

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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40A-30105384 BY DEBUFF, DANIEL G. AND SANDRA L.)))))	PRELIMINARY DETERMINATION TO GRANT FOLLOWING REMAND
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PROCEDURAL HISTORY/PRELIMINARY MATTERS

On February 11, 2016, Applicants submitted Application for Beneficial Water Use Permit No. 40A-30105384 to the Department's Lewistown Water Resources Regional Office. The Department published receipt of the Application on its website. The Department sent Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated August 8, 2016. Applicant responded with information received November 7, 2016. The Application was determined to be correct and complete on January 18, 2017. After the Department issued its Technical Report on March 23, 2017, the Applicant requested a waiver of the 120-day statutory timeline for issuing a Preliminary Determination on April 4, 2017. The waiver was requested for the Applicants to collect additional information/evidence to address the statutory criteria for permit issuance. On April 17, 2017 Applicants submitted additional information, upon which time the Department issued a revised/second Technical Report on November 14, 2017. An amendment to the application was received by the Department on March 5, 2018, requesting changes to the proposed flow rate, place of use, and irrigated acreage. The amendment resulted in a reset of the application received date to March 5, 2018. The Department reanalyzed the application and determined it to be correct and complete on April 16, 2018 and issued a revised/third Technical Report. Applicants responded to the Technical Report with an email memorandum on May 18, 2018.

Applicants propose to divert groundwater from a shallow, unconfined gravel and sand aquifer system, by means of four wells (well depths are 54.5 feet, 55 feet, 65 feet, and 70 feet) and a groundwater pit (the pit is 39 feet deep and taps the shallow groundwater aquifer). The wells will discharge groundwater into the pit, and the combined, stored water will be pumped to a center pivot irrigation system. The combined flow rate of all wells is 2.43 CFS, based on pump testing, for a volume of 216.4 AF. The flow rate of the secondary pumping system in the pit is 2.38 CFS. Since the secondary system diverts water from the pit at a flow rate less than the

combined capacity of the wells, no additional flow rate from the pit is factored into the appropriation. The period of diversion and use is from April 20 through October 10. The purpose of use is irrigation on 173.1 acres.

On August 14, 2018, the Lewistown Water Resources Regional Office issued a Preliminary Determination to Deny (PDD). The denial was based on the Department's determination that the "Applicants have not proven surface water is legally available from the Southern Springs discharge point and downgradient in the Elk Creek drainage, nor have they proven adverse effects would not result to water users in that drainage." (PDD p. 31)

Pursuant to § 85-2-307, MCA, the Applicants were given the opportunity to show cause why Application for Beneficial Water Use Permit No. 40A-30105384 should not be denied. A show cause hearing was scheduled and held on November 1, 2018, before this Hearing Examiner. On January 28, 2019 this Hearing Examiner issued a Final Order (FO). The FO states "[t]he evidence establishes that the proposed appropriation will cause year-round depletions at a constant rate at Southern Springs. The record is devoid of information regarding the physical availability of surface water in Elk Creek below Southern Springs and as such no finding of legal availability or lack of adverse effect can be made. Accordingly, this Hearing Examiner concludes that the Applicants have not proven by a preponderance of evidence that surface water can reasonably be considered legally available in Elk Creek during the period in which the Applicants seek to appropriate, in the amount consumed nor have they proven by a preponderance of the evidence that no adverse effect would result from their proposed use." (FO ¶ 30)

The FO then concludes "[f]or the reasons set forth above and those found in the Preliminary Determination to Deny dated August 14, 2018, Application for Beneficial Water Use Permit No. 40A-30105384 by Daniel G. and Sandra L. DeBuff is DENIED. (FO p. 15)

On February 27, 2019, the Applicant filed a Petition for Judicial Review (PJR) in the Montana Water Court. *Daniel G. DeBuff and Sandra L DeBuff v. DNRC*, WC-MAPA-2019-01, Montana Water Court (Feb. 27, 2019). Upon briefing and oral argument, the Water Court issued its "Order on Petition for Judicial Review" (Water Court Order) on November 21, 2019. The Water Court Order granted the DeBuffs Petition for Judicial Review and remanded the matter back to the DNRC. The Water Court Order states "[t]he DNRC is ORDERED to issue a Preliminary Determination to Grant consistent with this Order, and to provide notice and the opportunity for objections to the application pursuant to § 85-2-307(2)(b), MCA."

On January 31, 2020, DNRC filed its Notice of Appeal with the Montana Supreme Court. *DeBuff v. DNRC*, DA 20-0071, Montana Supreme Court (Jan. 31, 2020). Upon briefing, the Supreme Court issued its opinion on March 16, 2021, *Debuff v. DNRC*, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183. The Supreme Court reversed in part, affirmed in part, and remanded the matter to DNRC for further proceedings.

The Court held, *inter alia*, that DNRC was arbitrary and capricious when it failed to consider evapotranspiration evidence provided by DeBuff and that the full record (including the evapotranspiration evidence) established that DeBuff satisfied the statutory criteria to grant the preliminary determination. *Debuff*, ¶¶ 43–44. The Court concluded: “[t]he record here clearly establishes that the amended application, including evidence that DNRC rejected without a proper basis, *satisfies the statutory criteria for a preliminary determination* and may move forward to face objections.” *DeBuff*, ¶ 45 (emphasis provided).

The Water Court Order and Supreme Court opinion apply to findings of fact and conclusions of law from the August 14, 2018, Preliminary Determination to Deny related to legal availability and adverse effect to other water users. The Water Court Order directed DNRC to issue a Preliminary Determination to Grant. As such, no additional evidence has been taken or considered by the DNRC.

Accordingly, this Order vacates the January 28, 2019 Final Order in its entirety. The Hearing Examiner makes the following Findings of Fact and Conclusions of Law based on the existing administrative record, the Preliminary Determination to Deny, the Montana Water Court’s “Order on Petition for Judicial Review” and the Montana Supreme Court’s Opinion in *DeBuff*.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The application was initially filed with the Department on February 11, 2016. The proposed appropriation of water included a flow rate of 3.63 cubic feet per second (CFS) and a volume of 552.69 acre-feet (AF). After the completion of various processing stages, analysis, and reporting by the Department, and submission of a waiver of statutory timelines for processing the application, the Applicants amended their proposed appropriation on March 5, 2018. The proposed appropriation of water was amended to a flow rate of 2.38 CFS, and the volume was amended to 216.4 AF. During a phone conversation with Applicants’ Consultant, Pat Riley, on

June 14, 2018, the flow rate was adjusted/clarified to 2.43 CFS (1,090 GPM). (File; Memorandum dated June 14, 2018)

2. Applicants propose to divert groundwater from a shallow, unconfined gravel and sand aquifer system, by means of four wells (well depths are 54.5 feet, 55 feet, 65 feet, and 70 feet) and a groundwater pit (the pit is 39 feet deep and taps the shallow groundwater aquifer). The wells will discharge groundwater into the pit, and the combined, stored water will be pumped to a center pivot irrigation system. The combined flow rate of all wells is 2.43 CFS, based on pump testing. The flow rate of the secondary pumping system in the pit is 2.38 CFS. Since the secondary system diverts water from the pit at a flow rate less than the combined capacity of the wells, no additional flow rate from the pit is factored into the appropriation. The period of diversion and use is from April 20 through October 10. The purpose of use is irrigation on 173.1 acres. (Applicants' Amendment dated March 5, 2018; Memorandum dated June 14, 2018)

3. The diversion points (wells and pit) are generally located in the E2 Section 26, and the place of use (center pivot) is located in Section 35, all in T10N, R17E, Wheatland County. The project is approximately 12 miles southeast of Judith Gap, Montana, adjacent to what is known as Living Springs. (Application)

4. The proposed capacity of the groundwater pit is 19.5 AF. The surface area is projected to be 1.0 acre in size, and its maximum depth is 39 feet. The pit is considered one of five diversions, as it is constructed (dug) to a depth that exposes the shallow groundwater system. It contains a buried, 5-foot diameter culvert that will act as a secondary diversion system. It will directly divert groundwater exposed by the pit as well. (Application; Memorandum dated June 14, 2018)

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

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of

evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

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

(A) identification of physical water availability;

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

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

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to [75-5-301\(1\)](#); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

PHYSICAL AVAILABILITY

FINDINGS OF FACT

6. The source is shallow groundwater from an unconfined gravel and sand aquifer system, and the means of diversion consists of four wells (well depths are 54.5 feet, 55 feet, 65 feet, and 70 feet) and a groundwater pit (the pit is 39 feet deep and exposes the shallow groundwater aquifer).

The wells will discharge groundwater into the pit, and the combined, stored water will be pumped from a secondary diversion point to a center pivot irrigation system. The combined flow rate of all wells and any contribution of groundwater upwelling in the pit is 2.43 CFS and the proposed volume is 216.4 AF. The period of diversion and use is from April 20 through October 10. The purpose of use is irrigation on 173.1 acres. (Application; Department Memorandum dated June 14, 2018)

7. *Flow Rate.* Applicants conducted multiple aquifer tests to address the physical availability criteria. One of the production wells was pumped for 73 hours during the first test, from September 26 – September 29, 2014, at an average flow rate of 425 GPM. A second well was evaluated with a 72-hour drawdown and yield test at 290 GPM. A third well was evaluated with an 8-hour drawdown and yield test at 275 GPM. And a fourth well was evaluated with a 10-hour drawdown and yield test at 100 GPM. Finally, an 88.5-hour aquifer test was conducted on three of the production wells with a flow rate that fluctuated between 895 GPM and 1,895 GPM. The fourth well was monitored for water level impacts during the 88.5-hour test. Collectively, the various tests showed the four wells capable of diverting a combined flow rate of 1,090 GPM, or 2.43 CFS. The testing did not include a specific aquifer test on the groundwater pit. Since the secondary diversion in the pit will pump to the irrigation system at a rate less than the combined rate of the four wells, there is no need to factor in an additional appropriation (flow rate) from the pit. The testing data show water is physically available for sustaining the maximum requested flow rate (2.43 CFS). (Department Revised Aquifer Test Report, April 17, 2018)

8. *Volume.* Groundwater flux through the zone-of-influence (ZOI) was calculated by the Department to evaluate physical water availability. The predicted ZOI was determined by modeling the areal extent of groundwater drawdown of the 0.01-foot contour and was based on a constant pumping rate of 283 GPM throughout the period of diversion. The 283 GPM pumping rate was determined by calculating the average flow rate necessary to produce the proposed volume (216.4 AF) within the period of diversion. Using the Theis equation, a transmissivity of 166,000 ft² per day and a storativity value of 0.1, the resultant ZOI extends 41,000 feet from the proposed well field. Since the predicted ZOI extends past aquifer boundaries, it was truncated to the extent of those aquifer boundaries. The Department interpreted the boundary in the north/south direction based on formation outcrop, and to the stream channels of Timber Creek to the west, and Elk Creek to the east. A groundwater flux of 39,642 AF/year through the ZOI was calculated by multiplying the width of the ZOI (9,500 feet) by the aquifer transmissivity (166,000

ft²/day) and groundwater gradient (0.003 ft/ft). The calculations show there is sufficient volume of water available to meet the proposed volume of 216.4 AF. (Department Revised Aquifer Test Report, April 17, 2018)

CONCLUSIONS OF LAW

9. 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.”

10. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

11. 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).

12. The Applicants have proven that water is physically available at the proposed point of diversion in the amount Applicants seek to appropriate. § 85-2-311(1)(a)(i), MCA. (FOFs 7 -8)

LEGAL AVAILABILITY

FINDINGS OF FACT

13. *Groundwater.* Department Groundwater Hydrologist Attila Felnagy predicted the width of the zone-of-influence at 9,500 feet, which encompassed 21 groundwater rights. The cumulative volume of the 21 water rights is 612.3 AF.

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TABLE 1: GROUNDWATER RIGHTS LOCATED WITHIN THE ZONE-OF-INFLUENCE

WR NUMBER	WR OWNER	MEANS OF DIVERSION	VOLUME (AF)
40A 30104440	Lee	Well	5.1
40A 206037	Lee	Well	0.9
40A 206034	Lee	Well	1.7
40A 7207	Warner	Well	3.8
40A 206038	Lee	Spring	0.9
40A 206039	Lee	Spring	0.9
40A 184511	Glennie	Spring	418.5
40A 145907	Glennie	Spring	5.9
40A 205425	Berg	Spring	13.9
40A 206035	Lee	Spring	1.7
40A 14346	Warner	Well	0.8
40A 53490	Debuff	Spring	80.5
40A 30106006	Lee	Well	2.55
40A 30107177	Debuff	Spring	10.1
40A 30107178	Debuff	Spring	10.1
40A 30107179	Debuff	Spring	10.1
40A 30107182	Debuff	Spring	10.1
40A 30107183	Debuff	Spring	10.1
40A 30107184	Debuff	Spring	10.1
40A 30112242	Warner	Well	6.12
40A 30115423	Debuff	Well	8.43
Total			612.3 AF

14. Fohnagy predicts groundwater flux of 39,642 AF/year through the ZOI. In comparison, legal demands are 612.3 AF, for an estimated surplus of 39,030 AF. The Hearing Examiner finds that groundwater is legally available in the amount proposed in this application. (Department Revised Depletion Report; Department Technical Report)

15. *Surface Water.* The source aquifer for the proposed appropriation is hydraulically connected to surface water. The project lies adjacent to a large wetland complex known as Living Springs. Downgradient from Living Springs is an ephemeral tributary of Elk Creek, which rarely flows. Application materials. Further downgradient (south), about two miles from the project, lies a series of naturally flowing springs referred to in this Preliminary Determination as the Southern Springs. Groundwater discharges to at least three of the Southern Springs on a perennial basis

and contributes to surface water flows downstream of the spring discharge points. (Willis Weight Memo to Doug Mann, dated April 17, 2017; Department Revised Depletion Report)

16. Applicants' consultant Willis Weight asserts that depletions from the appropriation will only occur to Living Springs, and the source aquifer is not hydraulically connected to the Southern Springs. He characterizes the source aquifer as discontinuous and distinctly isolated, pinching out before it reaches the Southern Springs. He offered multiple alternatives for the water discharging from the Southern Springs, including from a collection of unknown sources, bedrock, and/or what is identified on a geologic map as the Qtab, a mapped geological unit of surficial sediments. (File Memos from Willis Weight)

17. Department staff Attila Fohnagy found that the source aquifer is hydraulically connected to the Southern Springs. The Qtab (source aquifer for both the points of diversion and Southern Springs) is mapped by Porter, et al. (1996) as continuous between the points of diversion and Southern Springs. The source aquifer is composed of gravels in a sand and clay matrix from the Living Springs area to the Southern Springs area. Fohnagy acknowledges that the shallow gravel lens near Living Springs thins or pinches out, but the pinching out does not constitute separate aquifers. These sand and gravel lenses are vertically and horizontally interconnected, water-bearing zones within one source aquifer. Well logs indicate a continuance of the shallow sand and gravel aquifer at a similar depth to the south. Fohnagy states there is no mapped bedrock feature (e.g. no flow boundary) that would prevent depletions to the Southern Springs. (Department Revised Depletion Report; Memo from Attila Fohnagy to Doug Mann, January 13, 2017)

18. In a 1987 permit proceeding before the Department, In the Matter of the Application for Beneficial Water Use Permit No. 40A 55880, by Daniel Debuff, the same Applicant as in the present proceeding acknowledged a hydraulic connection between the source aquifer at Living Springs and the Southern Springs. Additionally, the Department's Geohydrologist in 1987, Brian Harrison, projected a hydraulic connection between the two points. Both Debuff and Harrison believed there would be depletions to the Southern Springs from the irrigation project proposed at that time, which was to appropriate water from roughly the same area as in the present application. (File for Application for Beneficial Water Use Permit No. 40A 55880, by Daniel Debuff)

19. The Applicants in the present proceeding provided an analysis of evapotranspiration savings at Living Springs that was not available in the 1987 proceeding. The evapotranspiration analysis showed that the proposed use of 216.4 acre-feet would be more than compensated for by reduced evapotranspiration at Living Springs and result in zero net depletion at the Southern Springs. (Water Balance Document from Weight, Dec. 22, 2017)

20. Based on FOF's 16-19, the preponderance of the evidence shows that flows issuing from Southern Springs will not be affected by the proposed appropriation.

21. Normally, to determine if the physical water supply exceeds legal demands, the amount of water flowing from the Southern Springs would need to be known. However, because the proposed appropriation will not affect flows issuing from the Southern Springs, those flows will remain as they are currently and no impact on legal demands will occur.

22. The Hearing Examiner finds that whether the aquifer is connected or not, Applicants proposed appropriation will not affect water legally available in Elk Creek for appropriation below the Southern Springs' discharge point.

CONCLUSIONS OF LAW

23. Applicants have proven by a preponderance of the evidence that groundwater 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. (FOFs 13-14). Applicants have proven by a preponderance of the evidence that their proposed appropriation will not impact surface water flows and therefore a legal availability analysis of surface waters is not required. (FOF 15-22)

ADVERSE EFFECT

FINDINGS OF FACT

24. The Applicants propose to divert groundwater from a shallow, unconfined gravel and sand aquifer system, by means of four wells and a groundwater pit. The combined flow rate of all diversions is 2.43 CFS and the proposed volume is 216.4 AF. The proposed appropriation of groundwater is projected to deplete surface water by propagation of drawdown through the

unconfined aquifer to Living Springs, a prominent wetland complex. Depletions would also occur to a series of springs about two miles south of the wells, the Southern Springs, due to their hydraulic connectivity to the source aquifer. (FOF 24). However, Applicants provided an evapotranspiration analysis that showed that the reduction in evapotranspiration at the Living Springs wetland complex (in close proximity to the wells), through drawdown at that location, would more than offset any potential depletions at the Southern Springs. Therefore, the Applicants' proposed appropriation should have no impact on the Southern Springs. (FOF 19)

25. The Hearing Examiner finds the evidence demonstrates the amended application results in zero net depletion and that the proposed appropriation will not reduce the amount of water available for senior appropriators either physically or legally resulting in no adverse effect.

CONCLUSIONS OF LAW

26. The Applicants have proven by a preponderance of the evidence that the water rights of prior appropriators under an existing water right, certificate, permit, or a state water reservation will not be adversely affected. (FOF248, 25)

ADEQUATE DIVERSION

FINDINGS OF FACT

27. Applicant proposes to divert groundwater from a shallow, unconfined gravel and sand aquifer system, by means of four wells (well depths are 54.5 feet, 55 feet, 65 feet, and 70 feet) and a groundwater pit (the pit is 39 feet deep and taps the shallow groundwater aquifer). The proposed pit capacity is 19.5 AF. The wells will discharge groundwater into the pit, and the combined, stored water will be pumped via a 12-inch pipeline to a 173.1-acre center pivot. The combined flow rate of all wells and any contribution of groundwater upwelling in the pit is 2.43 CFS and the proposed volume is 216.4 AF. The secondary pumping system supplying the center pivot will divert water at a rate of 2.38 CFS. The file contains two schematics showing the general design and location of the wells, pit, and irrigation system, including manifold structure, pipe sizes and lengths, and pivot length. The pumping and pivot systems will be designed by an irrigation dealer. File.

28. The four groundwater wells were constructed by a licensed well driller with the State of Montana, according to the laws, rules and standards of the Board of Water Well Contractors. Well log reports were supplied with the application. File.

29. The Department finds the proposed means of diversion, construction, and operation of the appropriation works to be adequate.

CONCLUSIONS OF LAW

30. 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.

31. 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.

32. Water wells must be constructed according to the laws, rules, and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 411-105511 by Flying J Inc.* (DNRC Final Order 1999).

33. 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's 60-62).

BENEFICIAL USE

FINDINGS OF FACT

34. The proposed amount of water to be used is a flow rate of 2.43 CFS up to 216.4 AF (the volume estimate includes evaporation from the storage reservoir). The purpose of use is irrigation on 173.1 acres, and the period of use is April 20 through October 10. A 19.5 AF reservoir is included in the project.

35. The flow rate is based on the capacity of the wells, which will discharge water into the reservoir for storage purposes. Water will be pumped via a secondary diversion system from the reservoir at a flow rate of 2.38 CFS, which is the recommended design rate by the irrigation

equipment dealer. The per-acre flow rate amounts to 6.2 gallons per minute per acre, which is within a common range of design for center pivot irrigation in Montana. The proposed volume of 216.4 AF constitutes slightly deficit irrigation (1.25 AF per acre, as opposed to full service irrigation of 1.36 AF per acre).

36. The Department finds a flow rate of 2.43 CFS and volume of 216.4 AF to be a beneficial use of water.

CONCLUSIONS OF LAW

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

38. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

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

39. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial

use and that 216.4 AF of diverted volume and a flow rate of 2.42 CFS is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF's 67-69)

POSSESSORY INTEREST

FINDINGS OF FACT

40. The applicant signed and had the affidavit on the application form notarized 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

41. 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.

42. 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.

43. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 73)

PRELIMINARY DETERMINATION TO GRANT

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that the Application for Beneficial Water Use Permit No. 40A 30105384 should be granted authorizing the diversion of 2.43 CFS up to 216.4 AF from four wells and a groundwater pit located in the E2 Sec. 26, T10N, R17E for the irrigation of 173.1 acres located in Section 35, T10N, R17E, all in Wheatland County. The period of diversion and use is from April 20 through October 10.

NOTICE

The 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 a valid objection, it will proceed to a contested case proceeding pursuant to Title 2, Chapter 4, Part 6, MCA, and § 85-2-309, 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(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department determines necessary to satisfy the applicable criteria. §§ 85-2-310, - 312, MCA.

Dated this 1st day of July 2021.

/Original signed by David A. Vogler/

David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT FOLLOWING REMAND was served upon all parties listed below on this 1st day of July 2021 by first class United States mail and/or by electronic mail (e-mail).

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