

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

\* \* \* \* \*

**APPLICATION FOR BENEFICIAL  
WATER USE PERMIT NO. 76C 30148390 )  
BY DONALD R. AND LORIE Y. ) PRELIMINARY DETERMINATION TO  
GUTKNECHT ) GRANT PERMIT**

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On March 10, 2020, Donald R. and Lorie Y. Gutknecht (Applicant) submitted Application for Beneficial Water Use Permit No. 76C 30148390 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 30 gallons per minute (GPM) up to 1.9 acre-feet (AF) for lawn and garden use. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated April 9, 2020. The Applicant responded with information dated April 16, 2020. The Application was determined to be correct and complete as of April 21, 2020. An Environmental Assessment for this Application was completed on April 28, 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:

- Variance Approval Letter from the Department dated January 23, 2020; variance from ARM 36.12.1702 (4)(a)
- Pump Specs
- Pictures of potential pump and motor
- Site map with section, township and range, point of diversion and place of use identified

Information Received after Application Filed:

- Deficiency Response from Applicant received April 16, 2020

Information within the Department's Possession/Knowledge:

- Montana Fish Wildlife and Parks (MFWP) online Montana Fisheries Information System (Fish MT) bathymetry data for Island Lake.
- Assessment of legal demands on Island Lake and Island Creek using the Department's water right query system.

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 and use water from Island Lake, by means of a pump, April 15<sup>th</sup> thru October 15<sup>th</sup> at a rate of 30 GPM up to 1.9 AF, from a point in Lot 3, Island View Subdivision, in the NWSWNWNE, Section 31, Township 29N, Range 26W, Lincoln County, Montana for lawn and garden use. 0.75 acres will be irrigated. The place of use is generally located in Lot 3, Island View Subdivision, in the SWNWNE, Section 31, Township 29N, Range 26W, Lincoln County, Montana (Figure 1).



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

2. The point of diversion is located in the Fisher River Drainage Basin (76C), which is an area that is not subject to water right basin closures or controlled groundwater area restrictions.
3. No other water rights are associated with the place of use or supplemental to the proposed use.
4. Total diverted volume is 1.9 AF and is based on the Department's standard volume of 2.5 AF/acre for lawn and garden use referenced on the Department's Form 615. Water will be pumped from Island Creek (Island Lake) at a rate of 30 GPM. The pump can produce the requested flow rate given the total dynamic head of the system.

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

**GENERAL CONCLUSIONS OF LAW**

5. 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 . . .

6. 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.

7. 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.

8. 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).

9. 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.

10. 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**

11. The source of water for the proposed project is Island Lake, which has a surface area of approximately 205 acres. The geology around the Lake consists of glacial deposits of unconsolidated silt, sand and gravel. Coniff Creek flows seasonally into Island Lake from the east. Island Creek flows seasonally into the north end of Island Lake and out of the south end. In the spring, substantial runoff occurs from snowmelt and increased precipitation in the form of rain. This water recharges the nearby bedrock aquifer and unconfined aquifer surrounding and beneath the Lake and increases the volume of water entering the Lake via groundwater and surface water. According to the Montana Department of Fish, Wildlife, & Parks (MFWP) Fish Montana website, the elevation of Island Lake at full pool is 3,594 feet +/- 1.0-foot. A site visit was conducted by Department staff on July 11, 2018 which surveyed the outlet of Island Lake using a hand level and rod. The streambed of Lake Creek at the outlet is 1.5-2.0 feet lower than full pool. Once the water surface elevation of Island Lake reaches 3,593 feet +/- 1.0-foot, water is discharged from the Lake.

12. A site visit was conducted by Department staff on July 11, 2018 to investigate the hydrogeology of the area downstream of Island Lake and existing water rights. At and below the outlet of Island Lake, Island Creek is intermittent. During the spring diffuse flow occurs through broad wetlands, but after July or August and through the winter water normally does not discharge from the Lake, and the wetlands only have standing water or no water. A combination natural- man made dredged channel/ditch collects the diffuse flow one and a half miles downstream of the outlet. The channel is intermittent for the next one and a half miles and eventually flows into Lynch Lake three river miles downstream of Island Lake. Water leaves Lynch Lake via a man-made channel/ditch. Portions of the Creek go underground and a direct surface water connection to the Pleasant Valley Fisher River is intermittent.

13. No streamflow data exists for the streams entering or exiting Island Lake. Physical availability was only quantified for Island Lake because flow in and out of the Lake is intermittent.

14. The Department conducted the following steps to quantify the volume of Island Lake. The MFWP Fish Montana website provides bathymetric data for different water bodies. The Department digitized, using ArcGIS, MFWP’s bathymetric data (contour interval line data) for Island Lake and generated polygons of depth strata, which allowed the Department to quantify the total area of each depth strata. Then the end-area formula (see below), which can be applied to find the volume of prismatic forms, was applied to quantify the total volume of water within each depth strata (Table 1). The Department finds 4,121 AF to be a reasonable estimate of Island Lake’s physical availability.

**End-Area Formula**

$$V = \frac{1}{2}H(A_1 + A_2)$$

*H*= difference in depth between two successive depth contours;

*A<sub>1</sub>* = area of the lake within the outer depth contour being considered;

*A<sub>2</sub>* = area of the lake within the inner contour line under consideration.

Contour Interval (ft)	Area (Acres)	H (ft)	Depth Strata (ft)	Volume Per Strata (AF)
0	204.70	10	0-10	1,731.50
10	141.60	10	10-20	1,208.50
20	100.10	10	20-30	756.50
30	51.20	10	30-40	334.50
40	15.70	10	40-50	90.00
50	2.30	10		
<b>TOTAL VOLUME (AF)</b>				<b>4,121</b>

**Table 1:** Quantification of Island Lake Volume using End-Area Formula

15. The requested flow rate of 30 GPM up to 1.9 AF is physically available during the proposed period of diversion.

**CONCLUSIONS OF LAW**

16. 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.”

17. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

18. 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).

19. 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. (Findings of Fact No. 11-15)

### **Legal Availability:**

#### **FINDINGS OF FACT**

20. Physical availability was only quantified for Island Lake. Water coming into the Lake is lost through evaporation, evapotranspiration, direct discharge to Island Creek or seepage. Seepage from the Lake could show up lower down in the drainage as surface flow. The proposed use removes water from the Lake, which could reduce the amount of water seeping out of the bottom or flowing out of the Lake.

21. To be conservative, the Department’s legal availability assessment included existing surface water rights on Island Lake and Island Creek to the confluence with the Pleasant Valley Fisher River. They divert water below intermittent stream reaches and wetland flats via ditches. The volumes associated with these existing rights were subtracted from the Lake’s volume. The

total volume of water physically available in Island Lake is 4,121 AF. Existing legal demands on Island Lake and Island Creek total 1,169.3 AF. See Table 2 below for a summary of the existing water rights.

22. The Department finds that the proposed diverted flow of 30 GPM and diverted volume of 1.9 AF is legally available in Island Lake.

**Table 2:** Summary of Existing Legal demands for Island Lake and Island Creek

<b>WRNUMBER</b>	<b>PURPOSES</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>
76C 115793 00*	STOCK	0.25	06/01 to 10/19
76C 141578 00	IRRIGATION	300.00	04/01 to 10/04
76C 141577 00	IRRIGATION	400.00	04/01 to 10/04
76C 141575 00	IRRIGATION	162.00	04/01 to 10/04
76C 141579 00	IRRIGATION	300.00	01/01 to 12/31
76C 116364 00	INDUSTRIAL	1.00	04/01 to 10/31
76C 116388 00	FIRE PROTECTION	1.00	05/01 to 10/31
76C 30119518*	LAWN & GARDEN	5.00	4/15 to 10/15
<b>Total Volume (AF)</b>		<b>1,169.3</b>	

\*Island Lake Water Right

CONCLUSIONS OF LAW

23. 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).

24. 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.

25. The 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. (Findings of Fact Nos. 20-22)

### **Adverse Effect**

#### **FINDINGS OF FACT**

26. 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. Should call be made, the Applicant proposes to turn off their pump and stop diverting water under this permit.

27. Physical availability has been demonstrated and legal availability has been shown by comparing what is physically available on the source and what is legally appropriated. There is

sufficient water to meet all legal demands and the requested flow rate and volume of 30 GPM and 1.9 AF.

#### CONCLUSIONS OF LAW

28. 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.

29. 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).

30. 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.

31. 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.

32. 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.

33. 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.

34. 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. (Findings of Fact Nos. 26-27)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

35. The Applicant proposes to pump surface water from Island Lake at a rate of 30 GPM via a Munro LP 2 HP jet pump, model number LP200B. From the pump, water will travel uphill via a two-inch mainline and be distributed to eight hydrants via one and a half-inch branch line. Water will be applied to the place of use via one-inch garden hoses and moveable sprinklers.

36. Pump specifications were included in the application. Based on the total dynamic head (128 feet) and pump specifications (60 psi output or 139 feet); the system can produce and distribute the requested flow rate of 30 GPM and volume of 1.9 AF for lawn and garden irrigation use.

#### **CONCLUSIONS OF LAW**

37. 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.

38. 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.

39. 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 (Finding of Fact No. 35-36).

### **Beneficial Use**

#### **FINDINGS OF FACT**

40. The proposed appropriation is for 30 GPM up to 1.9 AF for lawn and garden use. Total diverted volume is 1.9 AF and was calculated using the standard of 2.5 AF/acre for lawn and garden use found on the Department's Form 615 (2.5 AF/acre × 0.75 acres).

41. Water will be pumped from Island Lake at a rate of 30 GPM. Based on the total dynamic head and pump specifications; the system can produce and distribute the requested flow rate of 30 GPM.

#### **CONCLUSIONS OF LAW**

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

43. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause

No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

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

44. 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.

45. The Applicant proposes to use water for lawn and garden use. The Applicant has proven by a preponderance of the evidence lawn and garden use is a beneficial use and that 1.9 AF of diverted volume and 30 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (Finding of Fact Nos. 40-41)

### **Possessory Interest**

#### **FINDINGS OF FACT**

46. 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**

47. 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.

48. 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.

49. 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. (Finding of Fact No. 46)

### **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. 76C 30148390 should be GRANTED.

The Department determines the Applicant may divert water from Island Creek (Island Lake), by means of a pump, from April 15<sup>th</sup> thru October 15<sup>th</sup> at a rate of 30 GPM up to 1.9 AF, from a point in Lot 3, Island View Subdivision, in the NWSWNWNE, Section 31, Township 29N, Range 26W, Lincoln County, Montana for lawn and garden use. The place of use is generally located in Lot 3, Island View Subdivision, in the SWNWNE, Section 31, Township 29N, Range 26W, Lincoln County, Montana. 0.75 acres may be irrigated.

**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 5<sup>th</sup> day of May 2020

/Original signed by Kathy Olsen/  
Kathy Olsen, Kalispell 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 5<sup>th</sup> day of May 2020, by first class United States mail.

DONALD AND LORIE GUTKNECHT  
PO BOX 1288  
MARION, MT 59925

\_\_\_\_\_  
NAME

\_\_\_\_\_  
DATE