

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

* * * * *

**APPLICATION FOR BENEFICIAL)
WATER USE PERMIT NO. 42M 30145939) PRELIMINARY DETERMINATION TO
BY EDWARD W & CYNTHIA K) GRANT PERMIT
MITTELSTAED)**

* * * * *

On October 30, 2019, Edward W & Cynthia K Mittelstaed (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30145939 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 66.1 acre-feet (AF) for irrigation and stock use. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 6, 2020. The Applicant responded with information dated February 27, 2020. The Applicant submitted an Amendment to the Application May 20, 2020. The priority date was reset to May 20, 2020. The Application was determined to be correct and complete as of September 11, 2020. An Environmental Assessment for this Application was completed on November 16, 2020.

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
- Reservoir Schematics
- Monthly measurement for the proposed period of use taken near the proposed diversion

Information Received after Application Filed

- Deficiency response (February 27, 2020)
- Amendment to Application (May 20, 2020)

Information within the Department's Possession/Knowledge

- Department water right records of existing rights.
- Variance of Monthly measurement requirements, December 7, 2020 by Steven B. Hamilton, Deputy Regional Manager in Glasgow.

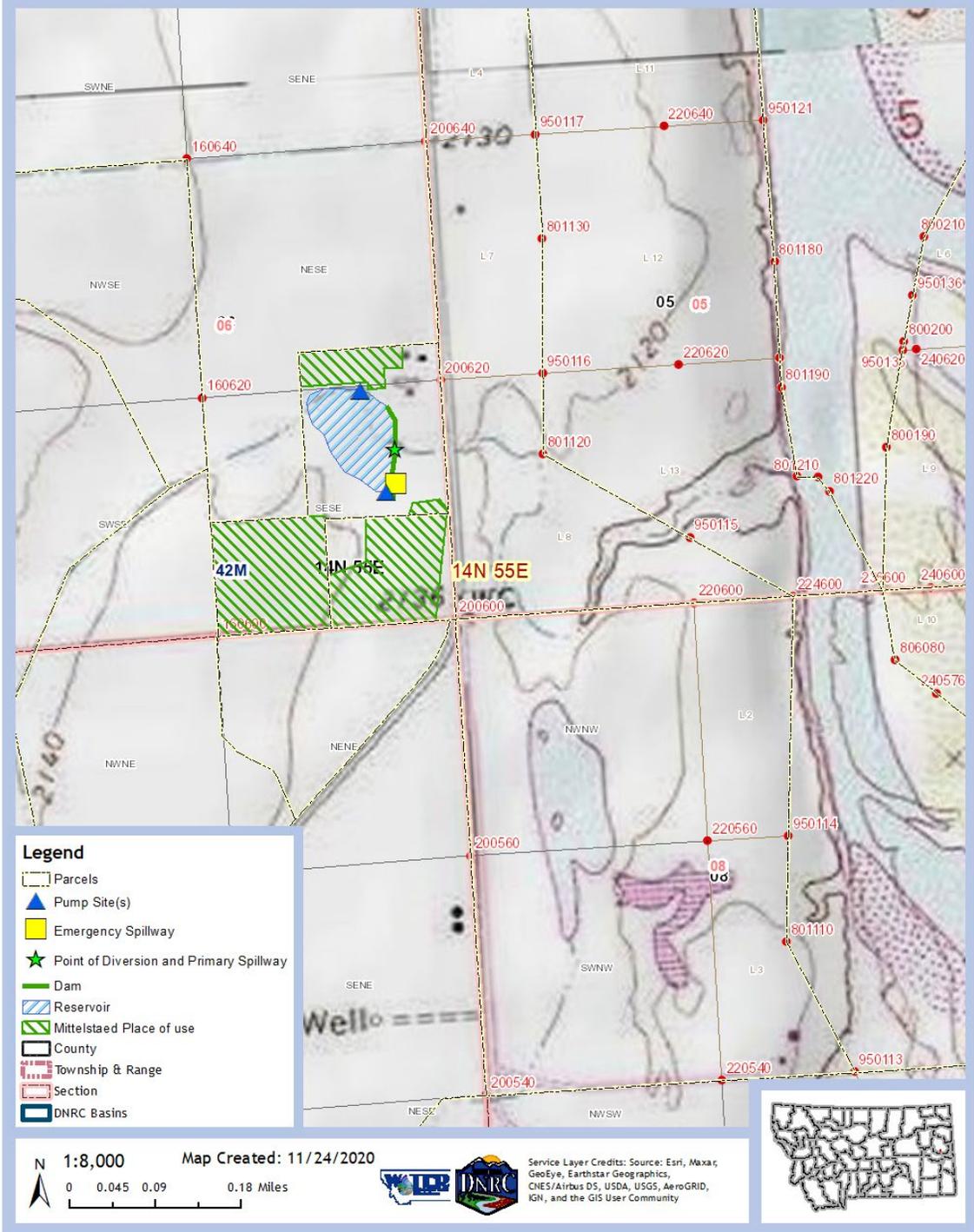
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from unnamed tributary (UT) of the Yellowstone River (wastewater) from January 1 to December 31, up to 66.1 AF per year, by means of rebuilding a breached existing (built before 1967) earthen dam, at a point in NESESE, Section 6, T14N, R55E, Dawson County, for up to 56.5 AF of irrigation of 19 acres from May 1 to August 31 and 0.1 AF for stock watering of 4.5 animal units use from January 1 to December 31. The place of use is generally located in the E2SE Section 6, T14N, R55E, Dawson County. The reservoir is an on-stream reservoir with a surface area of roughly 3.8 acres and a total capacity of 12.16 AF and an estimated annual evaporation of 9.5 AF.
2. The UT is a small non-perennial stream that receives most of its water from the end of a Buffalo Rapids Irrigation District (BRID) ditch. The source relies on wastewater from the BRID ditch and the Applicant will not be entitled to the continuation of wastewater from the ditch.

Mittelstaed Permit 42M 30145939



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 42M 30145939.

§ 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 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 proposed UT of the Yellowstone River does not have a USGS gaging station. The UT of the Yellowstone River is an ephemeral stream that receives water from the terminus of a Buffalo Rapids Irrigation District (BRID) lateral ditch into a natural drainage. The drainage basin area of the UT above the proposed diversion is 0.8 square miles. Streamstats estimates that 72 percent of the drainage basin is cultivated crop land with 55 percent being irrigated land. The natural mean annual discharge is negligible, if present, considered to the contributions from the BRID ditch. Flow in the UT below the terminus of the BRID ditch is predominantly dependent on contributions from the ditch. This is considered wastewater in the sense that the Applicant would have no right to its continuation. ARM 36.12.101(83)

10. The Applicant submitted 6 monthly measurements taken in 2017. The Applicants proposed period of use for the irrigation (May-August) falls within the measurements. The Applicant used a float area method to take measurements on the UT of the Yellowstone River inside a 100-foot long 36-inch diameter corrugated culvert located just downstream of the proposed diversion. The Applicant measured the depth of the water in the pipe and calculated the surface area of the water column, then recorded the time it took an orange to float through the length of the pipe. The flow rate measurements recorded by the Applicant and the Department’s calculated monthly volumes are in Table 1 below.

Table 1:

Applicant provided measurements of UT of the Yellowstone River at POD			
Month	Date	Measured Flow Rate (CFS)	Calculated Monthly Volume (AF)
March	3-15-17	0.28	16.9
April	4-15-17	0.65	40.2
May	5-15-17	0.23	14.0
June	6-15-17	0.54	33.0
July	7-15-17	0.41	24.9
August	8-15-17	0.54	33.0
			Total: 162.0

11. The Applicant did not submit monthly measurements for the entire proposed year-round stock period of use or the reservoirs full period of diversion. Due to the ephemeral nature of the source, a variance was granted by the Department for the monthly measurements taken from September to February.

12. The Department finds that the proposed volume is physically available during the requested period of diversion.

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 UT of the Yellowstone River extends approximately one-half mile downstream of the proposed point of diversion to the

confluence of the Yellowstone River. The Department determined that this was an acceptable reach because the UT represents a nearly immeasurable percent of the Yellowstone River's drainage area and therefore does not have significant contribution to the Yellowstone River's flow.

18. There are no water rights of record within the area of potential impact.

19. The Department finds that the proposed volume is legally available during the requested period of diversion.

CONCLUSIONS OF LAW

20. 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).

21. 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

22. 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 17-19)

Adverse Effect

FINDINGS OF FACT

23. There are no water users downstream of the proposed appropriation prior to the confluence with the Yellowstone river. If there is a water shortage and call were to be made, the Applicant has the ability to adjust the lower slide gates manually to release or bypass flows.

24. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available in UT of the Yellowstone 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

25. 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.

26. 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).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 23-24)

Adequate Diversion

FINDINGS OF FACT

32. The Applicant plans to divert water from UT of the Yellowstone River at a single diversion point using an existing on-stream reservoir. The reservoir was originally built sometime before 1967 by the Applicant's predecessor in interest but never filed on. The reservoir has a long history of washing out and is currently breached. The Applicant is proposing to bring the reservoir into compliance before rebuilding and improving the existing structure. When rebuilt, the dam will be 13 feet high, 12 feet wide at the crest and about 35 feet wide at the base. The Applicant used the calculations on the Department's Reservoir/Place of Storage Addendum to estimate a reservoir capacity of 12.16 AF with a maximum depth of 8 feet and surface area of about 3.8 acres at the spillway. The Applicant submitted design specification for reservoir highlighting the materials and improvements they intend to include.

33. A drop inlet spillway was and will continue to be the primary spillway. The Applicant has plans to install a vertical slide gate at the base of the structure under the primary spillway that is controlled by a wheel on a dock extending into the reservoir. The slide gate will give them the ability to control the level of the impoundment.

34. When the dam was initially constructed, it was constructed without an emergency spillway. The Applicant is proposing to build one on the southern end of the reservoir.

35. Stock will have open access to the reservoir and drink directly from it.

36. The Applicant will divert from the reservoir by means of a portable pump at two pump sites using a power take-off (PTO) pump and a Belarus 822 tractor capable of diverting up to 300 GPM (0.67 CFS). The fields will be irrigated by wheel lines and/or impact heads.

37. The Department finds that the means of diversion is adequate and capable of diverting the requested volume.

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 32-37).

Beneficial Use

FINDINGS OF FACT

41. The proposed appropriation is in Climatic Area 1 (High). The Applicant proposes to use water for the purpose of irrigation and stock. The irrigation use will have a period of use from May 1 to August 31. The stock use will have a period of use from January 1 to December 31. Water would be diverted from the source into an onstream reservoir by means of a dam from January 1 to December 31.

42. Irrigation is recognized by the Department as a beneficial use of water and has a water use standard of 2.63-3.04 AF per acre of sprinkler irrigation in Climatic Area 1. ARM 36.12.115(2)(e). The Applicant is proposing to irrigate a total of 19 acres by means of an onstream reservoir and portable pump. The Applicant's proposed appropriation would include 56.5 AF for sprinkler irrigation. The Applicant's proposed volume is within the standards set in ARM 36.12.115(2)(e). Irrigating 19 acres with 56.5 AF has an applied volume of 2.97 AF per acre.

43. Stock is recognized by the Department as a beneficial use of water and has a water use standard of 15 gallons per day per animal unit (AU). ARM 36.12.115(2)(c). The Applicant is proposing 4.5 AU with year-round use which would consume 0.1 AF annually.

44. The requested volume (66.1 AF) is the sum of the beneficial use and the net evaporation loss of the reservoir. The reservoir has a storage capacity of 12.16 AF. The evaporation losses

were estimated by the Department using the USDA Soil and Conservation Service Evaporation Pond Design for Agriculture Wastewater Disposal Technical Note: Environmental No. 7, February 1974. The evaporation loss was estimated to be 9.5 AF per year based on a surface area of 3.8 acres, an average precipitation of 13.93 inches (1.2 ft) and evaporation of 44 inches (3.7 ft) therefore $(3.8 \text{ AC} \times 3.7 \text{ ft}) - (3.8 \text{ AC} \times 1.2 \text{ ft}) = 9.5 \text{ AF}$. No flow rate will be assigned to this permit application because it consists of an on-stream reservoir.

45. The on-stream reservoir is necessary to ensure optimal operation of the sprinkler systems. The reservoir would need to divert up to the entire flow of the stream to maintain sufficient pumping depths in lower flow months for the 300 GPM (0.67 CFS) pump to operate. During the irrigation season, the reservoir will act more as a large pumping pit to buffer stream flows rather than a storage reservoir. The reservoir also provides storage for the livestock use in the winter and low flow months.

46. The Department finds that the volume requested is reasonable and necessary for the proposed beneficial use.

CONCLUSIONS OF LAW

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

48. 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).

49. 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 stock and irrigation use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation and stock use is a beneficial use and that 66.1 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 41-46)

Possessory Interest

FINDINGS OF FACT

51. The Applicant signed 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.

52. The Applicant's design plans have the reservoir impounding water within feet of their property line. To ensure the impoundment does not extend onto the neighboring property, the Applicant has agreed to the following condition:

The dam will be constructed and operated in such a way that the impoundment (pool) does not extend onto neighboring parcels.

CONCLUSIONS OF LAW

53. 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.

54. 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.

55. 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 51-52)

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. 42M 30145939 should be GRANTED.

The Department determines the Applicant may divert water from UT of the Yellowstone River, by means of a dam, from January 1- December 31 up to 66.1 AF, from a point in NESESE Section 6, T14N, R55E, Dawson County, for irrigation use of 56.5 AF from May 1 to August 31 and stock use of 0.1 AF from January 1 to December 31. The place of use is generally located in the E2SE Section 6, T14N, R55E, Dawson County. The reservoir is an on-stream reservoir with a surface area of roughly 3.8 acres and a total capacity of 12.16 AF. The source is predominantly wastewater from a Buffalo Rapids Irrigation District ditch and the Applicant has no right to its continuation.

The application will be subject to the following conditions, limitations or restrictions.

- 1. The dam will be constructed and operated in such a way that the impoundment (pool) does not extend onto neighboring parcels.**

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 8th day of December 2020.

/Original signed by Steven B. Hamilton/
Steven B. Hamilton, Deputy 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 8th day of December 2020, by first class United States mail.

NAME

DATE