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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N 30151091
BY ANTHONY R. RUCINSKI

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Anthony R. Rucinski (Applicant) submitted an Application for Beneficial Water Use Permit No. 76N 30151091 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on May 13, 2021. Applicant proposes to divert 20 gallons per minute (GPM) up to 2.18 acre-feet (AF) annually from the Clark Fork River. The proposed purpose is lawn and garden irrigation. The DNRC published receipt of the Application on its website on May 17, 2021. The DNRC determined the application correct and complete as of November 4, 2021. The DNRC completed an Environmental Assessment for this application on December 30, 2021.

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:
  - Attachment 1. Application Questions, Continuation Sheet (Supplemental Responses)
  - Attachment 2. Figures, Photos and References

Preliminary Determination to GRANT
Application for Beneficial Water Use Permit No. 76N 30151091
Information within the Department’s Possession/Knowledge

- Mean monthly stream flow data for the Clark Fork River from United States Geological Survey (USGS) Gaging Station #12389000 near Plains, MT (period of record October 1910 – October 2020) used for physical and legal availability analysis.

- Mean monthly stream flow data for the Thompson River from United States Geological Survey (USGS) Gaging Station #12389500 near Thompson Falls, MT (period of record October 1956 – March 2021) used for physical and legal availability analysis.

- List of existing surface water rights (Technical Report, Appendix A) on the Clark Fork River system from USGS Gaging Station #12389000 near Plains, MT to Thompson Falls Dam, downstream of the POD. This list was used to quantify physical and legal availability and to 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. Applicant proposes to divert water from the Clark Fork River using a pump. Applicant requests a 20 GPM flow rate up to an annual volume of 2.18 AF for 0.87 acres of lawn and garden irrigation. Lawn and garden irrigation will occur from April 1 – October 31. The point of diversion (POD) is located on the Clark Fork River in Salish Shores No. 2 subdivision Lot 51, SENWNW Section 23, Township 21N, Range 29W, Sanders County, Montana (Figure 1). The place of use is in Salish Shores No. 2 subdivision Lot 51, SENWNW Section 23, Township 21N, Range 29W, Sanders County, Montana (Figure 1). The POD is in the Lower Clark Fork Basin (76N), in an area that is not subject to water right basin closures or controlled groundwater area restrictions.
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

2. The Montana Constitution expressly recognizes in relevant part that:

   (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

   (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.

   (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

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

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

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

3. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Sections § 85-2-311(1) and -311(2) state 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 to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35.

4. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:
(1) (a) The department may issue a permit for less than the amount of water requested but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

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

5. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, superseded by legislation on another issue:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, Memorandum and Order (2011). The Supreme Court likewise explained that:

..., unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).
6. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

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

**Physical Availability**

**FINDINGS OF FACT**

8. The Applicant proposes to divert up to 2.18 AF annually at a maximum flow rate of 20 GPM from the Clark Fork River. Physical availability of the Clark Fork River at the POD was quantified monthly. USGS Gaging Station #12389000 on the Clark Fork River near Plains, MT is the nearest gage to the proposed POD. The date range used includes the entire period of record for this gage (October 1910 – October 2020. The gaging station is located upstream of the POD. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the monthly flow rates of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. Between the Clark Fork River gage and the POD, the Thompson River enters the Clark Fork River. Discharge from the two gages was summed to determine physical availability at the POD.

9. USGS Gage #12389500 on the Thompson River is located near the mouth of the Thompson River where it enters the Clark Fork River. The date range used includes the entire period of record for this gage (October 1956 – March 2021). Water rights on the Thompson River between the gage and confluence with the Clark Fork River and those rights from the Clark Fork River down to the POD have been accounted for in the physical availability analysis. The DNRC used the method...
below to quantify physically available monthly flows and volumes at the POD during the proposed period of diversion.

10. The Department calculated the monthly flows appropriated by existing users upstream of the POD on the Clark Fork River (Table 1, column D) by:
   i. Generating a list of existing water rights from USGS Gage #12389000 to the POD (list is included in Technical Report Appendix A and can be made available upon request);
   ii. Delegating all uses as occurring during their respective periods of diversion;
   iii. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate; and
   iv. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the period of diversion. This 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.

11. The Department calculated the monthly flows appropriated by existing users on the Thompson River between USGS Gage # 12389500 and the confluence of the Clark Fork River (Table 1, column D) by:
   i. Generating a list of existing water rights from USGS Gage #12389500 to the Clark Fork River (list is included in Technical Report Appendix A and can be made available upon request);
   ii. Delegating all uses as occurring during their respective periods of diversion; and
   iii. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This assumption is necessary due to the difficulty of differentiating the distribution of appropriated volume over the
period of diversion. This 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.

12. Since the Clark Fork gage used is upstream of the POD and a significant inflow of water from the Thompson River enters the Clark Fork River between the gage and the POD, the Department:

i. Subtracted the flow rates of the existing Thompson River rights between USGS Gage #12389500 and the confluence with the Clark Fork from the median of the mean monthly values at gage #12389500; and,

ii. Added the median of the mean monthly gage values from USGS Gages #12389000 to the calculated contribution of the Thompson River to the Clark Fork River from step i. (Table 1, column B);

iii. Subtracted the flow rates of the existing Clark Fork River rights between USGS Gage #12389000 and the POD (Table 1, column D) from the median of the mean monthly values at gage #12389000 to determine physical availability at the POD (Table 1, column E).

13. Physically available monthly flows were then converted to monthly volumes (Table 1, column F) using the following equation found on DNRC Form 615:

i. median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.
Table 1: Physical Availability Analysis of the Clark Fork River at the POD using USGS Gage #12389000 near Plains, MT and USGS Gage #12389500 near Thompson Falls, MT

<table>
<thead>
<tr>
<th>Month</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Calculated Flow at Gages 12389000 and 12389500 (CFS)</td>
<td>Median of the Mean Monthly Volume at Gages 12389000 and 12389500 (AF)</td>
<td>Existing Rights from Gage 12389000 to POD (CFS)</td>
<td>Physically Available Water at POD (CFS)</td>
<td>Physically Available Water at POD (AF)</td>
</tr>
<tr>
<td>January</td>
<td></td>
<td>12,697.10</td>
<td>779,348.00</td>
<td>6.4</td>
<td>12,690.8</td>
<td>778,958.2</td>
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<td>11,726.10</td>
<td>650,094.98</td>
<td>6.4</td>
<td>11,719.8</td>
<td>649,742.9</td>
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<td></td>
<td>11,502.60</td>
<td>706,029.59</td>
<td>8.4</td>
<td>11,494.3</td>
<td>705,517.1</td>
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<td></td>
<td>19,108.88</td>
<td>1,135,067.47</td>
<td>19.0</td>
<td>19,089.9</td>
<td>1,133,940.7</td>
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<tr>
<td>May</td>
<td></td>
<td>44,714.51</td>
<td>2,744,576.62</td>
<td>26.4</td>
<td>44,688.1</td>
<td>2,742,955.6</td>
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<td>51,266.76</td>
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<td>26.4</td>
<td>51,240.4</td>
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<td></td>
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<td>26.4</td>
<td>23,736.2</td>
<td>1,456,924.9</td>
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<td></td>
<td>10,756.46</td>
<td>660,231.51</td>
<td>26.4</td>
<td>10,730.1</td>
<td>658,610.5</td>
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<td>September</td>
<td></td>
<td>9,526.11</td>
<td>565,850.93</td>
<td>24.7</td>
<td>9,501.4</td>
<td>564,383.2</td>
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<tr>
<td>October</td>
<td></td>
<td>10,410.01</td>
<td>638,966.41</td>
<td>22.3</td>
<td>10,387.7</td>
<td>637,599.5</td>
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<tr>
<td>November</td>
<td></td>
<td>11,491.20</td>
<td>682,577.28</td>
<td>9.4</td>
<td>11,481.8</td>
<td>682,018.9</td>
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<td>December</td>
<td></td>
<td>12,374.70</td>
<td>759,559.09</td>
<td>6.4</td>
<td>12,368.4</td>
<td>759,169.3</td>
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</table>

14. The Department finds the requested flow rate of 20 GPM (0.04 CFS), up to a volume of 2.18 AF annually, is physically available in the Clark Fork River 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. 27665-41I 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).
17. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson (DNRC Final Order 1990); In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean (DNRC Final Order 1994).

18. The Applicant has proven that water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Finding of Fact (FOF) Nos. 8-14)

Legal Availability

FINDINGS OF FACT

19. Thompson Falls Dam is the nearest downstream point of control on the Clark Fork River. Operations at Thompson Falls Dam have the ability to alter flows downstream based on energy demands. For this reason, legal availability has been considered in the reach from the POD downstream to Thompson Falls Dam. Thompson Falls Dam is a hydroelectric run of the river dam located on the Clark Fork River near Thompson Falls, MT. The dam operator is a senior water rights user in this reach of the Clark Fork River, with water rights that equate to 23,420 CFS, equal to their energy generation capacity. Legal availability of the Clark Fork River at the POD was quantified monthly. The DNRC used the method below to quantify legally available monthly flows and volumes at the POD during the proposed period of diversion.

20. The Department quantified physically available monthly flows (Table 2, column B) and volumes (Table 2, column C) for the Clark Fork River at the POD.

21. The Department calculated the monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 2, column D) by:

   i. Generating a list of existing water rights from the POD downstream to Thompson Falls Dam (See Table 2 in the Technical Report);

   ii. Delegating all uses as occurring during their respective periods of diversion; and
iii. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

22. The Department subtracted out the flow rates of the existing legal demands (Table 2, column D) within the area of potential impact from the physically available water (Table 2, column B) to determine legal availability at the POD (Table 2, column E). Legally available monthly flows were then converted to monthly volumes (Table 2, column F).

23. Monthly flows were converted to monthly volumes using the following equation found on DNRC Form 615:

\[ \text{median of the mean monthly flow (CFS)} \times 1.98 \times \text{days per month} = \text{AF/month}. \]

<table>
<thead>
<tr>
<th>Month</th>
<th>Physically Available Water at POD (CFS)</th>
<th>Physically Available Water at POD (AF)</th>
<th>Existing Legal Demands from POD to Thompson Falls Dam (CFS)</th>
<th>Physically Available Water minus Legal Demands (CFS)</th>
<th>Physically Available Water minus Legal Demands (AF)</th>
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<tr>
<td>January</td>
<td>12,690.8</td>
<td>778,958.2</td>
<td>23,420.0</td>
<td>-10,729.3</td>
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<tr>
<td>February</td>
<td>11,719.8</td>
<td>649,742.9</td>
<td>23,420.0</td>
<td>-11,700.3</td>
<td>-648,661.9</td>
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<td>March</td>
<td>11,494.3</td>
<td>705,517.1</td>
<td>23,420.1</td>
<td>-11,925.8</td>
<td>-732,005.6</td>
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<td>April</td>
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<td>23,420.9</td>
<td>21,267.2</td>
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<td>June</td>
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<td>23,420.0</td>
<td>-11,051.7</td>
<td>-678,350.3</td>
</tr>
</tbody>
</table>

24. The Technical Report sent on November 4, 2021, provided the Applicant with the information in the Department’s possession which would use to assess legal availability of the
Clark Fork River at the requested POD. The Applicant did not submit quantifiable figures initially, or in response to the technical report, to overcome the shortage in legal availability of water in the considered reach of the Clark Fork River during the requested period of diversion.

25. The Department finds that the proposed diverted flow of 20 GPM (0.04 CFS) and annual diverted volume of 2.18 AF that the Applicant seeks to appropriate can only be found legally available in this reach of the Clark Fork River during the period of May 1 - July 31. Based on the Department’s analysis, water cannot be found legally available in April, August, September, and October, which are all months within the requested period of diversion.

CONCLUSIONS OF LAW

26. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

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

(A) identification of physical water availability;
(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

27. It is the applicant’s burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights
Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period of May 1-July 31, 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 19-25)

**Adverse Effect**

**FINDINGS OF FACT**

29. The Applicant has provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during shortages, the Applicant will:
   i. Turn off the pump when a senior appropriator makes a valid call for water.

30. The basin the proposed appropriation is in is not a legislatively or administratively closed. However, per the Department’s analysis, water can only be found legally available in this reach of the Clark Fork River during the period of May 1 - July 31. Appropriations of water in this reach of the Clark Fork in April, August, September, and October would adversely affect Thompson Falls Dam senior water rights.

31. The Applicants have shown that they can regulate their water use and that they have an implementation plan to protect senior water users. The Department finds the proposed water use will not adversely affect senior water users May 1 – July 31.

**CONCLUSIONS OF LAW**

32. In regard to senior hydropower water rights, the facts in this application are distinguishable from those In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by

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Thompson River Lumber Co (2006) (TRLC) concerning the Avista Company’s water rights for Noxon Reservoir. Thompson River Company’s proposed diversion on the Clark Fork was surface water immediately upstream of Avista’s Noxon Reservoir that had an immediate calculable adverse impact on Avista’s water rights and power production.

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

34. 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.

35. 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).
36. 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.

37. 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.

38. 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.


40. 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 29-31)

**Adequate Diversion**

**FINDINGS OF FACT**

41. The Applicant will divert water from the Clark Fork River at a maximum rate of 20 GPM. The diversion will use a Honda WH15XK1C1 4.0 HP pump located near an existing dock adjacent to the river. Water will be pulled from the river via 1.5” High Density Poly Ethelyne (HDPE) pipe. From the shoreline water will be pumped through a distribution line to a network of five hose bibs each containing one to four sprinkler heads. The distribution line will be comprised of
1.5-inch HDPE pipe, with each bib using .75” rubber hosing. The first hose bib will be located 80 feet from the pump, with the farthest being located 415 feet from the pump.

42. The total dynamic head (TDH) of the system at the highest and farthest zone is 118.1-feet, based on:
   i. The system operating pressure of 35-psi (equivalent to 80.85-feet of head) at the sprinkler;
   ii. The 34-foot elevation gain from the river surface to the place of use; and
   iii. The friction losses (equivalent to 3.26-feet of head) in the transmission and distribution lines at approximately 10 GPM.

43. The 0.87 acres of lawn and garden area will be irrigated in five zones. The preliminary design consists of one to four oscillating sprinklers. For each sprinkler the designed average operating pressure is 35 psi resulting in a flow rate of approximately 5.0 GPM. The resulting maximum demand is 20 GPM (4 oscillating sprinklers x 5 GPM = 20 GPM). Based on the per-zone irrigation demand, the total requested 20 GPM is justified and adequate.

44. The pump is capable of producing 20 GPM at the highest demand zone and of supplying water to the highest/farthest zone at 118.1-feet TDH based on the applicant-provided system specifications. This flow rate will allow the Applicant to supply the landscaping irrigation system at adequate operating pressures. The Department finds the system capable of producing and distributing the requested flow rate of 20 GPM and annual volume of 2.18 AF.

CONCLUSIONS OF LAW

45. 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.

46. 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.
47. The 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 41-44)

**Beneficial Use**

**FINDINGS OF FACT**

48. The Applicant requests 2.18 AF to irrigate 0.87 acres of lawn and garden area. The Applicant used the Department standard water requirement of 2.5 AF/acre of lawn and garden (2.5 AF/acre x 0.87 acres = 2.18 AF) from ARM 36.12.115(2). The applicant is located in Climate Zone II and therefore has requested a period of diversion of April 1 to October 31.

49. The Applicant will divert water from the Clark Fork River at a maximum flow rate of 20 GPM. Each irrigation zone will require a maximum of 20 GPM. Over the 214-day requested period of use, the applicant would need to run the irrigation system for approximately two hours and 45 minutes per day at the maximum flow rate to appropriate the full requested volume. This flow rate is reasonable and adequate to provide the requested volume for the purpose throughout the requested period of use.

50. The Department finds the water uses are beneficial, and that the requested flow rate of 20 GPM and annual volume of 2.18 AF are reasonably justified.

**CONCLUSIONS OF LAW**

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

52. 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

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53. 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).

54. 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.

55. Applicant proposes to use water for lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. “Domestic use” by DNRC rule means those water uses common to a household including: … (g) garden and landscaping irrigation up to five acres.” ARM 36.12.101(2). Applicant has proven by a preponderance of the evidence that lawn and garden irrigation is a beneficial use and that 2.18 AF of diverted volume and 20 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 48-50)

**Possessory Interest**

FINDINGS OF FACT

56. 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

57. 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.

58. 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.

59. The 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 56)
PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76N 30151091 should be GRANTED IN MODIFIED FORM. The Department finds that water can be found legally available in this reach of the Clark Fork River ONLY during the period of May 1 - July 31. Based on the Department’s analysis, water cannot be found legally available in April, August, September, and October, which are all months within the requested period of diversion.

The Department determines the applicant may divert water from the Clark Fork River using a pump. Applicant will divert at a maximum flow rate of 20 GPM up to an annual volume of 2.18 AF for 0.87 acres of lawn and garden irrigation. The period of diversion and use for lawn and garden irrigation will occur from May 1 – July 31. The point of diversion is located in the Clark Fork River in the vicinity of Salish Shores No. 2 Lot 51, SENWNW, Section 23, Township 21N, Range 29W, Sanders County, Montana. The place of use is located on Salish Shores No. 2 Lot 51, SENWNW, Section 23, Township 21N, Range 29W, Sanders County, Montana.
NOTICE

This Department has determined your application should be granted in modified form based upon findings specified in the above Preliminary Determination to Grant Permit in Modified Form. When an application is granted in modified form the applicant may obtain a hearing pursuant to § 2-4-604, MCA, to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be granted in modified form by filing a written request for a hearing with the Department within 30-days of service of the preliminary determination. §85-2-310(7), MCA.

This constitutes notice of your opportunity for a hearing to show cause by a preponderance of the evidence as to why your permit should not be granted in modified form. If you want to have a hearing, you must file a written request within 30-days of service of the notice of this Preliminary Determination to Grant in Modified Form.

In order to exhaust your administrative remedies under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) on a preliminary determination to grant an application in modified form, you must proceed to the show cause hearing and complete the show cause hearing process. Only a person who has exhausted his or her administrative remedies available within the agency and is aggrieved by a final written decision of the Department is entitled to judicial review under Montana Administrative Procedure Act (§2-4-702, MCA). If you file a written request for a hearing, your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be granted in modified form. A hearing date will be set within 45 days of the date of your written hearing request is filed with the Department and a notice of hearing and appointment of Hearing Examiner will be forwarded to you.

If you do not file a written request for a hearing within 30 days the Department will provide public notice of this Application and the Department’s Preliminary Determination to Grant in Modified Form 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 4th day of January 2022.

/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 4th day of January 2022, by first class United States mail.

ANTHONY R. RUCINSKI
PO BOX 1118
THOMPSON FALLS, MT 59873

ERIC HENDRICKSON
2101 MULLAN ROAD
MISSOULA, MT 59808

_________________________________  __________________________
NAME                                  DATE
Kalispell Regional Office, (406) 752-2288