

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 76LJ 30107338)
by Gerald & Linda Brevik, Debra & Lon) **PRELIMINARY DETERMINATION TO**
Savik, and Mark & Christina Brevik) **GRANT PERMIT****

On August 30, 2016, Gerald & Linda Brevik, Debra & Lon Savik, and Mark & Christina Brevik (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30107338 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 87 GPM and 5.6 AF from Fennon Slough for the purposes of lawn & garden irrigation use on 2.82 acres. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of September 29, 2016. An Environmental Assessment for this Application was completed on October 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: Topographic map showing location of parcels
Map showing point of diversion and irrigated area for each parcel

Information within the Department's Possession/Knowledge

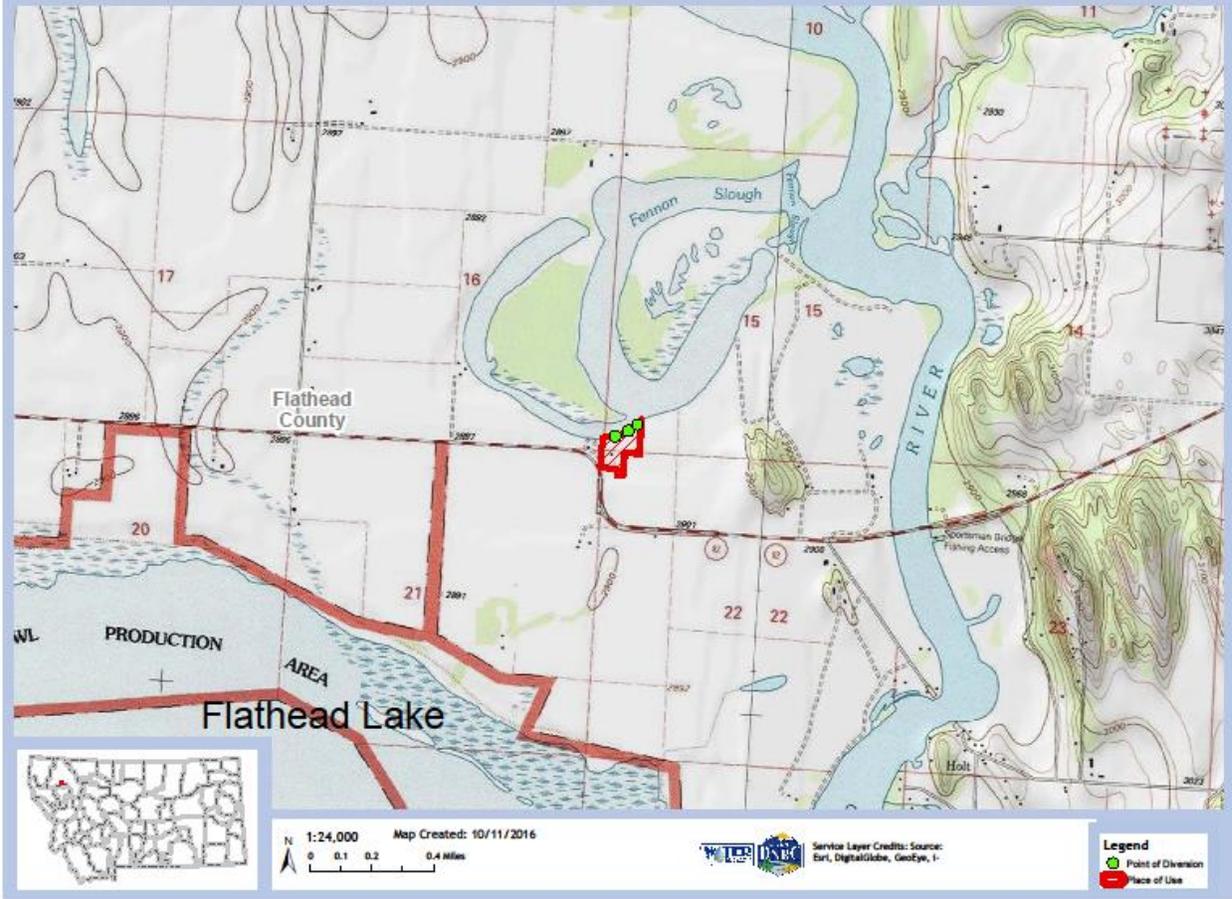
- USGS records for gaging station #12363000, (Flathead River at Columbia Falls, MT) from October 1951- September 2015
- USGS records for gaging station # 12372000, (Flathead River near Polson, MT) from October 1938- September 2015
- Department water right records of existing rights

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 pump water from Fennon Slough, from April 15- October 15 at 87 GPM up to 5.6 AF annually, from three points in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County, for lawn & garden irrigation use from April 15- October 15. The Applicant proposes to irrigate 2.82 acres of lawn & garden. The places of use are Parcels A, B, and C of COS 14666, and Parcel A of COS 8238, located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County and the NWNWNW Section 22, Township 27N, Range 20W, Flathead County.



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

GENERAL CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

(A) identification of physical water availability;

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

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

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

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

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

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

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

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

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

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

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

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

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

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

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

5. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, 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).

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

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

Physical Availability
FINDINGS OF FACT

8. The Applicant is requesting a maximum flow rate of 87 GPM up to 5.6 AF annually from Fennon Slough, which is directly connected to the Flathead River. Because water in Fennon Slough is controlled by the Flathead River, the Department will analyze physical availability of water for the Flathead River. In order to analyze physical availability of water at the proposed points of diversion, flow measurements from USGS Station #12363000 (Flathead River at Columbia Falls) were obtained. The period of record for the gage is October 1951- 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

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were calculated by converting CFS to Acre-Feet (CFS x 1.98 (Per DNRC form 615) x days per month =AF).

Table 1. Median of mean monthly flow and volume for the Flathead River at Columbia Falls, MT

	Apr	May	Jun	Jul	Aug	Sep	Oct
Flow (CFS)	10680	22630	24720	11450	5705	4953	5133
Volume (AF)	634392	1389029	1468368	702801	350172.9	294208.2	315063.5

9. Next, a list of existing water users between the USGS gaging station and the Applicant’s requested POD was generated in order to account for diversions from existing users (See application file for list) because the Applicant’s requested POD is downstream of the gage used. This list includes 144 water rights diverting water from the Flathead River as well as Church Slough, Egan Slough, and Fennon Slough, which are controlled and fed by the Flathead River. These water rights were subtracted from the median of mean monthly flow rates and volumes calculated at the gaging station in order to determine physical availability of water at the Applicant’s requested POD.

10. When calculating the volume appropriated by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st. This is done because all of the existing rights fall within irrigation climatic area three which has a standard period of use from April 1st to October 31st. All other water uses were analyzed as year-round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of existing uses from the source. The Department finds this an appropriate measure of evaluating physical availability of water as it protects existing water users.

11. The following table shows the physical availability of water in the Flathead River at the Applicant’s requested POD throughout the proposed period of diversion.

Table 2: Median of Mean Monthly Flow and Volume for the Flathead River at the Applicant’s requested PODs

	Apr	May	Jun	Jul	Aug	Sep	Oct
Flow (CFS)	10538.27	22488.27	24578.27	11308.27	5563.27	4811.27	4991.27
Volume (AF)	625973.2	1380330	1459949	694101.6	341473.5	285789.4	306364.2

12. The Department finds that the proposed diversion of 87 GPM up to 5.6 AF of volume annually is physically available from the Flathead River and thus, Fennon Slough.

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. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001).

17. 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 8-12)

Legal Availability:

FINDINGS OF FACT

18. The Department assessed all surface water legal demands on the Flathead River from USGS gage #12363000, Flathead River at Columbia Falls, MT, to USGS gage # 12372000, Flathead Lake near Polson, MT. This area of potential impact has been identified because Salish-Kootenai Dam near Polson is the control structure for Flathead Lake. The Applicant plans to divert water from the Flathead River system above the dam, which will reduce the total volume of water leaving the lake (passing over/through the dam). The Department analyzes the area of potential impact as two distinct reaches. The first reach is from the USGS gaging station at Columbia Falls (Gage #12363000) down to the inlet of the Flathead River into Flathead Lake. . For this reach, existing rights between the requested POD and the outlet of the Flathead River into Flathead Lake will be subtracted from the median of mean monthly flow rates and volumes found at the requested POD in order to determine legal availability in this reach. The second reach is Flathead Lake down to the USGS gage near Polson (Gage #12372000). For this reach, the gage used is directly below Salish-Kootenai Dam. For analysis of reaches where the gaging station used is below existing water rights, Department practice is to add in the flow rates and volumes of existing rights up to the proposed POD to determine physical availability, and then subtract out all existing rights (flow and volume) within the area of potential impact to determine legal availability. For this analysis, the Department will add in all rights from the USGS gage near Polson up to the inlet of the Flathead River into Flathead Lake to determine physical availability for the reach, then subtract out all existing rights down to Salish-Kootenai Dam in order to determine legal availability for this reach.

19. A list of 50 existing rights was generated for the first reach of the Flathead River system that will be analyzed for legal availability of water. A copy of this list can be found in the water right application file.

20. A list of 1,741 existing rights was generated for the second reach of the Flathead River system that will be analyzed for legal availability of water. A copy of this list can be found in the water right application file.

21. When calculating legal demand volumes, irrigation and lawn/garden uses were delegated as occurring from April 1st to October 31st. This is done because all of the legal demands exist within irrigation climatic area three which has a standard period of use from April 1st to October 31st. All other water uses were analyzed as year-round uses. Due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion, it was assumed that the flow rate of each legal demand is continuously diverted throughout each month of the period of diversion. This assumption leads to an overestimation of legal demands on volume of water. The Department finds this an appropriate measure of legal demands as it protects existing water users.

22. The Applicant is requesting a flow of 87 GPM up to 5.6 AF per year. The following tables summarize the existing legal demands on the Flathead River below USGS gage #12363000 to the inlet of Flathead Lake and Flathead Lake to USGS gage #12372000.

Table 3. Reach 1: Flathead River at Columbia Falls, USGS Gage #12363000, minus legal demands on Flathead River to inlet of Flathead Lake

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
April	10,538.3	6,667.6	3,870.7	229,916.6
May	22,488.3	8,142.6	14,345.7	880,536.0
June	24,578.3	8,142.6	16,435.7	976,277.6
July	11,308.3	5,419.6	5,888.7	361,445.4
August	5,563.3	3,517.6	2,045.7	125,562.0
September	4,811.3	3,517.6	1,293.7	76,842.8
October	4,991.3	3,517.6	1,473.7	90,452.7

Table 4. Reach 2: Flathead River near Polson, USGS Gage #12372000, minus legal demands on Flathead Lake

Month	Water Physically Available (CFS)	Existing Legal Demands (CFS)	Physically Available Water minus Legal Demands (CFS)	Physically Available Water minus Legal Demands (AF)
April	9,395.1	172.1	9,223.0	547,846.2
May	18,742.1	172.1	18,570.0	1,139,826.6
June	25,892.1	172.1	25,720.0	1,527,768.0
July	13,742.1	172.1	13,570.0	832,926.6
August	6,484.1	172.1	6,312.0	387,430.6
September	6,248.1	172.1	6,076.0	360,914.4
October	7,541.1	172.1	7,369.0	452,309.2

23. Confederated Salish & Kootenai Tribes owns the hydropower water rights for Salish-Kootenai Dam. The two claimed water rights for Salish-Kootenai Dam are for 14,540 CFS up to 614,200 AF for power generation, and a volume of 614,700 second foot days for storage for power generation which is equivalent to 1,217,106 AF. (A second foot day is the volume of water represented by a flow of 1 cubic foot per second for 24 hours. The term is used extensively as a unit of runoff volume or reservoir capacity.) The total volume from the two claimed rights is 614,200 AF plus 1,217,106 AF which equals 1,831,306 AF. Flathead Lake is managed to keep a full pool of water during the late spring and summer months. At the claimed flow rate of 14,540 CFS flowing 24 hours per day, both of the claimed water rights, the direct flow hydropower right and storage for hydropower water right, can be fulfilled over a period of 64 days.

24. Salish-Kootenai Dam operations are complex and must accommodate many management factors including, but not limited to federal licensing (Flathead Lake levels required by FERC (Federal Energy Regulatory Commission)) for fish and recreation, instream flow requirements, flood control, and irrigation needs. These factors fluctuate seasonally and from year to year. The average yearly flow of water through Flathead Lake is approximately 11,437 CFS as measured at the USGS gauge at Polson (12372000), for the time period of 1939-2006 (USGS, 2009). Even though hydropower water rights at Salish-Kootenai Dam require 1,831,306 AF, to

meet the hydropower water rights claimed in the adjudication, the records show that Salish-Kootenai Dam's reservoir, Flathead Lake, consistently obtains a full pool status each year.

25. Pending an adjudication of Confederated Salish & Kootenai Tribes hydropower water rights and completion of a water availability study that shows otherwise, the Department finds that water in Flathead Lake can reasonably be considered legally available during the period in which the Applicant seeks to appropriate. This finding is based on the information and on the records of the Department and other evidence provided to the Department.

CONCLUSIONS OF LAW

26. 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).

27. 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.

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

29. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 18-25)

Adverse Effect

FINDINGS OF FACT

30. The means of diversion is three pumps set in Fennon Slough. In the event of a water shortage, the Applicant plans to cease pumping until water becomes available again.

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

CONCLUSIONS OF LAW

32. 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.
33. 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).
34. 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.
35. 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.
36. 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.

37. 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.

38. 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 30, 31)

Adequate Diversion

FINDINGS OF FACT

39. The Applicant plans to divert water from Fennon Slough at three diversion points using multiple pumps. The first POD will be located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County, on property owned by Gerald & Linda Brevik. Water will be diverted from Fennon Slough using a 1 horsepower Goulds GT-10 Irri-Gator pump capable of diverting 29 GPM at 37-40 psi system pressure. Water will be applied to multiple zones of 10 Hunter PGP rotor sprinklers using red #7 heads. Each head is capable of applying 3 GPM at 40 psi and 2.6 GPM at 30 psi. Irrigation zones will be controlled by a control panel. The main diversion and conveyance pipeline will be 1.5” poly pipe to a distribution box. There are two separate areas of irrigation for a total of 1.07 acres of irrigation using this diversion. This diversion supplies water to property owned by Gerald & Linda Brevik (Parcel A of Certificate of Survey (COS) 14666), located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County.

40. The second POD will be located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County, on property owned by Debra & Lon Savik. Water will be diverted from Fennon Slough using a 1.5 horsepower Franklin Electric FP5172 pump capable of diverting 26 GPM at 40-42 psi system pressure. Water will be applied to multiple zones of 9 Hunter PGP rotor sprinklers using blue #3 heads. Each head is capable of applying 3 GPM at 45 psi and 2.7 GPM at 35 psi. Irrigation zones will be controlled by a control panel. The main diversion and conveyance pipeline will be 1.5” poly pipe that runs approximately 90 feet to a distribution box.

There are two separate areas of irrigation for a total of 0.87 acres of irrigation using this diversion. This diversion supplies water to property owned by Debra & Lon Savik (Parcel B of COS 14666) as well as property owned by Gerald & Linda Brevik (Parcel A of COS 14666 and Parcel A of COS 8238), located in the SWSWSW Section 15 and NWNWNW Section 22, Township 27N, Range 20W, Flathead County.

41. The third POD will be located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County, on property owned by Mark & Christina Brevik. Water will be diverted from Fennon Slough using a 2 horsepower Red Lion RLSP-200 pump capable of diverting 32 GPM with 7 sprinklers operating at 41 psi system pressure. Water will be applied using portable Rainbird impact 30PWH 5/32" sprinklers on stands. The sprinklers are each capable of applying 4.5 GPM at 40 psi and 4.7 GPM at 45 psi. Irrigation will be operated manually. The main diversion and conveyance pipeline will be 1.5" poly pipe that runs approximately 50 feet to the first distribution box. There are two separate areas of irrigation for a total of 0.88 acres of irrigation using this diversion. This diversion supplies water to property owned by Mark & Christina Brevik (Parcel C of COS 14666), located in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County.

CONCLUSIONS OF LAW

42. 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.

43. 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.

44. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA. (FOF 39-41)

Beneficial Use

FINDINGS OF FACT

45. The Applicant proposes to use water for the purpose of lawn & garden irrigation from April 15- October 15. Lawn & garden irrigation is recognized by the Department as a beneficial use of water. The Applicant intends to divert 5.6 AF at a flow of 87 GPM for irrigation of 2.82 acres of lawn & garden annually.

46. The Applicant will use 3 separate irrigation systems which will use 3 separate pump sites to divert water. The requested flow rate is the combined flow of all three pumps running at the same time. Lawn & garden irrigation requirements were calculated by the Applicant using the NRCS Irrigation Water Requirements (IWR) program for turf grass irrigation in conjunction with the Creston weather station and an application efficiency of 70% for sprinklers. The consumptive requirement of turf grass as identified by the IWR program is 16.57 inches of water (1.38 AF/acre). Dividing this requirement by 0.7 (sprinkler efficiency value) gives a requirement of 1.97 feet of water applied per acre for maximum production, equaling a total amount of 5.6 AF needed for lawn & garden irrigation.

47. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use based on design plans and system operation.

CONCLUSIONS OF LAW

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

49. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court,

Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

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

50. Applicant proposes to use water for lawn & garden irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 5.6 AF of diverted volume and 87 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 45-47)

Possessory Interest

FINDINGS OF FACT

51. 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

52. 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.

53. 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.

54. 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 51)

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. 76LJ 30107338 should be GRANTED.

The Department determines the Applicant may divert water from Fennon Slough, by means of three pumps, from April 15- October 15 at 87 GPM up to 5.6 AF, from three points in the SWSWSW Section 15, Township 27N, Range 20W, Flathead County, for lawn & garden irrigation use from April 15- October 15. The Applicant may irrigate 2.82 acres of lawn &

garden. The places of use are Parcels A,B, and C of COS 14666, and Parcel A of COS 8238, located in the SWSWSW Section 15 and NWNWNW Section 22, Township 27N, Range 20W, Flathead County.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 12th day of October, 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 12th day of October, 2016, by first class United States mail.

Gerald & Linda Brevik et al.
170 Fennon Way
Somers, MT 59932

Core Water Consulting
%Ray Halloran
1075 North Meridian Rd, Suite 2
Kalispell, MT 59901

/Original signed by Nathaniel T. Ward/

10/12/2016

NAME

DATE