

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30105215 BY GERALD L BRABECK</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On February 2, 2016, Gerald L Brabeck (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30105215 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 40 gallons per minute (GPM) and 5 acre-feet (AF) from the Missouri River. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 22, 2016. The Applicant responded with information dated March 2, 2016. The Application was determined to be correct and complete as of March 11, 2016. An Environmental Assessment for this Application was completed on March 16, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Signed Pre-Application meeting form
- Attachments
- Maps: Multiple Maps of the lot showing the location of point of diversion (POD) and general place of use (POU)
- Pump Information

Information Received after Application Filed

- Applicant's deficiency response dated March 2, 2016.

Information within the Department's Possession/Knowledge

- USGS gaging station records (Station # 06132000, Missouri River below Fort Peck Dam MT) from October 1943-March 2015.
- 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 to divert water from the Missouri River, by means of a pump, from April 1- October 31 at 40 GPM up to 5 AF, from a point in SWNWSW, Section 4, T26N, R41E, Valley County, for lawn and garden use from April 1- October 31. The Applicant proposes to irrigate lawn and garden on 2 acres. The place of use is generally located in NWSWSW, Section 4, T26N, R41E, Valley County.
2. DNRC standards are 70% efficiency for sprinkler irrigation. The total consumptive use of this diversion would therefore be 3.5 AF/year.

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

**GENERAL CONCLUSIONS OF LAW**

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

state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

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

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

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

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

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

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

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal

demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of

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the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

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

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

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

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

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

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

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

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

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

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

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

**Physical Availability**  
**FINDINGS OF FACT**

9. The Applicant is requesting a maximum flow rate of 40 GPM up to 5 AF annually from the Missouri River. The proposed point of diversion is located approximately 6.5 miles upstream from the USGS gaging station below Fort Peck Dam (USGS Station # 06132000). The median of mean monthly flows were obtained from the gaging station records as well as median of mean volumes, which were calculated by converting CFS to Acre-Feet (CFS x 1.98 x days per month).

10. The following is a list of existing water rights between the requested point of diversion and the specified USGS gaging station.

<b>Water Right Number</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>
40S 101270 00	0.05	1.5
40S 101271 00	0.05	18.0
40S 109581 00	0.04	6.9
40S 113831 00	0.07	1.5
40S 13558 00	0.06	1.5
40S 168976 00	0.05	3.0
40S 171314 00	0.06	5.3
40S 171315 00	0.06	2.0
40S 171316 00	0.08	5.3
40S 172437 00	0.02	1.3
40S 183132 00	4.67	126.0
40S 187299 00	0.07	1.5
40S 214948 00	0.04	4.0
40S 2219 00	1.78	350.0
40S 24326 00	0.06	2.6
40S 24327 00	0.06	1.4
40S 26907 00		1220.0
40S 28928 00	5	364.5
40S 30006466	0.04	1.5
40S 30006769	0.05	0.8
40S 30007495	0.05	1.3
40S 30011193	24.5	11254.0
40S 30012463	0.07	2.5
40S 30013570	0.07	2.5
40S 30016330	0.05	1.8

40S 30023172	0.04	3.1
40S 30023173	0.06	1.3
40S 30030763	0.07	4.1
40S 30041880	0.05	2.4
40S 30043282	0.08	1.3
40S 30066327	0.07	1.3
40S 30067051	0.07	1.9
40S 32087 00	5	459.0
40S 36833 00	0.04	2.0
40S 37631 00	0.04	1.0
40S 37635 00	0.22	7.0
40S 37641 00	0.06	7.0
40S 37648 00	6.23	800.0
40S 37649 00	6.23	1100.0
40S 38989 00	0.02	4.0
40S 39477 00	0.02	1.5
40S 42274 00	0.06	2.5
40S 42275 00	0.08	0.7
40S 42278 00	13.59	1080.0
40S 42279 00	0.08	10.2
40S 43872 00	4.77	378.0
40S 45385 00	0.01	1.0
40S 46390 00	0.3	30.0
40S 46468 00	0.02	1.7
40S 49291 00	4.45	60.0
40S 5133 00	0.02	2.5
40S 51832 00	0.04	3.0

40S 55517 00	0.11	25.0
40S 798 00	2.65	120.0
40S 799 00	4.67	471.0
40S 79902 00	0.08	22.0
40S 79909 00	0.03	2.3
40S 800 00	1.51	120.0

40S 80528 00	4.45	750.0
40S 84863 00	5.34	546.0
40S 89824 00	0.02	1.0
40S 97764 00	0.07	5.0
<b>Total</b>	<b>97.7</b>	<b>19409.1</b>

11. This list was used to evaluate the flow rate physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights, and adding these values to the median of mean flow values for the gaging station since the requested point of diversion is upstream of the gaging station. The result is the monthly median of mean flow rate for the Missouri River physically available at the point of diversion specified by the Applicant.

<b>Physical Availability-Flow Rate (cfs)</b>			
<b>Month</b>	<b>Median of Mean Monthly Flows</b>	<b>Water Rights Between Gauge and POD</b>	<b>Flow Rate Physically Available</b>
April	6706	67	6773
May	7634	93	7727
June	8079	98	8176
July	8823	98	8920
August	9245	98	9343
September	8209	96	8304
October	7887	61	7948

12. The list of existing water rights between the specified USGS gaging station (USGS Station # 06132000) and the point of diversion was also used to evaluate the volume physically available each month by determining the monthly volume being diverted. This was done by dividing the total volume for each right by the number of months each diversion takes place. The sum of these values was then added to the median of mean monthly volumes measured at the USGS

gaging station for each month the use occurs to determine volume physically available at the proposed point of diversion .

<b>Physical Availability-Volume (AF)</b>			
Month	Median of Mean Monthly Volumes	Water Rights Between Gauge and POD	Volume Physically Available
April	398336	1754	400091
May	468575	2016	470591
June	479863	2107	481970
July	541525	2107	543632
August	567458	2107	569565
September	487585	2107	489692
October	484104	1771	485875

**CONCLUSIONS OF LAW**

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

14. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

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

16. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-12)

**Legal Availability:**

**FINDINGS OF FACT**

17. The Department determined the area of potential impact on the Missouri River as approximately 3 miles downstream of the proposed point of diversion to where the USGS gaging station is located (USGS Station # 06132000). A list of existing legal demands within the area of impact, including the Montana Department of Fish, Wildlife, & Parks instream flow reservation, was generated and used by the Applicant to compare the physical availability (median of mean monthly flows and volumes) of water to the amount of water already appropriated under the existing water rights and reservations. The Department finds flows and volumes in the tables below show legal availability of water for appropriation during the period of diversion requested. The volume of water rights downstream of the requested point of diversion was calculated by dividing the claimed volumes of the downstream rights by the number of months of the claimed period of use. The Applicant is requesting a flow of 40 GPM (0.09 CFS) up to 5 AF per year. The legal availability is summarized in the tables below.

**Missouri River Legal Availability-Flow Rate (CFS)**

	Flow Rate Physically Available	FWP Instream right	Fort Peck Tribal Right	Downstream Water Rights	Flow Rate Legally Available
April	6773	4508	420	67	1778
May	7727	4508	854	93	2272
June	8176	4508	1219	98	2352
July	8920	4508	1749	98	2566
August	9343	4508	1464	98	3273
September	8304	4508	883	96	2818
October	7948	4508	407	61	2972

### Missouri River Legal Availability-Volume (AF)

	Water Physically Available	FWP Instream right	Fort Peck Tribal Right	Downstream Water Right	Volume Legally Available
April	400091	267775	24948	1754	105613
May	470591	276701	52419	2016	139455
June	481970	267775	72409	2107	139679
July	543632	267775	107354	2107	166396
August	569565	276701	89654	2107	201103
September	489692	267775	52450	2107	167360
October	485875	276701	24982	1771	182421

18. The comparison in the following tables shows water is legally available throughout the proposed period of diversion. The monthly volumes for the comparison are equal to the total requested volume divided by the period of use (5 AF/7 months=AF/month).

<b>Comparison-Flow Rate (cfs)</b>			
<b>Month</b>	<b>Flow Rate Legally Available at POD</b>	<b>Flow Rate Requested</b>	<b>Flow Rate Remaining</b>
Apr	1778	0.09	1778
May	2272	0.09	2272
Jun	2352	0.09	2351
Jul	2566	0.09	2565
Aug	3273	0.09	3273
Sep	2818	0.09	2817
Oct	2972	0.09	2972

Comparison-Volume (AF)			
Month	Volume Legally Available at POD	Volume Requested	Volume Remaining
Apr	105613	0.71	105612
May	139455	0.71	139454
Jun	139679	0.71	139678
Jul	166396	0.71	166395
Aug	201103	0.71	201102
Sep	167360	0.71	167359
Oct	182421	0.71	182420

### CONCLUSIONS OF LAW

19. 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).

20. 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*

21. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 17, 18)

### **Adverse Effect**

#### **FINDINGS OF FACT**

22. In the event of a water shortage, the Applicant plans to cease pumping if a valid call is made. The Applicant will not begin pumping until water becomes available again.

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

#### **CONCLUSIONS OF LAW**

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 22, 23)

## **Adequate Diversion**

### **FINDINGS OF FACT**

31. The Applicant plans to divert water from the Missouri River at a single diversion point using a self-priming 3 HP Sta-Rite D Series high head centrifugal pump (Cat. No. DHH). This pump is capable of delivering the requested flow rate of 40 GPM. The pump will feed a sprinkler system via a 2 inch suction pipe, then a buried 1.5 inch pipe from the pump to a distribution box which will run multiple sprinkler heads. The number and type of sprinkler heads for this system have not yet been determined by Applicant.

### **CONCLUSIONS OF LAW**

32. 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.

33. 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.

34. 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).

## **Beneficial Use**

### **FINDINGS OF FACT**

35. The Applicant proposes to use water for the purpose of lawn and garden irrigation from April 1- October 31. Lawn and garden irrigation is recognized by the Department as a beneficial use of water and has a water use standard of 2.5 AF per acre of lawn and garden irrigation. The Applicant plans to irrigate 2 acres with a pump capable of diverting water at the requested rate of 40 GPM up to 5 AF annually.

36. The requested flow rate is necessary to ensure optimal operation of the sprinkler system. The flow rate requested is similar to flow rates of other surface water lawn and garden irrigation permits in the area.

37. The Department finds that 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 lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence

lawn and garden irrigation is a beneficial use and that 5 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, (FOF 35-37)

### **Possessory Interest**

#### **FINDINGS OF FACT**

41. The Applicant signed and had 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**

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 30105215 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from April 1- October 31 at 40 GPM up to 5 AF, from a point in SWNWSW Section 4, T26N, R41E, Valley County, for lawn and garden irrigation use from April 1- October 31. The Applicant may irrigate their lawn and garden on 2 acres. The place of use is located in NWSWSW Section 4, T26N, R41E, Valley 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

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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 25<sup>th</sup> day of March 2016.

Original Signed by Denise Biggar  
Denise Biggar, Regional Manager  
Glasgow 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 25<sup>th</sup> day of March, 2016, by first class United States mail.

**NAME AND ADDRESS OF APPLICANT**

Gerald L. Brabeck  
PO Box 161  
Fort Peck, MT 59223

\_\_\_\_\_  
NAME

\_\_\_\_\_  
DATE