

Office of Administrative Hearings
Department of Natural Resources and Conservation
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
76M-30149719 BY KASSNER, AUGUST)

On April 13, 2022, I presided over a contested case hearing on Application for Beneficial Water Use Permit No. 76M-30149719 (“Application”) to determine whether August Kassner (“Applicant”) proved by a preponderance of evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied in light of Ronald and Lisa Denn’s valid objection regarding adverse effect and legal availability. For the reasons set forth below, I determine that Applicant has proved that the applicable criteria of § 85-2-311(1), MCA, have been satisfied by a preponderance of evidence.

EXHIBITS

Neither Applicant nor Objectors offered any exhibits at the hearing. The exhibits referred to in the following Findings of Fact are documents in the Administrative File on the matter or in Department records. The audio recording of the hearing is referred as “HR” to signify “hearing recording” and noting the minute and second of the track at which the relevant evidence is presented. The contents of the administrative file maintained by DNRC are referenced by the specific title and page of the document contained in the administrative file.

FINDINGS OF FACT

Background

1. On September 15, 2020, Applicant submitted the Application to the Missoula Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for a flow rate of 10 gallons per minute (“GPM”) up to 1.28 acre-feet from Verde Creek for the purposes of domestic and lawn and garden irrigation. Application Rec’d 9/15/2020.

2. The Application was determined to be correct and complete as of March 10, 2021. An Environmental Assessment for this Application was completed on July 7, 2021. C&C Ltr dated 3/11/21, E.A. dated 7/7/2021.
3. The Department issued a Preliminary Determination to Grant Permit (“PD”) on July 7, 2021. PD dated 7/7/2021.
4. Ronald and Lisa Denn (“Objectors”), downstream appropriators, filed an objection in August 2021 and amended that objection in September 2021. Objection dated 8/27/2021 and Amended 9/16/2021.
5. Objectors object to the PD on the grounds of legal availability, adverse effect, and physical availability. Objectors’ objections on the grounds of adverse effect and legal availability were deemed valid by DNRC. Objection Ltr. dated 9/30/2021.
6. Upon receipt of the valid objection, DNRC set this hearing to determine whether Applicants proved by a preponderance of evidence that the legal availability and adverse effect criteria of § 85-2-311(1), MCA, are satisfied. Hearing Notice dated 10/1/2021.
7. On March 8, 2022, I requested the Water Resources Division to appoint a staff expert to the case and the Department appointed DNRC employee Danika Holmes. Appointment of Staff Expert 3/22/2022.
8. On April 13, 2022, I conducted a contested case hearing and site visit on the Application.
9. Applicant August Kassner, Objector Ronald Denn, and witnesses Ron Felstet and Bonita Buchanan attended and testified at the hearing. HR 2:22.
10. Applicant August Kassner, Objector Ronald Denn, and witness Ron Felstet attended a site visit immediately following the hearing. No evidence or testimony was offered or entered during the site visit.
11. The appointed staff expert, Ms. Danika Holmes, attended the hearing and site visit on that same day but did not testify.
12. Both parties appeared *pro se* at the April 13th hearing and in subsequent conferences.

Proposed Appropriation and Objection

13. The Applicant proposes to divert water from Verde Creek at a flow rate of 10 GPM through a 4-inch PVC pipe placed within the creek above his property. The water will flow by gravity to

the place of use. PD FOF 35.

14. Applicant's house (the place of use) is downstream of the proposed point of diversion and upstream of Objector's point of diversion. Dept. File – Application Materials.
15. Applicant has observed Verde Creek running by his house for approximately 40 years. Applicant testified that downstream portion of Verde Creek running past Applicant's house generally runs all Spring and stops sometime in June or July, but this timing is quite variable from year to year. HR 11:55.
16. Verde Creek at the point of diversion has always had water in it in Applicant's 40 years of observation. HR 16:17.
17. Objectors own water right #76M 115755-00.
18. Water right #76M 115755-00 is for stock direct from source, and its point of diversion and place of use is downstream of the Applicant's proposed diversion. Abstract of WR #76M 115755-00 in Dept. Records.
19. Objectors own the property which comprises the place of use of water right #76M 115755-00.
20. Mr. Denn testified that in 2020, Verde Creek ran onto his property only up to the first part of July. HR 21:15.
21. Mr. Denn testified that in 2021, Verde Creek did not run onto his property. HR 19:33.
22. Mr. Denn testified that he made numerous requests of DNRC to look at or inspect Verde Creek and determine the flows and the timing of flows in Verde Creek. HR 22:06; Objection.
23. Don Felstet and Bonnie Buchanan each own property downstream of the Objector on Verde Creek. As their two properties were once one, Mr. Felstet and Ms. Buchanan split a water right from Verde Creek, Water Right #76M 149599-00. HR 25:40, HR 26:33; Abstract of WR# 76M 149599-00 in Dept. Records.
24. Since 1970, Mr. Felstet has observed Verde Creek where it flows through his property. During times of high water, the water goes all the way to the Clark Fork River. Flows have diminished in the last few years. HR 20:46.
25. The site visit included touring a reach between Mr. Denn's property and the Clark Fork River, a site on Mr. Denn's property, and walking most of the portion of Verde Creek from Mr. Denn's property to Mr. Kassner's point of diversion.

26. Ms. Holmes filed a Staff Expert Report on May 17, 2022, and a Supplemental Staff Expert report on August 26, 2022. Staff Expert Report 5/17/2022; Supp. Staff Expert Report 8/26/2022.

27. After the hearing I requested Staff Expert Danika Holmes to answer the following question in an Order dated April 28, 2022:

Please describe the observed and expected flows and seasonal characteristics of Verde Creek from the Applicant's proposed point of diversion to its intersection with Quartz Rd. This report should rely on your professional knowledge and expertise as well as your personal field observations and the April 13, 2022 testimony of Mr. Kassner, Mr. Denn, and Mr. Felstet.

Order 4/28/22.

28. On May 17, 2022, Staff Expert Danika Holmes reported that she was unable to answer the question posed, stating:

Without having conducted a more extensive longitudinal study to identify the specific hydrological dynamics in the Verde Creek Basin, I am unable to confidently speak to any activities in this basin that may be leading to seasonal fluctuations in streamflow and water availability as described by the parties in the Contested Case Hearing.

Staff Expert Report 5/17/2022.

29. June 2, 2022, I ordered Staff Expert Danika Holmes to gather the information needed to provide a substantive report and opinion and provide me with an estimate of the time required to prepare such a report by June 30, 2022. This deadline was extended by subsequent Order to August 26, 2022. Order dated 6/2/2022; Order dated 7/28/2022.

30. On August 26, 2022, Staff Expert Danika Holmes filed a Supplemental Report in this matter. In that report Ms. Holmes concluded that the scope of the proffered question was beyond the capacity of the DNRC Water Rights Bureau or the DNRC Water Management Bureau. She concluded:

[M]y field observations and the April 13, 2022 testimony of Mr. Kassner, Mr. Denn, and Mr. Felstet indicate that there are times when the reach between the applicant's proposed point of diversion and Quartz Road lacks surface flow. More specifically, the first and most downstream reach of Verde Creek observed during my site visit was the only section of the stream that was dry. However, based upon my professional knowledge and expertise, this anecdotal observation does not constitute adequate hydrologic data upon which I am able to confidently offer a science-based opinion regarding expected flows and seasonal characteristics of Verde Creek.

Staff Expert Supplemental Report dated 08/26/2022.

31. The Department in its Preliminary Determination to Grant found that “water from Verde Creek is both physically and legally available in amounts sufficiently exceeding the requested appropriation of 10 GPM and 1.28 AF to ensure no adverse effect to senior appropriators diverting from the same source.” PD ¶¶ 10.
32. After allowing the parties an opportunity to question the Staff Expert and provide closing statements by telephonic conference, I closed the record on October 4, 2022. Order; Close of Record 10/4/2022.
33. The Department queried its records for all water rights listing Verde Creek as the source between the proposed point of diversion downstream to the confluence of Verde Creek and the Clark Fork River. There are five existing water rights on Verde Creek below the Applicant’s proposed point of diversion with a combined total flow rate of 205 GPM and an annual volume of up to 62.4 AF. PD ¶¶ 17.
34. The Department produced the following table to quantify other water rights on Verde Creek.

Table 2: The following existing legal demands (water rights) may be affected by the proposed appropriation:

Water Right Number	Flow Rate (GPM/CFS)	Volume (AF)
76M 133446 00	200/0.45	60
76M 133447 00	n/a*	0.5
76M 99920 00	5/0.02	1.5
76M 99922 00	n/a*	0.1
76M 115755 00	n/a*	0.25

* there is not a flow rate listed for these water rights due to the fact they are stock drinking direct from the source. PD ¶¶ 17

35. The PD determined legal availability by subtracting downstream water rights from the estimated mean monthly flows at the point of diversion. The PD then compared existing legal demands to the estimated mean monthly flow and determined that water in the amount requested was legally available in all twelve months of the year. PD ¶¶ 20.
36. The Applicant’s plan to prevent adverse effect to water rights of a prior appropriator in time of

water shortage is to “remove the pipe from the creek ...and haul water for domestic use from another source if a call for water is made by a downstream senior water user on Verde Creek.” PD ¶ 25.

37. Both Objector and Applicant testified that there are periods each year when there is ample water available at the proposed point of diversion and less downstream. FOF 13,16,17.
38. Applicant testified that water apparently runs into the streambed (and thus sub-surface) at some point below his proposed point of diversion. HR 11:33.
39. Staff Expert Danika Holmes reported that she observed a small section of the Verde Creek streambed that was dry. However, “this anecdotal observation does not constitute adequate hydrologic evidence upon which I am able to confidently offer a science-based opinion regarding expected flows and seasonal characteristics of Verde Creek.” Staff Expert Supp. Report dated 8/26/2022.
40. Objector did not provide any evidence that water flowing by Applicant’s point of diversion would be available to satisfy Objector’s water right.

CONCLUSIONS OF LAW

Burden

41. The Applicant for a beneficial water use permit has the burden to establish all the statutory requirements in § 85-2-311, MCA. *Matter of Beneficial Water Use Permits of Ciotti*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079-1080 (1996).
42. Applicants have the initial burden to show legal availability and lack of adverse effect on all water sources within the area of potential impact. Section 85-2-311(l)(a)(ii)(B), MCA; Mont. Admin. R. 36.12.1705 (2021).
43. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA by a preponderance of the evidence. Section 85-2-311(1), MCA.
44. 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. *Montana Power Co. v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984).

Legal Availability

45. Montana law provides the department must rely on an “analysis of the evidence on physical water availability and existing legal demands of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.” Section 85-2-31(1)(a)(ii)(C), MCA.
46. To determine if water is legally available, the department will compare the physical water supply at the proposed point of diversion and the legal demands within the area of potential impact. ARM 36.12.1705.
47. Department properly applied the legal availability standard as enumerated in ARM 36.12.1705, as it compared the physical water supply at the proposed point of diversion and the legal demands within the area off potential impact.
48. It is the Applicant’s burden to present evidence to prove water can be reasonably considered legally available. Order Affirming DNRC Decision, *Sitz Ranch v. DNRC*, DV-10-13390, 7, Mont. 5th Jud. Dist. Ct. (2011) (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*, 249 Mont. 425, 816 P.2d 1054 (1991) (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.*, Final Order (DNRC 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*, Final Order (DNRC 2007) (permit denied for failure to prove legal availability); see also ARM 36.12.1705.
49. I find 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. Section 85-2-311(1)(a)(ii), MCA.

Adverse Effect

50. Adverse effect analysis under Montana law comprises a two-part test; first, is the proposed

appropriation likely to result in adverse effect to a downstream appropriator and second, is the Applicant's plan to address this adverse effect sufficient. Section 85-2-311(1)(b), MCA.

51. Section 85-2-311(1)(b), MCA, provides:

[T]he department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met: . . . 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.

52. Adverse effect for permit applications is based on applicant's plan showing the diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the rights of prior appropriators will be satisfied. ARM 36.12.1706.

53. The rule further provides:

(3) A written narrative must be provided addressing the applicant's plan to prevent potential adverse effects to existing water rights, certificates, permits, and water reservations. The plan may include:

- (a) an agreement to measure appropriations and monitor water supplies;
- (b) a plan to appropriate only when stream flows exceed certain trigger flow levels;
- (c) a mitigation or aquifer recharge plan; or
- (d) other conditions necessary to prevent adverse effects.

ARM 36.12.1706.

54. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Order Affirming DNRC Decision, *Sitz Ranch v. DNRC*, DV-10-13390, 4, Mont. 5th Jud. Dist. Ct. (2011). Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Order, *Wesmont Developers v. DNRC*, CDV-2009- 823, 8, Mont. 1st Jud. Dist. Ct. (2011).

55. The PD, the witness testimony, and the Staff Expert Reports provide no substantive information regarding the effect of the proposed appropriation on flows at the Objectors' point of diversion.

56. Applicant has offered a plan that would rely on Applicant curtailing domestic water use from Verde Creek when Objector runs short of water downstream.

57. Applicant's plan would be put into operation when Objectors would notify Applicant of this

situation, an action known as “calling” the junior (Applicant’s) water right.

58. I find that the Applicant’s adverse effect plan will result in controlled water use to ensure that the rights of the Objectors are preserved.

59. 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. Section 85-2-311(1)(b), MCA.

CONCLUSION

Based upon the foregoing testimony and evidence I conclude that the Applicant has proven that water is legally available and that the proposed diversion would not adversely affect the Objector. Water Right Application No. 76M 30149719 is hereby **GRANTED**.

NOTICE

This Final Order is the Department’s final decision in this matter. A final order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 27th day of January 2023.

/Original signed by Martin Balukas/
Martin Balukas, Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 27th day of January 2023 by first class United States mail and/or by electronic mail (email).

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