

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76LJ 30147504 BY THREE VP, LLC)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On March 9, 2020, Three VP, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30147504 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 12.0 gallons per minute (GPM) up to 0.64 acre-feet (AF) annually for domestic use from the Whitefish River (Whitefish Lake). The Department published receipt of the Application on its website. The Department held a pre-application meeting with the Applicant’s consultant, Water and Environmental Technologies, on December 9, 2019. The Application was determined to be correct and complete as of August 17, 2020. An Environmental Assessment for this Application was completed on September 17, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record:

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments:
 - Certificate of Survey #21067
 - Pump Specifications
 - Total Dynamic Head calculations
 - Pressure Tank Specifications
 - Deed Exhibit
 - Possessory Interest Documentation

- Maps:
 - Vicinity Map
 - Site Map

Information Received after Application Filed

- Email response received May 15, 2020 from the Applicant’s consultant, Water and Environmental Technologies to the Department re: Department’s May 7, 2020 telephone inquiry, including:
 - Revised application narrative Pages 9 and 10 with updated pressure tank pressure switch setting and minimum system pressure value.

Information within the Department’s Possession/Knowledge

- Mean monthly stream flow data for the Whitefish River from the United States Geological Survey (USGS) Gaging Station #12366000 near Kalispell, MT (period of record October 1929 – September 2006) used for physical/legal availability analysis.
- List of existing surface water rights on the Whitefish River system (including Whitefish Lake) used to quantify physical/legal availability and analyze adverse effect.

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Whitefish River (Whitefish Lake), by means of a pump, from January 1 – December 31 at a rate of 12.0 GPM up to 0.64 AF for domestic use from January 1 – December 31. The point of diversion (POD) is located in Government Lot 4, SWSWNE Section 22, Township 31N, Range 22W, Flathead County, Montana. The place of use is generally located in Government Lot 4, SWSWNE and NWNWSE Section 22, Township 31N, Range 22W, Flathead County, Montana (Figure 1).

2. The POD is in the Upper Flathead River Basin (76LJ), in an area that is not subject to water right basin closures or controlled groundwater area restrictions.
3. Unperfected Provisional Permit 76LJ 30117109, which was issued in 2018 for domestic and lawn and garden irrigation uses, is currently associated with this property. The original lot was aggregated with an adjacent lot and the size of the planned home has increased in the time since the issuance of provisional permit 76LJ 30117109. As a result, the original permitted volume for the domestic use is no longer sufficient to supply the domestic demands of the home. The Applicant filed an Application to Change an Existing Non-Irrigation Water Right concurrently with this permit application. The purpose of the change application is to change the place of use of the lawn and garden irrigation, remove the domestic use, and reduce the total diverted volume of unperfected provisional permit 76LJ 30117109. This permit application will supply the domestic water for the planned home and will operate in conjunction with provisional permit 76LJ 30117109, which will supply only the water for lawn and garden irrigation on the aggregated lot if the change application is authorized. Under this permit application, the Applicant will divert water utilizing a separate pump and conveyance system from the pump and conveyance system used for provisional permit 76LJ 30117109.

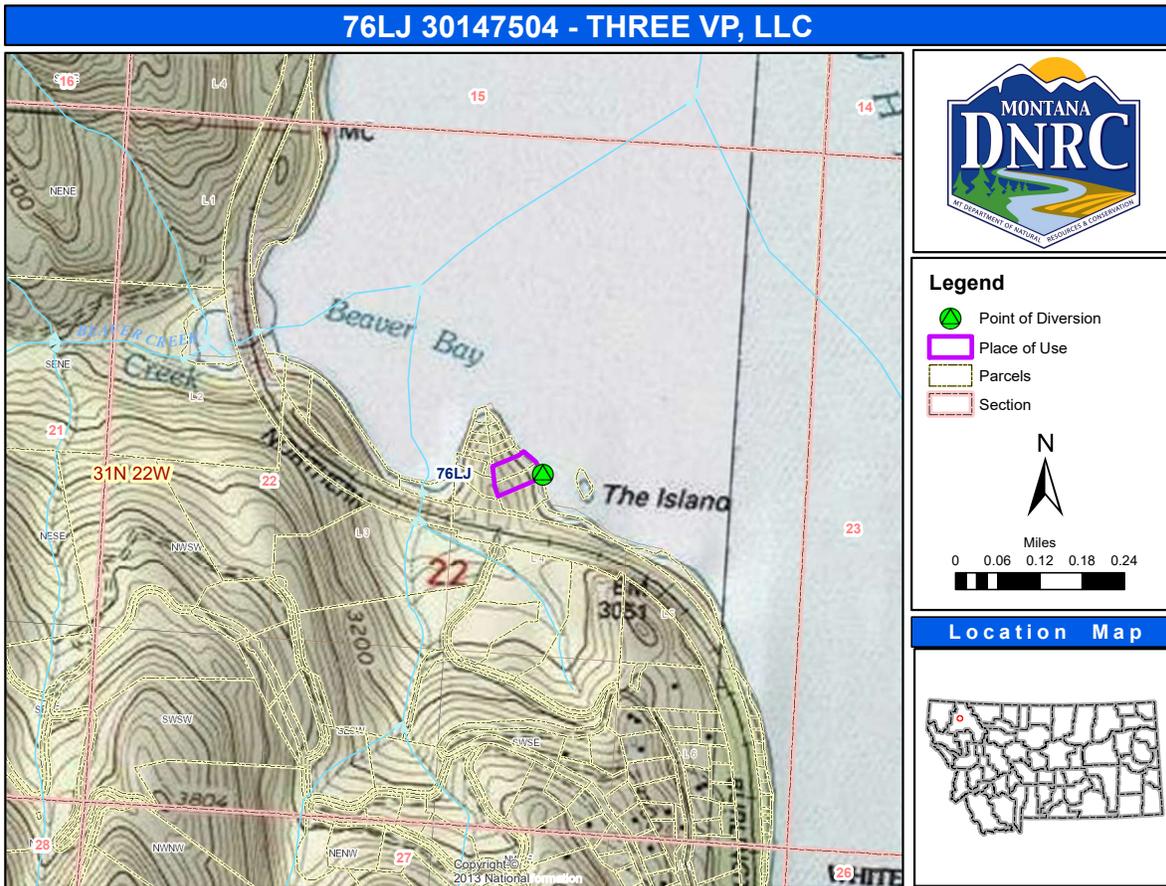


Figure 1: Map of the proposed place of use and point of diversion.

§ 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 to divert up to 0.64 AF annually at a maximum flow rate of 12.0 GPM from Whitefish Lake, which is located on the Whitefish River. USGS Gaging Station #12366000 (Whitefish River near Kalispell, MT) was used to quantify the median of the mean monthly flow and volume of water for the Whitefish River system (period of record October 1929 – September 2006). This gage is the nearest gage downstream of Whitefish Lake and the Applicant's POD.

11. For analysis of reaches where the gaging station used is below the proposed POD or depleted reach, Department practice is to add the flow rates and volumes of existing rights from the gage up to the proposed POD to the median of the mean monthly flow rates and volumes calculated at the gage in order to determine physical availability at the POD. For this analysis,

the Department added in all water rights from the USGS Gaging Station #12366000 near Kalispell up to the inlet of Whitefish Lake (Table 1, column D) to determine physical availability of water at the POD on the Whitefish River (Whitefish Lake) (Table 1, columns E-F). A list of existing water rights, including all Whitefish Lake water rights, was generated for this reach of the Whitefish River to account for existing uses. A copy of this list can be found in the application file or provided upon request.

12. When calculating the flow and volume appropriated by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1 through October 31. All other water uses were calculated as year-round uses. In order to account for livestock direct from source rights, Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. 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 assessing existing rights as it protects existing water users.

13. Per DNRC Form 615, median of the mean monthly volumes were calculated by converting monthly median of the mean flow in cubic-feet per second (CFS) to AF per month (monthly flow (CFS) x 1.98 x days per month =AF/month).

Table 1: Physical Availability at the Point of Diversion on the Whitefish River (Whitefish Lake)					
A	B	C	D	E	F
Month	Median of the Mean Monthly Flow at Gage 12366000 (CFS)	Median of the Mean Monthly Volume at Gage 12366000 (AF)	Existing Legal Demands on Whitefish Lake and Whitefish River to Gage 12366000 (CFS)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
January	59.60	3,658.25	32.93	92.53	5,679.49
February	57.50	3,187.80	32.93	90.43	5,013.44
March	87.70	5,383.03	32.93	120.63	7,404.27
April	215.00	12,771.00	84.31	299.31	17,779.22
May	496.00	30,444.48	84.31	580.31	35,619.64
June	583.30	34,648.02	84.31	667.61	39,656.24
July	264.70	16,247.29	84.31	349.01	21,422.45
August	104.20	6,395.80	84.31	188.51	11,570.96
September	81.30	4,829.22	84.31	165.61	9,837.44
October	67.15	4,121.67	84.31	151.46	9,296.83
November	68.30	4,057.02	32.93	101.23	6,013.06
December	60.10	3,688.94	32.93	93.03	5,710.18

14. Based on this information, the Department finds the requested flow rate of 12.0 GPM (0.03 CFS) up to a volume of 0.64 AF is physically available in the Whitefish River (Whitefish Lake) during the proposed period of diversion.

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. 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. (Finding of Fact (FOF) No.10-14)

Legal Availability:

FINDINGS OF FACT

19. The Department assessed all surface water legal demands on the Whitefish River from the inlet of Whitefish Lake to the confluence of the Whitefish River with the Stillwater River. This area of potential impact (the affected reach) has been identified because the Applicant plans to divert water from the Whitefish River (Whitefish Lake), which will reduce the total volume of water discharging from the Whitefish River system.

20. To determine legal availability, Department practice for a requested POD upstream of a gage is to determine physical availability at the POD (see Table 1), and then subtract out all existing water rights within the affected reach.

21. For this analysis, all existing water rights within the Whitefish River system from the inlet of Whitefish Lake down to the confluence of the Whitefish River with the Stillwater River (Table 2, columns C-D) were subtracted from the physically available median of the mean monthly flow rates and volumes found at the proposed POD to determine legally available water at the POD (Table 2, columns E-F). A list of the existing water rights within the Whitefish River system used in this analysis can be found in the water right file or provided upon request.

22. When calculating legal demands by existing users on the source, irrigation and lawn/garden uses were delegated as occurring from April 1 through October 31. All other water uses were calculated as year-round uses. In order to account for livestock direct from source rights,

Department practice is to assign one flow rate (0.08 CFS) for all stock rights without a designated flow rate. 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 by existing users. The Department finds this an appropriate measure of legal demands as it protects existing water users.

23. Per DNRC Form 615, median of the mean monthly volumes were calculated by converting monthly median of the mean flow (CFS) to AF per month (monthly flow (CFS) x 1.98 x days per month =AF/month).

Table 2: Physical vs. Legal Availability Analysis of the Whitefish River System					
A	B	C	D	E	F
Month	Physically Available Water at POD (CFS)	Existing Legal Demands on Whitefish Lake and Whitefish River to Gage 12366000 (CFS)	Existing Legal Demands Below Gage 12366000 (CFS)	Physically Available Water Minus All Existing Legal Demands (CFS)	Physically Available Water Minus All Existing Legal Demands (AF)
January	92.53	32.93	4.06	55.54	3,409.05
February	90.43	32.93	4.06	53.44	2,962.71
March	120.63	32.93	4.06	83.64	5,133.82
April	299.31	84.31	54.52	160.48	9,532.51
May	580.31	84.31	54.52	441.48	27,098.04
June	667.61	84.31	54.52	528.78	31,409.53
July	349.01	84.31	54.52	210.18	12,900.85
August	188.51	84.31	54.52	49.68	3,049.36
September	165.61	84.31	54.52	26.78	1,590.73
October	151.46	84.31	54.52	12.63	775.23
November	101.23	32.93	4.06	64.24	3,815.86
December	93.03	32.93	4.06	56.04	3,439.74

24. The Department finds that the proposed diverted flow of 12.0 GPM (0.03 CFS) and annual diverted volume of 0.64 AF is legally available in the Whitefish River (Whitefish Lake).

CONCLUSIONS OF LAW

25. 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).

26. 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.

27. 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 19-24)

Adverse Effect

FINDINGS OF FACT

28. The Applicant has a plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of prior appropriators will be satisfied in times of water shortage. If a valid call is made, the Applicant proposes to turn off their pump and stop diverting water under this permit.

29. Physical availability has been demonstrated by using USGS gaging station data and existing water rights between the POD and the gage, showing that there is sufficient water available in the source throughout the proposed period of diversion exceeding the amount requested. Legal availability has been shown by comparing what is physically available on the source and what is legally appropriated by existing users. There is sufficient water to meet all existing legal demands in addition to the Applicant's requested flow rate of 12.0 GPM and annual volume of up to 0.64 AF.

CONCLUSIONS OF LAW

30. 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.

31. 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(5).

32. 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.

33. 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.

34. 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.

35. 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.

36. 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 28-29)

Adequate Diversion

FINDINGS OF FACT

37. The Applicant proposes to divert water from the Whitefish River (Whitefish Lake) at a maximum rate of 12.0 GPM while maintaining a minimum operating pressure of 45 pounds per square inch (psi) via a Goulds 10GS05 0.5-hp submersible pump (or equivalent). The pump will be installed on a five-foot section of six-inch PVC pipe mounted to a steel sled and installed in the lake at a depth of approximately five feet below the low water level. The pump will divert water from the lake through 300-feet of buried 1.5-inch HDPE water line into a 119-gallon Well-X-Troll WX 350 pressure tank within the residence. From the pressure tank, water will pass through a filtration and disinfection system before use within the residence. The pump is controlled by the pressure tank's pressure switch with a 45/65-psi setting.

38. The Applicant provided the pump performance curve for the Goulds 10GS05 0.5-hp submersible pump, pressure tank specifications, and a total dynamic head calculation with the application.

39. Based on the total dynamic head (140-feet), pump performance curve associated with the pump, and pressure tank specifications, the Department finds that the system can produce and distribute the requested flow rate (12.0 GPM) and volume (0.64 AF).

CONCLUSIONS OF LAW

40. 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.

41. 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.

42. 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 37-39)

Beneficial Use

FINDINGS OF FACT

43. Using Flathead County Regulations for properties with onsite sewage treatment systems, the six-bedroom home as designed will require up to 575-gallons per day for an annual demand of 0.64 AF (575 gpd x 365 days = 209,875 gallons ÷ 325,851 gallons/AF = 0.64 AF). The Applicant provided the deed exhibit of the unrecorded subdivision, the Underwood Property, which was platted in 1949. At the time of platting, there were no limitations on the use of surface water for in-home domestic uses.

44. Based on the total dynamic head and system design specifications, water will be diverted from the Whitefish River (Whitefish Lake) at a maximum flow rate of 12.0 GPM. Coupled with the pressure tank, this flow rate will provide adequate domestic water during periods of peak demand (such as the concurrent use of shower heads, sinks, toilets, and dish/clothes washers).

45. The Department finds the water use to be beneficial, and the requested flow rate and volume are reasonably justified.

CONCLUSIONS OF LAW

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

47. 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).

48. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

49. Applicant proposes to use water for domestic use, which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that domestic use is a beneficial use and that 0.64 AF of diverted volume and 12.0 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 43-45)

Possessory Interest

FINDINGS OF FACT

50. 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.

CONCLUSIONS OF LAW

51. 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.

52. 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.

53. Applicant has proven by a preponderance of the evidence that they have 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 50)

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 30147504 should be GRANTED.

The Department determines the Applicant may divert water from the Whitefish River (Whitefish Lake), by means of a pump, from January 1 to December 31 at a flow rate of 12.0 GPM up to 0.64 AF, from a point in Government Lot 4, SWSWNE Section 22, Township 31N, Range 22W, Flathead County, Montana, for domestic use from January 1 to December 31. The place of use is generally located in Government Lot 4, SWSWNE and NWNWSE Section 22, Township 31N, Range 22W, Flathead County, Montana.

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 1st day of October 2020.

/Original signed by Kathy Olsen/
Kathy Olsen, 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 1st day of October 2020, by first class United States mail.

THREE VP, LLC
415 SHORELAND DRIVE SE
BELLEVUE, WA 98004

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTN: JAMIE GRAHAM
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

NAME
Kalispell Regional Office, (406) 752-2288

DATE