPM up to 12 AF, from a point in the NWNWNE Section 6, T26N, R42E, McCone County for industrial use from March 1 – November 1. The place of use is generally located E2 Section 6, T26N, R42E, McCone County. This permit is for the same project as permit 30065556 which expired on December 31, 2015. The project (repair of spillway at Fort Peck dam) was not completed in the time anticipated so this permit would provide water for an additional year to complete the construction project. This temporary use of water will expire December 31, 2016.
2. The industrial use is comprised of a concrete batch plant, washing equipment and dust abatement for repairs to the Fort Peck Dam spillway plunge pool. The majority of the water is to be used to mix approximately 100,000 yards of concrete. Water is not expected to return to the source, therefore the consumptive use of the proposed diversion is 100%.
3. The Applicant stated that a flow meter will be installed to measure the flow rate and volume diverted.

§ 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

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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 Applicant is requesting a flow rate up to 300 GPM from the Missouri River. The USGS gaging station records (station # 06132000) for the Missouri River below Fort Peck Dam (1943–2015 period of record) was used for to analyze physical and legal availability. The gaging station is located approximately 1/3 of a mile upstream of the proposed point of diversion. There are no existing rights between the gage and the proposed point of diversion. The median of the mean monthly flows were obtained from the gaging station records and then used to calculate the

median monthly volumes for each month during the requested period of diversion (median monthly flow in CFS x 1.98 x number of days in each month). The median of the mean monthly flow rates and volumes are summarized in the tables below.

Physical Availability-Flow Rate (CFS)

	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
Median Monthly Flows	6942	6706	7634	8079	8823	9245	8209	7887
Water Rights between Gage and POD	0	0	0	0	0	0	0	0
Flow Rate Physically Available	6942	6706	7634	8079	8823	9245	8209	7887

Physical Availability-Volume (AF)

	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
Median Monthly Volumes	426100	398336	468575	495889	541556	567458	487615	484104
Water Rights between Gage and POD	0	0	0	0	0	0	0	0
Volume Physically Available	426100	398336	468575	495889	541556	567458	487615	484104

CONCLUSIONS OF LAW

11. 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.”

12. *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).

13. 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).

14. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10)

Legal Availability:

FINDINGS OF FACT

15. The Department defined the potential area of impact as approximately 5 miles downstream of the proposed point of diversion and finds this to be a reasonable area of assessment. The Department provided a listing of the existing water rights including the Montana Department of Fish, Wildlife & Parks instream flow reservation, the Fort Peck Tribes reserved water right, as well as private individual rights. Below is a table of the existing rights within the potential area of impact.

Wr number	Flow rate (CFS)	Volume (AF)	QSection	Sec	TR	Period of Diversion
40S 168953	0.08	15.68	N2SENE	4	26N42E	4/1-11/30
40S 178473	0.08	15.68	NENE	4	26N42E	4/1-11/30
40S 10030	11.8	575	NWNENW	3	26N42E	4/1-11/30
40S 11184	8.01	270	NESWNW	3	26N42E	4/15-11/15
40S 31904	14.93	89	NWSENE	3	26N42E	4/1-11/30
40S 46364	5.53	960	SWNE	32	27N42E	4/1-11/19
40S 28935	6.68	532.5	NWSWNE	32	27N42E	4/1-11/4
40S 184730	0.08	42	NWNW	33	27N42E	1/1-12/31
40S 182895	15.37	555	NWSESE	34	27N42E	4/1-11/30

40S 168938	15.37	498	NWSESE	34	27N42E	4/1-11/30
40S 4929	16	840	NENWSE	33	27N42E	4/15-10/15
40S 33997	10	597.9	SEWNNE	32	27N42E	4/1-10/31
40S 30065511	6.68	189.65	NE	32	27N42E	1/1-12/31
Total	110.43	5180.41				

16. The Department then compared the physical water availability (median of mean monthly flows and volumes) to the amount of water already appropriated under the existing water rights and reservations identified. The Department calculated the median of the mean monthly flows and volumes represented in the tables below are legally available for appropriation. The appropriated volumes were calculated by dividing the claimed volumes of the downstream rights by the number of months of the claimed period of use. The FWP instream right volume was calculated by multiplying the flow rate times 1.98 times the number of days in each month for a total yearly volume of 5,492,310 AF. The Applicant is requesting a flow rate up to 300 GPM not to exceed 12 AF. Legal availability is summarized in the tables below.

	Legal Availability-Flow Rate (CFS)							
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
Flow Rate Physically Available	6942	6706	7634	8079	8823	9245	8209	7887
FWP Instream Right	5178	5178	5178	5178	5178	5178	5178	5178
Fort Peck Tribal Right	325	420	854	1219	1749	1464	883	407
Downstream Water Rights	7	110	110	110	110	110	110	110
Flow Rate Legally Available	1432	998	1492	1572	1786	2493	2038	2192

	Legal Availability-Volume (AF)								
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	
Water Physically Available	426100	398336	468575	495889	541556	567458	487615	484104	
FWP Instream Right	317826	307573	317826	307573	317826	317826	307573	317826	
Fort Peck Tribal Right	19949	24948	52419	72409	107354	89654	52450	24982	
Downstream Water Rights	19	1131	1131	1131	1131	1131	1131	1131	
Volume Legally Available	88306	64684	97199	114776	115245	158847	126461	140165	

17. The comparison in the following tables show water is legally available throughout the proposed period of diversion for the Applicant's use. For ease of calculation the flow and volumes were rounded up to the nearest whole number.

	Comparison-Flow Rate (CFS)								
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	
Flow Rate Legally Available at POD	1432	998	1492	1572	1786	2493	2038	2192	
Flow Rate Requested	0.67	0.67	0.67	0.67	0.67	0.67	0.67	0.67	
Flow Rate Remaining	1431	997	1491	1571	1785	2492	2037	2191	

	Comparison-Volume (AF)								
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	
Volume Legally Available	88306	64684	97199	114776	115245	158847	126461	140165	
Volume Requested	2	2	2	2	2	2	2	2	
Volume Remaining	88304	64682	97197	114774	115243	158845	126459	140163	

CONCLUSIONS OF LAW

18. 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).

19. 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.

20. 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 15-17)

Adverse Effect

FINDINGS OF FACT

21. During times of water shortage, the Applicant's plan is to cease pumping water from the Missouri River. In the event of a call being placed on water, the Applicant will stop diverting water until such time that diverting water will no longer have an adverse impact on downstream water right holders. The Applicant will work with the DNRC to ensure that no adverse affect will occur during the duration of the project.

22. Water is legally available in all months of the proposed period of diversion. The Applicant will install flow meters at the point of diversion and will monitor the flow and volume of water diverted.

23. The Department finds there will be no adverse effect, because the amount of water requested is legally available at this point on the Missouri River and the Applicant's plan to curtail their appropriation during times of water shortages is adequate.

CONCLUSIONS OF LAW

24. 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.

25. 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).

26. 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.

27. 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.

28. 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.

29. 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.

30. 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 21-23)

Adequate Diversion

FINDINGS OF FACT

31. Water will be diverted from the Missouri River via a pumping system capable of delivering 300 GPM. The diversion from the Missouri River will use a Griffin 6” variable use self priming pump (model 6NHCD) with screened intake. Water will be transferred to the concrete batch plant via approximately 1500 feet of HDPE or PVC pipe.

32. The Applicant provided a data sheet and pump curve of the proposed pump. The pump curve shows that water can be diverted at the rates requested. (Department File).

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 31-32).

Beneficial Use

FINDINGS OF FACT

36. The Applicant proposes to use the water in the construction of a concrete plunge pool at the base of the Fort Peck Dam spillway. The water will be used for mixing approximately 100,000 yards of concrete before the project is completed, with an anticipated maximum annual water usage of 10 AF. This figure is based on 36 gallons of water per yard of concrete and the projected construction schedule. An additional 2 AF of water will be used for dust abatement and washing equipment and trucks. The flow requested is based on the needs of the batch plant and the ability to fill water trucks in a timely manner.

37. The Department finds the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

CONCLUSIONS OF LAW

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

39. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

40. Applicant proposes to use water for industrial use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence industrial use is a beneficial use and that 12 AF of diverted volume and 300 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 36-37)

Possessory Interest

FINDINGS OF FACT

41. 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

42. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

43. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

44. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 41)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30104788 should be GRANTED.

The Department determines the applicant may divert water from the Missouri River, by means of a pump, from March 1 – November 1 at 300 GPM up to 12 AF, from a point in the NWNWNE Section 6, T26N, R42E, McCone County, for industrial use from March 1 – November 1. The place of use is located E2 Section 6, T26N, R42E, McCone 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

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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 7th day of January, 2015.

Original Signed by Denise Biggar
Denise Biggar, Regional Manager
Glasgow Water Resources Office
Department of Natural Resources and Conservation