

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76K 30162334 BY THE PROFITT FAMILY TRUST)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On December 15, 2023, the Profitt Family Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76K 30162334 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 20 GPM and 2.78 AF for domestic use and lawn & garden irrigation. The Department published receipt of the Application on its website. A preapplication meeting was held between the Department and the Applicant on November 20, 2023. The Application was determined to be correct and complete as of March 11, 2024. An Environmental Assessment for this Application was completed on May 9, 2024.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-SW
- Attachments:
 - Monthly flow data for United States Geological Survey (USGS) Gaging Station #12369200 near Condon, MT (10/1972 - 09/1992)
 - Diversion system schematics (12/11/2023)
 - Big Foot 40G and 80G Filter Specifications from Big Foot Manufacturing website
 - *GT IRRI-GATOR* Xylem Technical Brochure BGT R5 (2021)
 - Septic Permit #SP21-0110, Missoula City-County Health Department (9/12/2023)
 - Certificate of Missoula County Surveyor 4256 (6/30/1993)
 - Copy of DNRC Pre-Application Discussion Checklist (11/20/2023)
- Maps:
 - Site Layout Map, dated December 11, 2023
 - Surface Water Diversion Map, dated December 11, 2023

Information Received after Application Filed

- Email correspondence between consultant and Department dated April 1, 2024 clarifying details of irrigation place of use.

Information within the Department's Possession/Knowledge

- Stream flow data for Swan River from USGS Gaging Station #12369200 near Condon, MT (period of record October 1972 – September 1992) and USGS Gaging Station #12370000 near Bigfork, MT (period of record May 1922 – November 2023).
- List of existing surface water rights on the Swan River system from Lindbergh Lake to the confluence of Swan River and Glacier Creek.
- Plat map of Certificate of Survey No. 4256

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).

For the purposes of this document, Department of DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Swan River by means of a pump from January 1 to December 31 at 20 GPM up to 2.78 AF/YR, from a point in the NWSWSW Sec. 29, T20N, R16W, Missoula County, for domestic use from January 1 to December 31, and for lawn and garden irrigation from April 25 to October 5. The Applicant proposes to provide water for one residential dwelling and irrigate 1 acre of lawn and garden. The place of use is generally located in the NWSWSW Sec. 29, T20N, R16W, Missoula County.

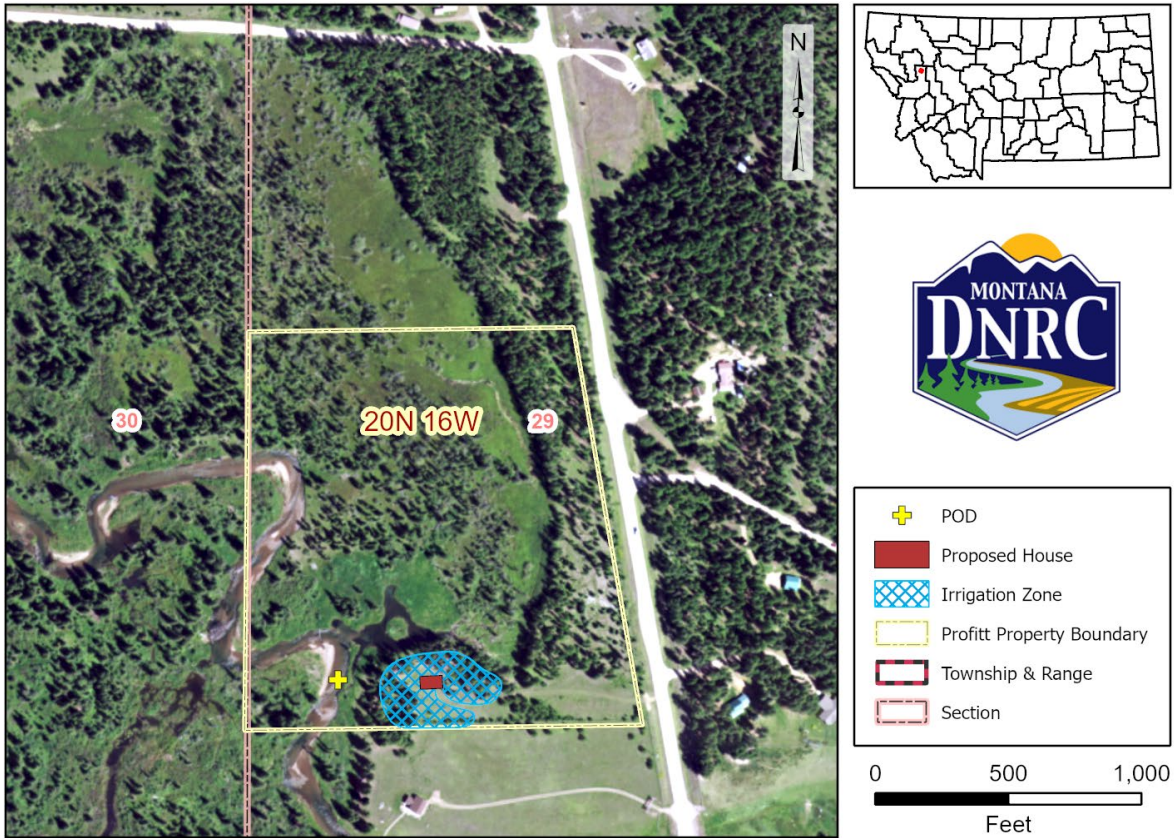


Figure 1. Map of proposed permit.

§ 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. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:

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

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

(A) identification of physical water availability;

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

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

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

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

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

(e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest

system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

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

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

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

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

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 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, 357 Mont. 438, 240 P.3d 628.

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*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080 (1996), *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. Section 85-2-311(6), MCA.

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

PHYSICAL AVAILABILITY

FINDINGS OF FACT

8. The Applicant proposes to divert up to 2.78 AF/YR at a flow rate of 20 GPM from the Swan River. USGS Gaging Station #12369200 on the Swan River near Condon, MT is the nearest gage to the proposed POD and was located approximately 3 miles upstream of the proposed POD. The period of record for the Condon gage is from October 1972 – September 1992. The Department used the USGS Streamflow Record Extension Facilitator (SREF) program and data from USGS Gaging Station #12370000, Swan River near Bigfork, to estimate streamflows for the Swan River near Condon, MT from October 1992 to November 2023 (the latest month where approved data was fully available at the Bigfork gage when the model was run).

9. The Department calculated the median of the mean monthly flow rates in cubic feet per second for the Swan River using the extended record for USGS gage #12369200 (Table 1, column 2). These flow rates were then converted into monthly volumes (Table 2, column 2).

10. The Department calculated monthly flow and volume appropriated by existing users on the source by:

- i. Generating a list of existing surface water rights from the Lindbergh Lake inlet to the confluence of Swan River and Glacier Creek.
- ii. Assuming that the full flow rate is utilized during the authorized period of diversion.
- iii. Assuming that the full volume of each water right is used each year.
- iv. Assuming that the period of diversion is identical to the period of use
- v. Assuming that the volume for each purpose of a water right is distributed evenly across every month of the period of use of that purpose.

11. Because the SREF model cannot account for water rights which came into effect after the measured period of record at Condon, the demands of water rights upstream of the gage with priority dates after 9/30/1992 were subtracted from the median of the mean monthly flows and volumes. Since the Condon gage is upstream of the proposed POD, the Department also subtracted the demands of water rights between the gage and the proposed POD (Columns C, D of Tables 1, 2).

12. Table 1 below displays the flow rate of water physically available at the proposed point of diversion:

Table 1: Physical Availability Analysis of Flow Rate on the Swan River from the Lindbergh Lake Inlet to the confluence of Swan River and Glacier Creek				
A	B	C	D	E
Month	Median of the Mean Flow (CFS)	New Legal Demands Above Gage (CFS)	Legal Demands Between Gage and POD (CFS)	Physical Availability (CFS)
January	45.39	1.43	0.00	43.96
February	42.32	1.43	0.00	40.89
March	73.58	1.43	0.00	72.15
April	206.03	1.46	0.00	204.58
May	382.97	1.46	0.00	381.51
June	468.67	1.46	0.00	467.21
July	212.94	1.46	0.17	211.31
August	75.90	1.46	0.17	74.27
September	49.50	1.46	0.00	48.04
October	50.89	1.46	0.00	49.43
November	60.35	1.46	0.00	58.89
December	47.84	1.43	0.00	46.41

13. Table 2 below displays the volume of water physically available at the proposed point of diversion:

Table 2: Physical Availability Analysis of Volume on the Swan River from the Lindbergh Lake Inlet to the confluence of Swan River and Glacier Creek				
A	B	C	D	E
Month	Median of the Mean Volume (AF)	New Legal Demands Above Gage (AF)	Legal Demands Between Gage and POD (AF)	Physical Availability (AF)
January	2790.08	3.07	0.00	2787.02
February	2349.86	3.07	0.00	2346.79
March	4523.22	3.07	0.00	4520.16
April	12256.92	4.58	0.00	12252.34
May	23542.18	6.00	0.00	23536.18
June	27880.98	6.25	0.00	27874.73
July	13089.78	6.25	0.68	13082.86
August	4666.00	6.25	0.68	4659.07
September	2944.76	6.25	0.00	2938.51
October	3128.18	6.25	0.00	3121.93
November	3590.22	3.15	0.00	3587.07
December	2940.79	3.07	0.00	2937.72

14. The Department finds surface water is physically available during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

15. The area of potential impact for this application is limited to the Swan River from the point of diversion to the confluence of the Swan River and Glacier Creek. The Swan River is located in a region that does not experience water shortages or disputes. The Swan Valley is not a major agricultural area and does not place high demands on the water resource. Below the town of Condon, the Swan River picks up numerous tributary sources from the Swan and Mission Mountain ranges and increases in flow. Due to the abovementioned source conditions, the Department finds the confluence of the Swan River with Glacier Creek to be an appropriate hydrologic boundary for the area of potential impact. To determine legal availability, the department obtained water right information in the area of potential impact and subtracted the demands of these water rights from the amount of water determined to be physically available. There are 10 water rights with points of diversion located in the area of potential impact. See Table 3, below, for a summary of legal demands.

Table 3: Water Rights in the Area of Potential Impact		
Water Right No.	Flow Rate (CFS)	Volume (AF)
76K 6214 00	0.06	1.5
76K 6215 00	0.06	0
76K 35141 00	0.11	13.82
76K 104519 00	0.06	1.5
76K 107687 00	0.04	5
76K 118414 00	0.23	26.4
76K 118415 00	0.07	0
76K 147352 00	0.11	0
76K 147353 00	19.00	22
76K 30069051	0.02	1.88

16. The comparison between physically available and legally available water in the Swan River is shown in Table 4 below, indicating that water is legally available for the proposed appropriation.

Table 4: Legal Availability Analysis of the Swan River from the Proposed POD to the Confluence of Swan River and Glacier Creek

Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands (CFS)	Existing Legal Demands (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
January	43.96	2787.02	0.29	0.02	43.67	2787.00
February	40.89	2346.79	0.29	0.02	40.60	2346.77
March	72.15	4520.16	0.29	0.02	71.86	4520.14
April	204.58	12252.34	19.34	6.61	185.23	12245.73
May	381.51	23536.18	19.45	6.86	362.06	23529.32
June	467.21	27874.73	19.74	12.52	447.47	27862.21
July	211.31	13082.86	19.74	12.52	191.57	13070.34
August	74.27	4659.07	19.74	12.52	54.54	4646.55
September	48.04	2938.51	19.74	12.52	28.31	2925.99
October	49.43	3121.93	0.68	8.48	48.75	3113.46
November	58.89	3587.07	0.29	0.02	58.60	3587.05
December	46.41	2937.72	0.29	0.02	46.12	2937.71

17. The Department finds the proposed appropriation of 20 GPM and up to 2.78 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

18. During times of water shortage or if a legitimate call for water is made, the water right holder will shut off the pump from the diversion point to stop all pumping of water from the Swan River. Gate valves will be installed in the diversion system to be able to isolate the system’s cistern from the pump and water force main, giving the ability to bring hauled water to the cistern and prevent draining of the cistern from the house to the Swan River. Water use will not resume until legal and physical availability is restored.

19. The Applicant has proven both physical and legal availability of water at the point of diversion. Enough water remains in the Swan River to meet existing legal demands within the area of potential impact and the requested 20 GPM up to 2.78 AF/YR. The Applicant has shown that the proposed water use can be regulated, and that there is an implementation plan to protect senior water users. The Department finds the proposed water use will not adversely affect senior water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

20. The means of diversion consists of an intake filter submerged in the Swan River connected by a 2-inch HDPE pipe to a ¾ hp self-priming IRRI-GATOR pump housed in a pre-cast dry vault. The pump will be throttled to limit it to drawing 20 GPM. The dry vault contains stairs to access the pump and a gate valve to allow backflushing the pipe and intake valve in case of sediment buildup. From this access point, 2-inch HDPE runs approximately 70 feet to a pre-cast 1,200-gallon cistern located beside the house. The irrigation pump will be located in this cistern. Domestic water will be drawn out of the cistern by a booster pump in the house. From the booster pump, the water will be treated and transferred to a pressure tank for household use.

21. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

22. The proposed appropriation of up to 2.78 AF and 20 GPM per year from the Swan River is for the purposes of domestic use and lawn and garden irrigation. Water will be appropriated year-round for domestic use in one residence planned for construction and will require a flow rate of 20 GPM and a volume of 0.28 AF per year. The volume requested is based on a water requirement of 100 gallons per day per person and the Missoula County census which shows an average of 2.5 residents per household in Missoula County, resulting in a proposed diverted volume of 250 gallons per day (0.28 AF/year). The volume requested is less than DNRC's standard of 1 acre-foot per domestic residence, however it is a widely accepted volumetric requirement for residential use. The proposed place of use for the lawn & garden purpose is in USDA Natural Resources Conservation Service climatic area V. The Applicant requests the DNRC standard period of diversion and period of use of April 25 – October 5 for this climatic area per ARM 36.12.112(1)(c)(v). Lawn and garden irrigation will require a diverted volume of 2.5 AF per year according to the standard specified in ARM 36.12.115(2)(b).

23. The place of use lies in a parcel whose area is greater than 20 acres and as such is not subject to DEQ sanitary review.

24. The department finds that the proposed water use is beneficial, and that the requested flow rate of 20 GPM and 2.78 AF/YR are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

25. The Applicant signed 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

PHYSICAL AVAILABILITY

26. 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.”

27. 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).

28. 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).

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

LEGAL AVAILABILITY

30. 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).

31. 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.

32. In analyzing legal availability for surface water, Applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under § 85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

33. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

34. 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. (FOF 15-17)

ADVERSE EFFECT

35. 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.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

36. 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).

37. 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*, 4 (2011).

38. In analyzing adverse effect to other appropriators, an Applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 816 P.2d 1054 (1991).

39. 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*, 7 (2011) (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Bostwick Properties, Inc.*, ¶ 21.

40. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, 8 (2011).

41. 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. (FOF 18-19)

ADEQUATE DIVERSION

42. 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.

43. 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.

44. 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. Section 85-2-311(1)(c), MCA (FOF 20-21).

BENEFICIAL USE

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; 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*, 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*, 3 (2011) (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. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 ("issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied"); *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 and lawn and garden use which are recognized beneficial uses. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that domestic and lawn and garden purposes are beneficial uses and that 2.78 AF of diverted volume and 20 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 22-24)

POSSESSORY INTEREST

50. 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.

51. 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.

52. 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. Section 85-2-311(1)(e), MCA. (FOF 25)

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. 76K 30162334 should be GRANTED.

The Department determines the Applicant may divert water from the Swan River, by means of a pump, from January 1 to December 31 at 20 GPM up to 2.78 AF/YR, from a point in the NWSWSW Sec. 29, T20N, R16W, for domestic use from January 1 to December 31 and for lawn and garden irrigation from April 25 to October 5. The Applicant may irrigate one acre of lawn and garden. The place of use for both domestic and lawn and garden is located in the NWSWSW Sec. 29, T20N, R16W.

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 decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

DATED this 15th day of May, 2024.

/Original signed by Jim Nave/
Jim Nave, Manager
Missoula Regional Office
Montana 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 15th day of May, 2024, by first class United States mail.

PROFITT FAMILY TRUST
C/O RONALD & BRENDA PROFITT
P.O. BOX 7608
KALISPELL, MT 59904

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