

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76M 30149719 BY AUGUST KASSNER)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On September 15, 2020, August Kassner (Applicant) submitted Application for Beneficial Water Use Permit No. 76M-30149719 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 (AF) from Verde Creek a tributary to the Clark Fork River for the purposes of domestic and lawn and garden irrigation. The Department published receipt of the Application on its website. 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.

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
- All necessary application attachments
- Maps: 2013 and 2020 Aerial photo depicting the point of diversion and place of use
 - 2013 USGS Topo Maps depicting the point of diversion and place of use

Information within the Department’s Possession/Knowledge

- Analysis of mean monthly flow estimates using USGS paper #2365, entitled “Methods of Estimating Monthly Stream Flow Characteristics at Ungauged Sites in Western Montana”.

- Legal availability analysis on Verde Creek using the Department's water right query system.
- Memorandum From then DNRC Administrator John E. Tubbs dated May 1, 2009 titled Permitting in the Open Clark Fork and Flathead Basins Follow-up to June 9, 2008 Memorandum

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

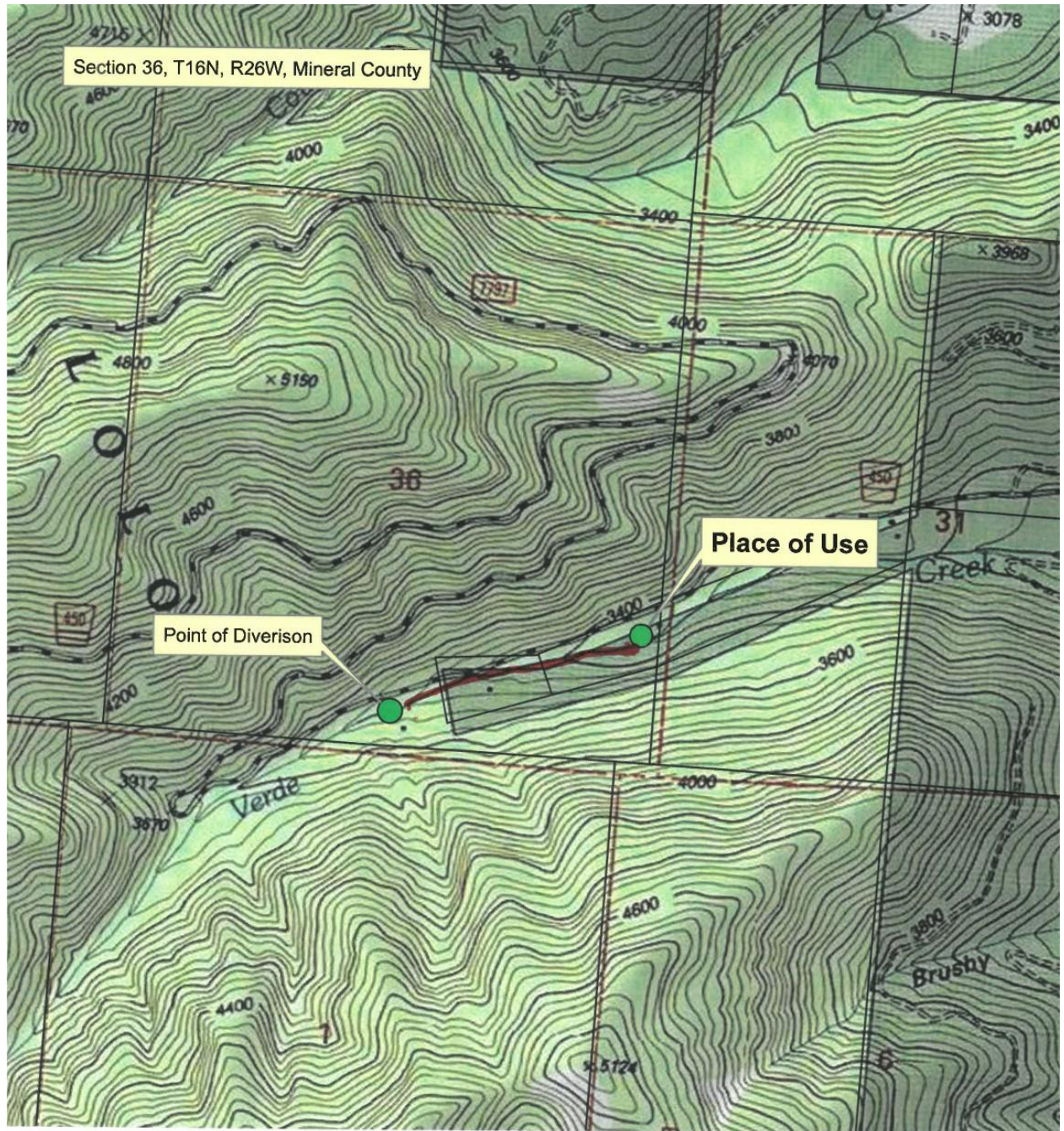
PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Verde Creek, a tributary to the Clark Fork River, from a point located in the SWSWSE of Section 36, T16N, R26W, Mineral County by means of a 4-inch diameter PVC pipe, eight feet in length placed within the creek. The 4-inch diameter PVC pipe will be attached to a 1.25-inch diameter plastic delivery pipe. Water will be gravity fed and conveyed through the 1.25-inch diameter pipe 2,640 feet to a domestic dwelling. The proposed diverted flow rate and volume from Verde Creek is 10 GPM up to 1.28 AF from January 1st through December 31st annually for in-house domestic use and April 15th through October 15th for lawn and garden irrigation of 0.11 acres. The place of use is generally located SESE of Section 36, T16N, R26W, Mineral County.
2. The system will be plumbed into the domestic dwelling with a shut-off valve and the lawn and garden irrigation will be done using soaker hoses. When water is not being used, it will return to directly to Verde Creek out of the end of the conveyance pipeline.
3. Consumptive use for the proposed diversion, assuming DNRC standard of 10% consumption for domestic use treated by on-site septic is 0.10 AF and IWR adjusted for

turf grass using the Superior weather station for sprinkler lawn and garden irrigation of 0.11 acres, equals 0.20 AF. The total proposed consumptive use is **0.30 AF** annually.

Application for Beneficial Water use Permit No. 76M-30149719 Site Map



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

GENERAL CONCLUSIONS OF LAW

4. 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 . . .

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.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. 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.

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

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

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

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

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. 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

10. USGS gaging stations are not available on Verde Creek to calculate physical availability of water for the proposed appropriation. The Department utilized USGS Paper #2365, titled “Methods of Estimating Monthly Stream Flow Characteristics at Ungagged Sites in Western Montana”, to estimate mean monthly flows on Verde Creek (Table 1), which is an acceptable method for estimating stream flow under ARM 36.12.1702 (7)(m). Mean monthly flows were also converted to mean monthly volumes. The USGS created the StreamStats program based on the model described in Paper #2365 (SIR 2015-5019-G) (Appendix G by McCarthy, Sando, et. Al. (2016)). This program was used by the Department to estimate monthly streamflow in Verde Creek. This program estimates mean monthly discharge in a designated basin using specific basin characteristic inputs. The program does not account for any water use occurring upstream of the proposed point of diversion, therefore, to conservatively estimate streamflow’s at the proposed point of diversion upstream legal demands are subtracted from the estimated mean monthly flows during the period of diversion for these rights. This method mimics the data obtained from actual USGS gage sites. In this situation, there is one upstream legal demand to subtract, water right number 76M-149599 with a flowrate of 1 CFS. The average monthly flow rate of both methods is shown in Table 1 below.

11. The Applicant also took streamflow measurements during the seven months of the year when the stream was not frozen. The Applicant requested and was granted a variance September 15, 2020 to the Administrative Rules of Montana 36.12.1702, due to the fact it is not feasible to take physical measurements during the month the winters months when the stream is frozen. The stream flow measurements were taken at the proposed point of diversion during the months of April, May, June, July, August, September, and October. The measurements represent a single point measurement taken on one day during a given month. A standard USGS methodology, the float area method, was used to measure the discharge of Verde Creek. The Department determined that the Applicant used an acceptable method to measure stream flow.

12. The Applicant’s seven flow measurements were compared to estimated flows calculated using USGS method cited above and Streamstats software. The measurements were found to be reasonable and within the range of expected values, validating the results obtained from the estimation techniques. The Applicant’s measurements and the Department’s streamflow estimations support physical water availability in the amounts requested, 10 GPM (0.02 CFS) up to 1.28 AF and are summarized in Table 1 below.

Table 1: Mean Monthly Flow and Volume Estimates for Verde Creek (CFS and AF)

	StreamStats Physical Availability (CFS)	Applicant-Supplied Measurements (CFS)	StreamStats Physical Availability (AF)
January	2.20	Ice	135.24
February	2.03	Ice	113.72
March	2.25	Ice	138.31
April	6.30	13.3	374.79
May	20.7	11.5	1272.49
June	27.3	7.22	1624.08
July	12.5	5.44	768.41
August	4.95	3.28	304.29
September	3.35	1.74	199.29
October	3.47	1.74	213.31
November	3.32	Ice	197.51
December	2.89	Ice	177.66

CONCLUSIONS OF LAW

13. Pursuant to § 85-2-311(1)(a)(i), MCA, an Applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate.”
14. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 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).
15. An Applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the Applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).
16. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF Nos. 10-12)

Legal Availability:

FINDINGS OF FACT

17. To determine legal availability 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.

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.

18. The Department considers this to be an appropriate reach for calculating legal availability due to the amount of water determined to be physically available at the point of diversion compared to the amount of water the Applicant is requesting. The source of appropriation and the reach of stream used for legal availability analysis are located in an area that is open to surface water appropriations and the Department is not aware of water shortages or disputes within the drainage.

19. Legal availability analysis data was determined by subtracting downstream water rights from the estimated mean monthly flows at the point of diversion, as all upstream uses were accounted for in the physical availability calculations.

20. The existing legal demands were then compared to the estimated mean monthly flow and volume to determine legal availability. The following table lists monthly legal and physical availability in flow rate and volume compared to monthly existing legal demands in flow rate and volume:

Table 3: A comparison of the physical and legal water supply (CFS) at the point of diversion to the existing water rights in the area of potential impact over the requested period of diversion

	StreamStats Physical Availability (CFS)	Existing Legal Demands Upstream (CFS)	Physically Available at POD (CFS)	Existing Legal Demands Below POD (CFS)	Legally Available (CFS)
January	2.20		2.20	0.02	2.18
February	2.03		2.03	0.02	2.01
March	2.25		2.25	0.02	2.23
April	6.30	1.00	5.30	0.47	4.83
May	20.7	1.00	19.70	0.47	19.23
June	27.3	1.00	26.30	0.47	25.83
July	12.5	1.00	11.50	0.47	11.03
August	4.95	1.00	3.95	0.47	3.48
September	3.35	1.00	2.35	0.47	1.88
October	3.47	1.00	2.47	0.47	2.00
November	3.32		3.32	0.02	3.30
December	2.89		2.89	0.02	2.87

Table 4: A comparison of the physical and legal water supply (AF) at the point of diversion to the existing water rights in the area of potential impact over the requested period of diversion.

	StreamStats Physical Availability at POD (AF)	Existing Legal Demands Below POD (AF)	Legally Available (AF)
January	135.24	1.07	134.17
February	112.71	1.07	111.64
March	138.31	1.07	137.24
April	315.30	13.57	301.73
May	1211.02	13.57	1197.45
June	1564.59	13.57	1551.02
July	706.94	13.57	693.37
August	242.82	13.57	229.25
September	139.80	13.57	126.23
October	151.84	13.57	138.27
November	197.51	1.07	196.44
December	177.66	1.07	176.59

21. The Department's calculation of the mean monthly flow and volume of water compared to existing legal demands on the source of supply demonstrates that the proposed appropriation of 10 GPM up to 1.28 AF is legally available in every month of the proposed period of diversion.

CONCLUSIONS OF LAW

22. 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).

23. 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.

24. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF Nos. 17-21)

Adverse Effect

FINDINGS OF FACT

25. 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. The Applicant's use of water can be controlled and a 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. Water for domestic use can be hauled in from another source if a call for water is made by a downstream senior water user on Verde Creek.

26. The Department finds 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.

27. Verde Creek is tributary to the Clark Fork River in subbasin 76M. The depletion to the Clark Fork River from the proposed appropriation is the amount of consumptive use associated with the proposed appropriation, which is calculated to be 0.10 AF for in-house domestic use and 0.20 AF for irrigation of 0.11 acres of lawn and garden. The rate of depletion is estimated to be the maximum flow rate diverted, 10 GPM. Per the May 1, 2009 DNRC Memorandum titled Permitting in the Open Clark Fork and Flathead Basins Follow-Up to June 9, 2008, Memorandum, the Department will not consider the Thompson River Lumber Decision when evaluating adverse effect issuance criteria when

the proposed appropriation is for surface water in amounts of 35 gpm or less and 10 acre-feet of consumption per year.

CONCLUSIONS OF LAW

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

29. 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(8).

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

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

32. It is the Applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

33. 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*, (2011) Pg. 8.

34. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF Nos. 25-27)

Adequate Diversion

FINDINGS OF FACT

35. The Applicant proposes to divert 10 GPM from Verde Creek by placing a 4-inch diameter by 8-foot long PVC pipe within the creek. A 1.25-inch diameter pipe will be connected to one end. Water will be gravity fed 2,640 feet to the place of use. At the place of use, water will be plumbed into the residential dwelling and can be used for irrigation of lawn and garden.

36. The flow rate diverted will be limited by the size of the pipe. The Department verified the estimated flow for 1.25-inch diameter pipe 2,640 feet in length by using the Manning Formula. The estimated flow rate calculated is approximately 9 GPM.

37. The Applicant proposes to use a garden soaker hose to manually spot irrigate portions of the lawn and garden area within the 0.11-acre domestic lawn and garden place of use.

CONCLUSIONS OF LAW

38. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.
39. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.
40. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF Nos. 35-37).

Beneficial Use

FINDINGS OF FACT

41. The proposed appropriation of 10 GPM up to 1.28 AF per year from Verde Creek is for the purposes of domestic and irrigation of 0.11 acres of lawn and garden. Water will be diverted from Verde Creek January 1st through December 31st annually for domestic use and April 15th through October 15th for irrigation of lawn and garden.
42. The consumptive use for irrigation of 0.11 acres 0.20 AF, using USDA's Irrigation Water Requirements (IWR) software for turf grass using the Superior weather station for sprinklers is 1.75 AF per acre. (0.11 x 1.75 = 0.20AF)
43. Applicant's requested volume of 1.28 AF per year for domestic use and lawn and garden irrigation is based on Administrative Rules of Montana (ARM) 36.12.115(2)(a), allocating 1.0 AF per household for year-round domestic use and 2.5 acre-feet per acre for lawn and garden irrigation (2.50 AF/ac x 0.11 acres). The consumptive use for domestic, 0.1 AF, was calculated using DNRC's standard of 10% of diverted volume consumed for

domestic use treated by on-site septic (1 AF x 10% = 0.10 AF). The total proposed consumptive use of **0.30 AF** (0.20 AF + 0.10 AF = 0.30 AF)

CONCLUSIONS OF LAW

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

45. 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).

46. 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).

47. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as 'lawn and garden irrigation') which is a recognized beneficial use. § 85-2-102(5), MCA. "Domestic use" by DNRC rule means those water uses common to a household including: ... (g) garden and landscaping

irrigation up to five acres.” ARM 36.12.101(22). Applicant has proven by a preponderance of the evidence domestic and lawn and garden irrigation is a beneficial use and that 1.28AF of diverted volume and 10 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF Nos. 41-43)

Possessory Interest

FINDINGS OF FACT

48. 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.

49. The proposed use has a point of diversion and means of conveyance on National Forest Service lands, and the Applicant has a written special use authorization from the United States Forest Service, as required by federal law. The special use authorization allows the Applicant 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. The Applicant submitted a copy of the special use authorization.

CONCLUSIONS OF LAW

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. § 85-2-311(1)(e), MCA. (FOF No. 48,49)

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. 76M-30149719 should be GRANTED.

The Department determines the Applicant may divert water from Verde Creek, by means of a PVC pipe 8-foot long 4-inch in diameter placed within the creek, from January 1st through December 31st annually at 10 GPM up to 1.28 AF, from a point in the SWSWSE of Section 36, T16N, R26W, Mineral County. The point of diversion is located on National Forest Service land, pursuant to § 85-2-311(1)(e), MCA, a 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 must be in an active status. The diverted water is for the purpose of domestic use from January 1st to December 31st and lawn and garden irrigation from April 15th to October 15th, annually. The Applicant may irrigate lawn and garden on 0.11 acres. The place of use is located SESE Section 36, T16N, R26W, Mineral County.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 7th day of July 2021.

/Original signed by Jim Nave/
Jim Nave, Regional Manager
Missoula Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 7th day of July 2021, by first class United States mail.

AUGUST KASSNER
1491 VERDE CREEK RD.
SUPERIOR, MT 59872

/ORIGINAL SIGNED BY KATHY SCHUBERT/

JULY 7, 2021

NAME

DATE