

**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. 76N 30106284 BY State of Montana Board of Land Commissioners, Trust Lands Management Division</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On April 15, 2016, the State of Montana Board of Land Commissioners, Trust Lands Management Division (Trust Lands) (Applicant) submitted Application for Beneficial Water Use Permit No. 76N 30106284 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 350 gallons per minute (GPM) up to 0.15 acre-feet (AF) annually. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of April 29, 2016. An Environmental Assessment for this Application was completed on May 2, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Reciprocal access agreement between DNRC and Plum Creek Timber Co.
- Maps: Topographic overview maps (2) showing locations of all requested PODs  
Small scale topographic maps (6) showing individual PODs

Information Received after Application Filed:

- Request reducing period of diversion to May 15-June 30, received April 28, 2016

Information within the Department's Possession/Knowledge

- Department water right records of existing water rights
- USGS records for gaging station #12389500, Thompson River near Thompson Falls, MT
- USGS records for gaging station #12389000, Clark Fork River near Plains, MT
- USGS records for gaging station #12390700, Prospect Creek at Thompson Falls, MT

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



**PROPOSED APPROPRIATION**

Preliminary Determination to Grant  
Application for Beneficial Water Use Permit No. 76N 30106284.

**FINDINGS OF FACT**

1. The Applicant proposes to divert water from the Thompson River, by multiple means of diversion, from May 15-June 30 at 350 GPM up to 0.15 AF, from up to twenty locations throughout the Thompson River system for fire training use from May 15-June 30. Water will be diverted using 350 gallon buckets suspended from helicopters as well as onboard pumps of wildland fire engines and tenders. Three of the points of Diversion (PODs) which are located on the Thompson Lakes will be accessible only by helicopter; the rest will be accessible by helicopter, fire engines, and tenders. The PODs and places of use (POUs) are identified in the following table. Because water use is dependent on training location and is not tied to a specific parcel within the service area, and because water use relies on helicopters, fire engines, and tenders taking possession of the water at the points of diversion, the places of use for this application are considered to be the same as the points of diversion.
2. Water diverted for fire training use is considered to be 100% consumed.

**Table 1. Points of diversion and places of use for application 76N 30106284**

<b>POD/POU ID#</b>	<b>POD/POU Location</b>	<b>Diversion Type</b>	<b>Access Type</b>
1	NESWNE Section 8, T25N, R26W, Flathead County	Bucket/Pump	County Road
2	W2 Section 32, T27N, R27W, Lincoln County	Bucket	Air (Helicopter only)
3	N2 Section 10, T26N, R27W, Lincoln County	Bucket	Air (Helicopter only)
4	S2 Section 11, T26N, R27W, Lincoln County	Bucket	Air (Helicopter only)
5	SENESE Section 18, T25N, R26W, Sanders County	Bucket/Pump	Plum Creek Access Agreement
6	SESWNW Section 23, T25N, R27W, Sanders County	Bucket/Pump	County Road
7	SESESE Section 26, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
8	NWNWNW Section 36, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
9	NWSESE Section 36, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
10	NWSENE Section 26, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands
11	NWSWSW Section 36, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands
12	SESWSW Section 36, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands

13	NWNENE Section 12, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
14	SESWSW Section 6, T23N, R26W, Sanders County	Bucket/Pump	Trust Lands
15	SENWNW Section 7, T23N, R26W, Sanders County	Bucket/Pump	County Road
16	SESESE Section 14, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
17	SWNWNW Section 24, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
18	NENWNW Section 26, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
19	SWNWNW Section 34, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
20	NWSESW Section 32, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands

3. The Applicant will be subject to the following conditions, limitations, or restrictions on their permit:

The sum of the flow rates for USGS gaging stations #12389000 (Clark Fork River near Plains, MT), #12389500 (Thompson River near Thompson Falls, MT), and #12390700 (Prospect Creek at Thompson Falls, MT) must equal or exceed the following trigger flow rates in order for the Applicant to divert water:

May 15-31	50,049 CFS
June 1-30	50,051 CFS

When stream flows do not equal or exceed the above trigger flows, the appropriator may not divert water. The Applicant will be required to monitor the above identified USGS gaging stations to meet its obligation and not create adverse effect to existing water users.

**§ 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 Applicant is requesting a maximum flow rate of 350 GPM up to 0.15 AF annually from the Thompson River. The Applicant is proposing to use up to 20 PODs where they will divert water for fire training. The most upstream POD is located on Upper Thompson Lake. The analysis of physical availability will be done using the most upstream POD.

11. In order to analyze physical availability of water at the proposed points of diversion, flow measurements from USGS Station #12389500 (Thompson River near Thompson Falls, MT), located approximately 54 miles downstream of the uppermost requested POD, were obtained.

The period of record for the gage is October 1956- September 2015. The gaging station records were used to calculate median of mean flow rates (CFS) for each month during the proposed period of diversion as well as median of mean volumes, which were calculated by converting CFS to Acre-Feet (CFS x 1.98 x days per month =AF).

12. Next, a list of existing water rights between the requested POD and the gaging station was compiled using the DNRC water rights database. The flow rate over the period of diversion for each of these rights was then added to the gaged data in order to calculate the amount of water physically available in the river system at the uppermost requested POD. For all livestock direct from source rights, a combined flow rate of 35 GPM was assumed.

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

**Table 2. Physical availability of water at the Applicant’s uppermost requested POD.**

	May	Jun
<b>Flow (CFS)</b>	1187.4	879.3
<b>Volume (AF)</b>	72882.8	52230.4

14. The Applicant is requesting 350 GPM up to 0.15 AF from May 15-June 30. The above table confirms that the flow and volume the Applicant seeks to divert is physically available.

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. 27665-411 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).

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

**Legal Availability:**

**FINDINGS OF FACT**

19. An area of potential impact from the requested POD down to the confluence of the Thompson River and the Clark Fork was determined for this application as any new water use has the potential to affect existing water users. In order to determine legal availability of water on the Thompson River, the Department assessed all surface water legal demands on the Thompson River. There are a total of 61 water rights on the Thompson River. In order to account for the livestock direct from source water rights, it was assumed that all stock rights combined would not exceed a flow rate demand of 35 GPM (0.08 CFS). The Applicant is requesting a flow of 350 GPM up to 0.15 AF per year. The following table shows the legal availability of water on the Thompson River during the proposed period of appropriation.

**Table 3. Thompson River legal availability of water**

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
May	1187.4	10.4	1177.0	72244.3

June	879.3	10.5	868.8	51606.7
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20. The Applicant is requesting 350 GPM up to 0.15 AF from May 15-June 30. The above table confirms that the flow and volume the Applicant seeks to divert is legally available.

CONCLUSIONS OF LAW

21. 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).

22. 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.

23. 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 19, 20)

### **Adverse Effect**

#### **FINDINGS OF FACT**

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

25. The Thompson River flows into the Clark Fork River above Thompson Falls, MT. The Clark Fork River is over-appropriated above Noxon Rapids dam during most of the year due to existing year-round hydropower rights of 50,000 CFS for Noxon Rapids dam. USGS gaging station #12389000 on the Clark Fork River near Plains, MT, is approximately 73 river miles upstream of the Noxon Rapids dam and includes a period of record from October 1910-November 2015. The gaging station records show that the Avista hydropower water rights are only met for a short period of time during spring runoff in May and June on most years (May 22-June 14 on average). The Applicant is requesting a maximum flow rate of 350 GPM up to 0.15 AF from May 15-June 30 of each year. There are a total of 81 water rights between USGS gaging station #12389000 and Noxon Rapids dam, including the Avista hydropower water rights for the dam. The legal demands for this stretch can be broken up into three distinct time periods and are shown in the table below.

**Table 4. Clark Fork River legal demands**

Clark Fork River Legal Demands	
Time Period	Flow (CFS)
May 15-19	50047.0
May 20-31	50047.1
June 1-30	50049.0

26. USGS gaging station #12389000 near Plains, MT, does not take into account inflows from the Thompson River or Prospect Creek, both of which have USGS gaging stations on them near their confluences with the Clark Fork River and contribute flow above Noxon Rapids dam.

There are no existing legal demands between the USGS gage on Prospect Creek and its confluence with the Clark Fork River; therefore all flow at the gage will augment flows on the Clark Fork River. There are four existing legal demands totaling 0.5 CFS on the Thompson River between the USGS gage on the Thompson River and its confluence with the Clark Fork River; therefore 0.5 CFS less than the gaged flows at any given time will augment flows in the Clark Fork River. The following table shows median of mean daily flow rates at the USGS gaging station on the Clark Fork River near Plains, legal demands on the Clark Fork River from the USGS gaging station near Plains down to Noxon Rapids dam, median of mean daily flow contributed to the Clark Fork River by the Thompson River and Prospect Creek, and legal availability of water at Noxon Rapids dam accounting for all three sources and all existing legal demands.

**Table 5. Median of mean daily flows and existing legal demands at Noxon Rapids dam**

Day	Clark Fork Flows (CFS)	Clark Fork Existing Legal Demands (CFS)	Thompson River Inflows (CFS)	Prospect Creek Inflows (CFS)	Flow Legally Available (CFS)
15-May	38,200	50,047	1,070	664	-10,113
16-May	40,200	50,047	1,020	682	-8,145
17-May	41,400	50,047	1,080	739	-6,828
18-May	44,800	50,047	1,250	776	-3,221
19-May	45,700	50,047	1,210	762	-2,375
20-May	46,600	50,047	1,140	774	-1,534
21-May	47,000	50,047	1,200	770	-1,078

22-May	50,800	50,047	1,280	777	2,809
23-May	52,400	50,047	1,240	806	4,398
24-May	51,600	50,047	1,310	785	3,647
25-May	54,000	50,047	1,340	764	6,056
26-May	54,600	50,047	1,370	784	6,706
27-May	54,300	50,047	1,280	757	6,289
28-May	54,100	50,047	1,290	743	6,085
29-May	57,100	50,047	1,260	778	9,090
30-May	56,600	50,047	1,320	745	8,617
31-May	58,200	50,047	1,290	721	10,163
1-Jun	58,200	50,049	1,180	680	10,011
2-Jun	57,400	50,049	1,150	694	9,195
3-Jun	58,100	50,049	1,170	678	9,899
4-Jun	59,800	50,049	1,130	682	11,563
5-Jun	58,800	50,049	1,090	668	10,509
6-Jun	58,300	50,049	1,030	627	9,908
7-Jun	57,100	50,049	1,020	614	8,685
8-Jun	58,000	50,049	1,020	589	9,560
9-Jun	57,600	50,049	1,000	566	9,117
10-Jun	56,000	50,049	983	546	7,480
11-Jun	54,800	50,049	934	495	6,180
12-Jun	53,600	50,049	902	482	4,935
13-Jun	52,200	50,049	886	502	3,539
14-Jun	51,000	50,049	872	465	2,288
15-Jun	50,000	50,049	839	474	1,264
16-Jun	49,800	50,049	792	446	989
17-Jun	49,700	50,049	782	426	859
18-Jun	48,900	50,049	769	401	21
19-Jun	48,100	50,049	754	386	-809
20-Jun	47,500	50,049	770	364	-1,415
21-Jun	47,000	50,049	760	354	-1,935
22-Jun	48,800	50,049	740	326	-183
23-Jun	48,400	50,049	711	311	-627
24-Jun	46,500	50,049	687	296	-2,566
25-Jun	44,900	50,049	681	276	-4,192
26-Jun	42,400	50,049	669	259	-6,721
27-Jun	41,300	50,049	650	250	-7,849

28-Jun	40,500	50,049	620	248	-8,681
29-Jun	42,600	50,049	590	236	-6,623
30-Jun	40,600	50,049	575	225	-8,649

27. Based on the Department’s findings, the Applicant will be subject to the following conditions, limitations, or restrictions on their permit:

The sum of the flow rates for USGS gaging stations #12389000 (Clark Fork River near Plains, MT), #12389500 (Thompson River near Thompson Falls, MT), and #12390700 (Prospect Creek at Thompson Falls, MT) must equal or exceed the following trigger flow rates in order for the Applicant to divert water:

May 15-31	50,049 CFS
June 1-30	50,051 CFS

When stream flows do not equal or exceed the above trigger flows, the appropriator may not divert water. The Applicant will be required to monitor the above identified USGS gaging stations to meet its obligation and not create adverse effect to existing water users.

28. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available on the Thompson River at the point of diversion, the Applicant’s plan to curtail their appropriation during times of water shortage is adequate, and trigger flow conditions established for this permit ensure that the Applicant will not create adverse effect to existing water users.

CONCLUSIONS OF LAW

29. 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.

30. 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).

31. 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.

32. 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.

33. 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.

34. 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.

35. In regard to senior hydropower water rights, the facts in this application are distinguishable from those in *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Co* (2006) (TRLC) concerning the Avista Company’s water rights

for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production.

The proposed appropriation in this case is for fire training use more than 55 miles upstream of Noxon Reservoir. Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin, does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista's prior appropriation in this basin which has not been closed to appropriation by the Legislature does not include the right to prevent this appropriation where Avista can reasonably exercise its hydropower water right.

36. 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 24-28)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

37. The Applicant is proposing to divert water from the Thompson River using either 350 gallon helicopter buckets or onboard pumps on wildland fire engines and tender trucks. The maximum proposed diversion rate is 350 GPM, which is based on the helicopter bucket size. Tender trucks have a maximum diversion rate of 300 GPM using a Hale model HPX 300 B23 pump. Mark III pumps with a maximum diversion rate of 98 GPM will also be used, allowing the Applicant to fill up to 3 engines simultaneously. Each engine is capable of storing up to 500 gallons and each tender has a maximum capacity of 3,000 gallons.

CONCLUSIONS OF LAW

38. 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.

39. 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.

40. 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 37)

**Beneficial Use**

FINDINGS OF FACT

41. The Applicant is requesting 350 GPM up to 0.15 AF per annum for fire training use. Helicopters with 350 gallon capacity buckets will divert water from the Thompson River at a maximum flow rate of 350 GPM. Wildland fire engines and tenders will divert water from the Thompson River at a maximum flow rate of 300 GPM. Any planned fire training will occur from May 15-June 30 in order to prepare crews prior to the start of the Montana fire season. The Applicant provided the following anticipated water use calculations.

Engines:                    25 engines x 3 fills of 500 gallons each = 37,500 gallons

Tender:                    1 tender x 2 fills of 3000 gallons each = 6,000 gallons

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

CONCLUSIONS OF LAW

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

43. 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).

44. Applicant proposes to use water for fire training use. Applicant has proven by a preponderance of the evidence fire training use is a beneficial use and that 0.15 AF of diverted volume and 350 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 41)

### **Possessory Interest**

#### **FINDINGS OF FACT**

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

## CONCLUSIONS OF LAW

46. 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.

47. 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.

48. 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 45)

## 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. 76N 30106284 should be GRANTED.

The Department determines the Applicant may divert water from the Thompson River, by means of a pump or helicopter bucket, from May 15-June 30 at 350 GPM up to 0.15 AF, for fire training use from May 15-June 30. The 20 points of diversion and places of use authorized under this permit are identified in the following table.

<b>POD/POU ID#</b>	<b>POD/POU Location</b>	<b>Diversion Type</b>	<b>Access Type</b>
1	NESWNE Section 8, T25N, R26W, Flathead County	Bucket/Pump	County Road
2	W2 Section 32, T27N, R27W, Lincoln County	Bucket	Air (Helicopter only)
3	N2 Section 10, T26N, R27W, Lincoln County	Bucket	Air (Helicopter only)
4	S2 Section 11, T26N, R27W, Lincoln County	Bucket	Air (Helicopter only)
5	SENESE Section 18, T25N, R26W, Sanders County	Bucket/Pump	Plum Creek Access Agreement
6	SESWNW Section 23, T25N, R27W, Sanders County	Bucket/Pump	County Road
7	SESESE Section 26, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
8	NWNWNW Section 36, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
9	NWSESE Section 36, T25N, R27W, Sanders County	Bucket/Pump	Trust Lands
10	NWSENE Section 26, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands
11	NWSWSW Section 36, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands
12	SESWSW Section 36, T24N, R27W, Sanders County	Bucket/Pump	Trust Lands
13	NWNESE Section 12, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
14	SESWSW Section 6, T23N, R26W, Sanders County	Bucket/Pump	Trust Lands
15	SESWNW Section 7, T23N, R26W, Sanders County	Bucket/Pump	County Road
16	SESESE Section 14, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
17	SWNWNW Section 24, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
18	NENWNW Section 26, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
19	SWNWNE Section 34, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands

20	NWSESW Section 32, T23N, R27W, Sanders County	Bucket/Pump	Trust Lands
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The water use permit will be subject to the following conditions, limitations, or restrictions:

The sum of the flow rates for USGS gaging stations #12389000 (Clark Fork River near Plains, MT), #12389500 (Thompson River near Thompson Falls, MT), and #12390700 (Prospect Creek at Thompson Falls, MT) must equal or exceed the following trigger flow rates in order for the Applicant to divert water:

May 15-31	50,049 CFS
June 1-30	50,051 CFS

When stream flows do not equal or exceed the above trigger flows, the appropriator may not divert water. The Applicant will be required to monitor the above identified USGS gaging stations to meet its obligation and not create adverse effect to existing water users.

**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 12<sup>th</sup> day of May, 2016.

/Original signed by Kathy Olsen/

Kathy Olsen, Deputy Regional Manager

Kalispell Regional Office

Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 12<sup>th</sup> day of May, 2016, by first class United States mail.

MONTANA, STATE OF BOARD OF LAND COMMISSIONERS  
% TRUST LANDS MANAGEMENT DIVISION  
PO BOX 201601  
HELENA, MT 59620-1601

/Original signed by Nathaniel T. Ward/

5/12/2016

NAME

DATE