The Montana State Board of Land Commissioners (Applicant) submitted Surface Water Application for Beneficial Water Use Permit No. 76N 30153338 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on September 7, 2021. The Department published receipt of the application on the DNRC website. The Applicants propose to divert at 17.6 gallons per minute (GPM) up to a volume of 1.51 acre-feet (AF) annually from McGregor Creek (McGregor Lake). The requested purposes are domestic use and lawn and garden irrigation. The DNRC deemed the application to be correct and complete on February 8, 2022. An Environmental Assessment was completed on March 30, 2022.

INFORMATION

The Department considered the following information submitted by the Applicants, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Permit Application Criteria Addendum
- Attachments:
  - Attachment A. Certificate of Survey 19909
  - Attachment B. Variance Request and Approval
  - Attachment C. Pump Specifications and Pump Curve
  - Attachment D. Hydraulic Calculations
Information within the Department’s Possession/Knowledge

- August 30, 2021, letter from Greg Poncin (DNRC Trust Land Management Division – Northwest Land Office Area Operations Manager) to DNRC Water Resources. Letter regards: “Attachment to Hullett Surface Water Rights Request, DNRC Leased Lot 18, McGregor Lake, Lease #3052005,” and details that it is the Trust Land cabin lease lot lessees’ (Rick and Susie Hullett) responsibility to obtain a water right in the Applicant’s name for the lessees’ use of water on the lease lot. This letter authorized the Hulletts to sign the Form 600 on behalf of the Applicant.

- Montana Department of Fish, Wildlife, and Parks (MTFWP) bathymetric (contour interval line) data for McGregor Lake used to quantify physical availability (lake surveyed July 18, 2011).

- List of existing surface water rights on McGregor Lake and McGregor Creek used to quantify legal availability (included in the Technical Report Legal Availability section).


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 McGregor Creek (McGregor Lake) (hereafter McGregor Lake) using a pump. The Applicant requests a 17.6 GPM flow rate up to an annual volume of 1.51 AF for domestic use (1.0 AF for one household) and 0.24 acres of lawn and garden irrigation (0.51 AF). Domestic use will occur from January 1 – December 31 and lawn and garden irrigation will occur from April 25 – October 5. The point of diversion (POD) is located in Government Lot 3, SENENW Section 16, Township 26N, Range 25W, Flathead County, Montana (Figure 1). The place of use is located in Government Lots 2 and 3, SWNWNE and SENENW of Section 16, Township 26N, Range 25W, Flathead County, Montana, further described as Lot 18 in Certificate of Survey No. 19909 (Figure 1). The POD is in the Lower Clark Fork River Basin (76N), in an area not subject to water right basin closures or controlled groundwater area restrictions.
§ 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 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 1.51 AF annually at a maximum flow rate of 17.6 GPM from McGregor Lake. Neither the Applicants nor the Department could quantify the annual amount and timing of water released from McGregor Lake because the outflow is regulated by a dam, known as Palm Dam, on McGregor Creek at the lake outlet. The Applicant requested a variance from the physical surface water availability measurement requirements in ARM 36.12.1702(3). This request stated the Applicant would accept DNRC calculations of lake volume as physical availability. The Department granted the variance request. The Department quantified the physical availability of McGregor Lake as the volume of the lake using a
methodology discussed in the 2019 DNRC Technical Memorandum: Physical Availability of Ponds.

9. **Hydrogeologic setting of McGregor Lake:** The surficial geology around McGregor Lake consists of soils derived primarily from volcanic ash over glacial till/outwash, alluvial deposits, and colluvial deposits (NRCS, 2019) formed from the Ravalli Group of the Precambrian Belt Supergroup (MBMG, 2018). McGregor Lake receives surface water recharge from numerous un-gaged perennial and intermittent streams and subsurface recharge from the snowmelt and precipitation fed bedrock and unconfined aquifers hydraulically connected to the lake.

10. The outlet of McGregor Lake is regulated at Palm Dam by a single downstream appropriator. Palm Dam is a concrete structure with sliding checkboards that control the outflow of water through their removal or insertion. Based on information found in historic water right filings, the dam was constructed to supply downstream irrigation uses. Downstream of the outlet, McGregor Creek is a gaining stream due to tributary inflow and upwelling groundwater as evidenced by DNRC 2015-2016 streamflow data (Figure 2) collected at the Thompson River Road bridge (approximately 4.9 river miles downstream of Palm Dam).
11. Considering the hydrogeologic information above, the Department quantified the volume (physical availability) of water in McGregor Lake during the proposed period of diversion using publicly available bathymetric data from the MTFWP FishMT website. The Department used that data to generate polygons of depth strata in ArcGIS (Figure 3) and then quantified the total area of each depth stratum. DNRC calculated McGregor Lake’s total area as 1,470 acres based on the sum of all depth strata areas. The end-area formula for finding the volume of prismoidal forms (below) was used to quantify the total volume of water within each depth stratum (Table 1). The Department calculated 156,773.0 AF as a reasonable estimate of the lake’s physically available volume.

Figure 2: Comparison of McGregor Creek discharge data
End-Area Formula

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

\( H = \) difference in depth between two successive depth contours;
\( A_1 = \) area of the lake within the outer depth contour being considered;
\( A_2 = \) area of the lake within the inner contour line under consideration.

**Table 1: Physical Availability Bathymetric Analysis of McGregor Lake Using the End-Area Formula**

<table>
<thead>
<tr>
<th>Contour Interval (ft)</th>
<th>H (ft)</th>
<th>Area (ac)</th>
<th>Total Area (ac)</th>
<th>Depth Strata (ft)</th>
<th>Volume (AF)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>20</td>
<td>184.1</td>
<td>1,470.4</td>
<td>0-20</td>
<td>27,567.0</td>
</tr>
<tr>
<td>20</td>
<td>20</td>
<td>132.6</td>
<td>1,286.3</td>
<td>20-40</td>
<td>24,400.0</td>
</tr>
<tr>
<td>40</td>
<td>20</td>
<td>118.0</td>
<td>1,153.7</td>
<td>40-60</td>
<td>21,894.0</td>
</tr>
<tr>
<td>60</td>
<td>20</td>
<td>122.8</td>
<td>1,035.7</td>
<td>60-80</td>
<td>19,486.0</td>
</tr>
<tr>
<td>80</td>
<td>20</td>
<td>129.3</td>
<td>912.9</td>
<td>80-100</td>
<td>16,965.0</td>
</tr>
<tr>
<td>100</td>
<td>20</td>
<td>131.6</td>
<td>783.6</td>
<td>100-120</td>
<td>14,356.0</td>
</tr>
<tr>
<td>120</td>
<td>20</td>
<td>154.8</td>
<td>652.0</td>
<td>120-140</td>
<td>11,492.0</td>
</tr>
<tr>
<td>140</td>
<td>20</td>
<td>118.4</td>
<td>497.2</td>
<td>140-160</td>
<td>8,760.0</td>
</tr>
<tr>
<td>160</td>
<td>20</td>
<td>120.6</td>
<td>378.8</td>
<td>160-180</td>
<td>6,370.0</td>
</tr>
<tr>
<td>180</td>
<td>20</td>
<td>127.3</td>
<td>258.2</td>
<td>180-200</td>
<td>3,891.0</td>
</tr>
<tr>
<td>200</td>
<td>20</td>
<td>102.6</td>
<td>130.9</td>
<td>200-220</td>
<td>1,592.0</td>
</tr>
<tr>
<td>220</td>
<td>20</td>
<td>28.3</td>
<td>28.3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL VOLUME (AF)** 156,773.0
12. The Department finds that the requested annual volume of 1.51 AF, diverted at a flow rate of 17.6 GPM, is physically available in McGregor Lake during the proposed period of diversion.

CONCLUSIONS OF LAW

13. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”
14. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

15. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

16. 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) Nos. 8-12)

**Legal Availability**

**FINDINGS OF FACT**

17. The proposed diversion of 1.51 AF at 17.6 GPM will reduce the volume of water in McGregor Lake. Since the lake outlet is regulated, and the lake stage is typically lower than the outlet structure invert level, McGregor Creek immediately downstream of the outlet is dry approximately nine months of year. Neither the Applicant nor the Department could quantify the annual amount and timing of water released from McGregor Lake because a private entity regulates the outflow. The first water right on McGregor Creek is five miles below the lake outlet, just downstream of the Thompson River Road bridge. At this location, tributary inflow and upwelling groundwater dominate McGregor Creek flows. The legal availability analysis was limited to McGregor Lake because McGregor Creek is intermittent immediately downstream of Palm Dam due to regulated outflows at the dam.

18. Existing legal demands on the source were quantified and subtracted from physically available water. Existing water rights downstream of McGregor Lake that use Palm Dam as their
primary point of diversion were included as legal demands in addition to rights diverting directly from the lake. The included downstream rights use McGregor Creek as a carrier to transport McGregor Lake water downstream to secondary points of diversion. The total volume of water physically available in McGregor Lake is 156,773.0 AF (Table 1). Existing legal demands on McGregor Lake total 2,076.3 AF, leaving 154,696.7 AF of water legally available for appropriation from McGregor Lake (Table 2). A list of existing legal demands used for this analysis is contained in the permit application file.

<table>
<thead>
<tr>
<th>Volume of McGregor Lake (AF)</th>
<th>Existing Legal Demand Volume (AF)</th>
<th>Legally Available Volume (AF)</th>
</tr>
</thead>
<tbody>
<tr>
<td>156,773.0</td>
<td>2,076.3</td>
<td>154,696.7</td>
</tr>
</tbody>
</table>

19. The Department finds that the proposed annual diverted volume of 1.51 AF, diverted at a flow rate of 17.6 GPM, is legally available in McGregor Lake during the proposed period of diversion.

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

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

(A) identification of physical water availability;

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

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

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

21. It is the applicant’s burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005) (it is the applicant’s burden to produce the required evidence.); In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC (DNRC Final Order 2007) (permit denied for failure to prove legal availability); see also ARM 36.12.1705.

22. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 17-19)

**Adverse Effect**

**FINDINGS OF FACT**

23. The Applicant 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. Reduce irrigation by 50 percent;

   ii. Irrigate only flowers, shrubs, and trees to ensure survival through drought;

   iii. Turn off the pump when a senior appropriator makes a valid call for water; and,

   iv. Haul potable water in for domestic use.
24. The Applicant has proven both physical and legal availability of McGregor Lake water. Enough water remains in McGregor Lake to meet existing legal demands and the requested 1.51 AF diverted at 17.6 GPM. The Applicant has shown that they can regulate their water use and have an implementation plan to protect senior water users. The Department finds the proposed water use will not adversely affect senior McGregor Lake water users.

CONCLUSIONS OF LAW

25. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

26. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

27. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 4.


Preliminary Determination to Grant Application for Beneficial Water Use Permit No. 76N 30153338
29. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); In the Matter of Application to Change Water Right No. 41H 1223599 by MGR #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.


31. 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. 76N 30010429 by 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 right and power production. The proposed appropriation in this case is a mountain lake more than 50 miles upstream of Noxon Reservoir.

32. 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 appropriation 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 right.
33. Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 23-24)

**Adequate Diversion**

**FINDINGS OF FACT**

34. The Applicant will divert water from McGregor Lake at a maximum rate of 17.6 GPM. The diversion will use a Goulds J15S jet pump with a NEMA standard single phase 1.5-HP motor and a Well-X-Trol WX-302 pressure tank with a 40/60-pounds per square inch (psi) pressure switch. The water system intake is located approximately 60-feet offshore and 10-feet below the low water elevation near the lake bottom. The intake includes a perforated plastic screen to prevent large debris from entering the system and a foot-valve to prevent system backflow and pump prime loss. A 1.25-inch poly suction line will transmit water 180-feet from the pump intake (or 120-feet from the shoreline) to the dwelling crawlspace where the pump and pressure tank are located.

35. The system will distribute water to household fixtures, one frost-free hydrant, and two exterior hose spigots. Household water will be conveyed by a 0.75-inch copper line and will pass through a sediment filtration and ultraviolet light disinfection system. The pressure tank with 40/60-psi pressure switch will ensure the system operates at a minimum pressure of 40 psi. The pump will turn on when the system pressure drops to 40 psi and will turn off when the system pressure reaches 60 psi. Standard garden hoses connected to up to two Rainbird 25-PJDA-C impact sprinklers operating at 40-psi will be used to irrigate the lawn and garden area.

36. The total dynamic head (TDH) of the system at the pressure tank is 113 feet, based on:
   i. The minimum system operating pressure of 40-psi (equivalent to 92-feet of head) at the pressure tank;
   ii. The 13-foot elevation gain from McGregor Lake’s surface to the pressure tank/place of use; and,
iii. The friction losses in the 120-foot length of 1.25-inch poly transmission line at 17.6 GPM (equivalent to 8-feet of head).

37. The pump is capable of producing 17.6 GPM at 113-feet TDH based on the applicant-provided system specifications. This flow rate will allow the Applicants to simultaneously supply the domestic uses and the exterior hose spigots at a minimum 40-psi operating pressure. The Department finds the system capable of producing and distributing the requested flow rate of 17.6 GPM and annual volume of 1.51 AF.

CONCLUSIONS OF LAW
38. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

39. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

40. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 34-37)

Beneficial Use

FINDINGS OF FACT
41. The Applicant requests 1.0 AF for a single domestic household per ARM 36.12.115(2)(a). This property does not have restrictions against using surface water from McGregor Lake for domestic use because Montana State Trust Land cabin/home lease sites are exempt from sanitary review under the Montana Subdivision and Platting Act (pursuant to § 76-4-125(1)(f), MCA and the limitations in § 77-2-318(2), MCA).
42. The Applicant requests 0.51 AF to irrigate 0.24 acres of lawn and garden based on Department guidelines from the 2010 technical memorandum “DNRC Consumptive Use Methodology – Turf Grass.” Using the United States Department of Agriculture - Natural Resources and Conservation Service (USDA-NRCS) Irrigation Water Requirements (IWR) software, Kalispell WSO Airport Weather Station climate data, and assuming 70 percent sprinkler irrigation efficiency, the applicant identified a net irrigation requirement of 25.36 inches, or 2.11 AF per acre per year (25.36 inches/acre ÷ 12.0 inches/foot = 2.11 AF/acre). The requested annual irrigation volume is 0.51 AF for 0.24 acres of lawn and garden area (2.11 AF/acre x 0.24 acres = 0.51 AF).

43. The Applicant will divert water from McGregor Lake at a maximum flow rate of 17.6 GPM to supply domestic fixtures and irrigation needs. Rainbird 25-PJDA-C impact sprinklers connected to standard garden hoses connected to a frost-free hydrant and two outdoor spigots will apply irrigation water as required to meet irrigation demands. Up to two sprinklers will operate at any one time. The applicant provided a projected water demand estimate using fixture values based on the American Water Works Association M22 Manual. Based on this fixture demand analysis (including two hose connections with 50-feet of hose), the requested flow rate is equal to the total fixture flow demand and thus adequate to meet that demand. The requested flow rate is adequate to provide the volume for both purposes throughout their requested periods of use.

44. The Department finds the water uses are beneficial, and that the requested flow rate of 17.6 GPM and annual volume of 1.51 AF are reasonably justified.

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

46. 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).

47. 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 includes garden and landscaping irrigation, also commonly referred to as ‘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(22). Applicant has proven by a preponderance of the evidence that domestic use and lawn and garden irrigation are beneficial uses and that 1.51 AF of diverted volume and 17.6 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 41-44)
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. 76N 30153338 should be GRANTED.

The Department determines the Applicant may divert water from McGregor Creek (McGregor Lake) using a pump at 17.6 GPM up to an annual volume of 1.51 AF for domestic use (1.0 AF for one household) and 0.24 acres of lawn and garden irrigation (0.51 AF). Domestic use may occur from January 1 – December 31 and lawn and garden irrigation may occur from April 25 – October 5 annually. The point of diversion is located in Government Lot 3, SENENW Section 16, Township 26N, Range 25W, Flathead County, Montana. The place of use is located in Government Lots 2 and 3, SWNWNE and SENENW of Section 16, Township 26N, Range 25W, Flathead County, Montana, further described as Lot 18 in Certificate of Survey No. 19909.
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 30th day of March 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 30th day of March 2022, by first class United States mail.

MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620-1601

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTN: DALTON WILLIAMS
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

________________________________________  ________________________
NAME       DATE

Kalispell Regional Office, (406) 752-2288