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

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 76LJ-30151442, 76LJ-30151446, AND 76LJ- 30151447 BY MADDY, MICHAEL R. AND MARLO GV	) ) ) ) )	<b>FINAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT</b>
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**INTRODUCTION**

Objectors Michael J. Meuli, Nancy J. Meuli, and Meuli Limited Partnership (“Objectors”) filed a Motion for Summary Judgment in the case of Application for Beneficial Water Use Permit Nos. 76LJ 30151442, 76LJ 30151446, and 76LJ 3015447. I now GRANT Objectors’ Motion for Summary Judgment.

**STANDARD OF REVIEW**

“Summary judgment is appropriate when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. After the moving party meets its initial burden, the burden shifts to the party opposing summary judgment to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to judgment as a matter of law.” *George v. Bowler*, 2015 MT 209, ¶ 9, 380 Mont. 155, 354 P.3d 585 (internal citation omitted). “In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences that might be drawn from the

offered evidence should be drawn in favor of the party opposing summary judgment.” *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 338 Mont. 214, 164 P.3d 913 (internal citations omitted). “Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists.” *Montana Metals Bldgs, Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 696, 696 (1997).

### **HISTORY**

Michael and Marlo Maddy (“Applicants”) applied for three permits to withdraw water from Lake Mary Ronan to serve a proposed residential and commercial development. Lake Mary Ronan is a natural lake that is impounded approximately four feet above its natural level by a man-made dam. Water that is not impounded by this dam flows out of Lake Mary Ronan and forms Ronan Creek. Ronan Creek is the only outlet of Lake Mary Ronan. The Department reviewed the Applicant’s evidence, assembled relevant data in a technical report (“Technical Report”), and drafted the Preliminary Determination to Grant Applicants’ water rights. The Kalispell Regional Office of the DNRC Water Resources Division issued a Preliminary Determination to Grant these three permits on September 13, 2021.

Objectors hold water rights diverted from Ronan Creek downstream of Lake Mary Ronan, as well as storage rights in Lake Mary Ronan itself. Objectors filed a valid objection to the Preliminary Determination to Grant on November 28, 2021, based on the grounds of physical availability, legal availability, and adverse effect. On January 3, 2022, the Department notified Objectors that their objections were valid.

### **CONTESTED CASE AND MOTION**

The Department initiated contested case proceedings based on Objectors’ valid objections. The contested case permits the Objector to produce evidence showing why the Department erred in issuing the Preliminary Determination to Grant in favor of Applicant. Applicant relies on the analysis and conclusions reached by the department. The department itself is not a party to this action. Objector asserts that department’s analysis was insufficient, and the department should have analyzed the Applicants’

applications more thoroughly and not issued the Preliminary Determination to Grant.

### **OBJECTORS' MOTION**

Objectors now move for Summary Judgment in this matter based on the assertion that there are no disputed issues of material fact and that the Department erred as a matter of law in its analysis. In the Preliminary Determination to Grant the Department confined its analysis to the legal demands and potential adverse affect to existing water rights with points of diversion in Lake Mary Ronan itself, and not downstream in Ronan Creek. Objectors allege that this is an impermissible limitation of the area of impact of the proposed appropriation. There is no factual dispute or disagreement regarding the nature or circumstances of the proposed appropriation or the Department's analysis.

### **LEGAL BASIS FOR ISSUING A PERMIT**

The Department issued a Preliminary Determination to Grant Applicants' permits on September 13, 2021. The Department relies on a combination of statute and rules as laid out in pertinent part below:

Section 85-2-311(1), MCA provides in relevant part:

... the Department shall issue a permit if the applicant proves by a preponderance of the evidence that 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 be 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 of water rights 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 of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.

(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.

Montana administrative rules clarify this analysis in reference to legal availability:

To determine if water is legally available, the department will compare the physical water supply at the proposed point of diversion and the legal demands within the area off potential impact. ARM 36.123.1705 (2021).

Likewise, adverse effect is specifically described in rule:

Adverse effect is based upon the applicant's plan showing the diversion and use of water and operation of the proposed project can be implemented and properly regulated during times of water shortage so that the rights of prior appropriators will be satisfied. ARM 36.12.1706 (2021).

The Department gathers evidence and information from the applicant and on its own. This information is assembled in the Technical Report which is a part of the record in this case.

### **APPLICANTS' BURDEN**

The applicant for a beneficial water use permit has the burden to establish all the statutory requirements § 85-2-311, MCA. *Matter of Beneficial Water Use Permits of Ciotti*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079-1080 (1996). Specific to this application, Applicants have the initial burden to show legal availability and lack of adverse effect on all water sources within the area of potential impact. Section 85-2-311(I)(a)(ii)(B), MCA; ARM 36.12.1705.

An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA by a preponderance of the evidence. Section 85-2-311(1), MCA.

Before issuing a permit, the Department must analyze the availability of water and the extent of adverse effect on prior appropriators. To complete this analysis,

the Department determines the area of potential impact, which dictates which other water sources and rights will be considered in this analysis. For legal availability this preliminary requirement is spelled out in ARM 36.12.1705, area of impact is a likewise logical corollary for an adverse effect analysis as enumerated in ARM 36.12.1704.

### **AREA OF POTENTIAL IMPACT STANDARD**

The term “area of potential impact” is not defined in law or rule. However, read together ARM 36.12.1704 and 1705 provide illumination. In pertinent part:

#### **36.12.1704 PERMIT APPLICATION - EXISTING LEGAL DEMANDS**

(1) Legal demands usually exist on the source of supply or its downstream tributaries and may be affected by a proposed water right application, including prior appropriations and water reservations. These existing legal demands will be senior to a new application and the senior water rights must not be affected.

a. [text omitted]

(2) The department will identify the existing legal demands on the source of supply and those waters to which it is tributary and which the department determines may be affected by the proposed appropriation

And

#### **36.12.1705 PERMIT APPLICATION CRITERIA – COMPARISON OF PHYSICAL WATER AVAILABILITY AND EXISTING LEGAL DEMANDS**

(1) To determine if water is legally available, the department will compare physical water supply at the proposed point of diversion and the legal demands within the area of potential impact.

These rules direct the Department to consider those water rights that could be affected from an appropriation. The presence of water rights which could be affected defines the bounds of the area of potential impact.

In considering adverse effect the Montana Supreme Court said that one need

look no farther than the plain language of § 85-2-311(1)(a)(ii), MCA and consider the “existing legal demands on the [subject] source of supply” throughout the potentially impacted area “based on the records of the department.” *Clark Fork Coalition v. DNRC*, 2021 MT 44, ¶ 40, 403 Mont. 225,481 P.3d 198. Thus, the area of potential impact is the entire area in which the water rights in DNRC’s records system could be impacted by the proposed appropriation. The area of potential impact includes the downstream sources to which the source of a proposed appropriation is tributary or hydrologically connected. ARM 36.12.1704(2). The area of potential impact includes all sources that receive water from the appropriated source through a surface or subsurface connection. See *Ryan v. Quinlan*, 45 MT 521, 124 P. 512 (1912). Ninety years ago, the Montana Supreme Court held that: “The burden was necessarily upon the plaintiff to establish his right to intercept and appropriate the natural overflow from the lake, for if this overflow, however small in volume, reaches the creek by reasonably ascertainable channels, it is one of its sources of supply.” *Ryan* at 531,515.

### **AREA OF POTENTIAL IMPACT ANALYSIS**

The Department determined that “the area of potential impact is Lake Mary Ronan” and proceeded with its analyses in this limited geographic area.

Objector’s Motion disputes the Department’s legal availability analysis asserting that the Department incorrectly interprets the statute and rule description of “area of impact” thus discounting impact to prior appropriators.

The Department *did not* determine the proposed appropriation would have no impact below the dam of Lake Mary Ronan. Rather, the Department determined that this impact is difficult or impossible to quantify. The Department limited its area of potential impact for legal availability analysis and adverse effect to water rights drawing directly from Lake Mary Ronan, with the unambiguous statement that “The area of potential impact is Lake Mary Ronan.”

The Preliminary Determination goes on to describe it this way:

The outlet of Lake Mary Ronan is controlled by a private individual and outlet structure. Existing water rights on Ronan Creek downstream of Lake Mary Ronan were not considered in the legal availability analysis because the flows in Ronan Creek (downstream from Lake Mary Ronan *sic.*) are a direct result of how the outlet structure is managed.

The Preliminary Determination explains that the dam on Lake Mary Ronan is a storage dam that is used to retain water for four downstream water rights Nos. 76LJ 45094, 76LJ 45093, 76LJ 39786, and 76LJ 45090, all with a 1922 priority date. The general abstracts for these rights describes it thus:

WATER RELEASED FROM MARY RONAN RESERVOIR USES  
RONAN CREEK AS A NATURAL CARRIER TO CONVEY WATER TO A  
SECONDARY POINT OF DIVERSION.

The owner of these rights is legally permitted to store water in Lake Mary Ronan and release it according to its needs downstream.

DNRC's impact analysis stops at the dam. There is no information in the record which shows that the Department attempted to investigate the operation of the dam, how senior water rights below the dam are filled, or the actual flows in Ronan Creek below the dam. The Preliminary Determination to Grant and the Technical Report contain no information about water rights or legal demands that may be affected below the dam.

Montana statutes, rules, and Court decisions interpret the relationship between surface water and groundwater and the connectivity and effect of interception or capture of surface and groundwater water before it enters into a surface water source. Presumably the connection between a lake and the creek flowing as its sole outlet is so obvious that it does not merit analogous discussion. The Applicant cites no legal theory or precedent which bolsters this conclusion that a dam severs the connection between an impoundment and its outlet. Moving beyond this issue of actual connectivity, I am left to consider existence of other water rights which may be affected by any appropriation.

The Department considered only water rights with a point of diversion within Lake Mary Ronan. The Department considered 23 water rights in its Technical Report, all of

which have a source in Lake Mary Ronan. Objectors claim as a matter of law that this analysis was inadequate and that the department's analysis failed to consider their own water right No. 76LJ 30151447, as well as the rights of other appropriators downstream on Ronan Creek. As the Department's analysis did not consider water rights downstream of the dam on Lake Mary Ronan, these downstream water rights were not considered in the Technical Report. A search of the publicly available DNRC Water Rights Query system for surface water rights with a source of Ronan Creek yields the results listed in the table below. I take judicial notice of the water rights in the following table in order to recognize their existence as water rights with a listed source of Ronan Creek, and not of their other elements including flow rate or priority date.

<b>Water Right Number</b>	<b>Priority Date</b>	<b>Flow Rate</b>	<b>Source</b>
76LJ 103298-00	September 12, 1901	2.5 CCFS	Ronan Creek, Lake Mary Ronan, Freeland Creek
76LJ 103299-00	June 28, 1922	2.5CFS	Ronan Creek
76LJ 128991-00	April 16, 1943	1.19 CFS	Ronan Creek
76LJ 34260 00	June 25, 1907	2.01 CFS	Ronan Creek
767LJ 45050-00	July 16, 1855	1.54 CFS	Ronan Creek
76LJ 45089-00	June 10, 1922	Livestock Direct from Source	Ronan Creek
76LJ 45092-00	January 18, 1936	4.5 CFS	Ronan Creek
76LJ 45095-00	September 12, 1901	1.63 CFS	Ronan Creek
76LJ 48108-00	February 2, 1901	Livestock Direct from Source	Ronan Creek
76 LJ 48113-00	February 4, 1901	1.47 CFS	Ronan Creek
76LJ 50493-00	July 30, 1982	448.8 GPM	Ronan Creek



The existence and details of these water rights is all publicly available in the online DNRC Water Right Query System, and none were considered in the Department's analysis, as enumerated in the department's Technical Report. The undisputed evidence in the record is that water flows out of Lake Mary Ronan and into Ronan Creek. Technical Report, p. 2. Based on the above table, I conclude that there exist numerous water rights which should have been included in a legal availability and adverse effect analysis.

The case law and rules specifically require the Department to draw the area of potential impact to include those water rights which "may be affected by the proposed appropriation." The Department is required to analyze whether downstream appropriators could be affected by an upstream permit. The Department did not perform this analysis.

### **APPLICANTS' RESPONSE TO THE MOTION**

Applicants assert that summary judgment is inappropriate for three reasons: 1) The agency's decision is entitled to deference; 2) The Objector did not prove a shortage of water in Dayton or Ronan Creeks; and alternatively, 3) The proper remedy is remand. I consider each of these arguments in turn.

#### **I. AGENCY DEFERENCE**

Applicant asserts that the DNRC's decision to grant the permit applications is entitled to deference as an agency decision. Here, I apply the Montana Supreme Court interpretation of agency deference:

This Court acknowledges that agencies have specific, technical, and scientific knowledge surpassing that of the Courts. We therefore defer to consistent, rational, and well-supported agency decision-making. However, this Court will not automatically defer to the agency without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision. An agency has an obligation to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made [Citations omitted].

*Mont. Env'tl. Info. Ctr. v. Mont. DEQ*, 2019 MT 213 ¶ 20, 397 Mont. 161, 451 P3d. 493.

The Department's Preliminary Determination to Grant is a 25-page document addressing the permit criteria listed in § 85-2-311, MCA. The Department explained its analysis and reasoning for its determination of area of impact for legal availability and adverse affect in the following statement:

The area of potential impact is Lake Mary Ronan. The outlet of Lake Mary Ronan is controlled by a private individual and outlet structure. Existing water rights on Ronan Creek downstream of Lake Mary Ronan were not considered in the legal availability analysis because the flows in Ronan Creek are a direct result of how the outlet structure is managed. For this reason, Department approved USGS regression equations that quantify mean monthly streamflow would not provide accurate estimates of streamflow in Ronan Creek.

Based on the lack of information and explanation of the area of impact analysis I conclude that the record does not demonstrate the Department examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made as required by law. The determination of area of impact is a legal determination which should have a hydrologic underpinning. The Department does not cite any statutory or rule authority for its limitation of the area of impact, nor any technical or special scientific expertise which supports its decision.

The Department did not make a record of a thoughtful and reasoned analysis of the area of impact of Applicants' proposed appropriation and did not rely on any specific scientific or technical expertise to reach its conclusion. Therefore, this conclusion is not entitled to agency deference.

## **II. SHORTAGE OF WATER IN RONAN AND DAYTON CREEKS**

Applicant states that "[Objector] has not proven that Ronan Creek and Dayton Creek lack sufficient water to satisfy [Objector's] existing water rights." Applicant must prove all the elements listed in § 85-2-311, MCA, including legal availability and lack of adverse effect, by a preponderance of evidence. Section 85-2-311(1), MCA. A discussion of whether Ronan Creek and Dayton Creek have sufficient water to satisfy Objectors' water rights is at the crux of the Department's legal availability and adverse affect

analysis. The focus of this opinion is to determine whether the Applicant successfully proved the elements of § 85-2-311, MCA, in light of the Objection. Applicant's argument impermissibly shifts the burden to the objector and has no merit.

### **III. REMAND AS A REMEDY**

Applicant asserts that as an alternative to denying the Motion for Summary Judgment, I should remand the application to the Department for further analysis. ARM 36.12.201 provides that the proceedings between Applicant and Objector are a "contested case" under the Montana Administrative Procedure Act (MAPA) of §§ 85-2-1 through 4, MCA. Under this provision a "contested case" is a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required to be made after an opportunity for hearing. Remand is not a determination of legal rights, duties, or privileges of a party. I decline to embrace an expansive reading of § 2-4-611, MCA and I decline to remand the case.

### **CONCLUSION**

Nothing will prevent Applicant from re-applying for the same water right to be subject to a more thorough analysis by the Department. The Department file in this case includes a cover letter from the Applicant's applications with the following statement:

"The applications have been signed by the applicants and there is no filing fee enclosed pursuant to our December meeting regarding the previously terminated applications."

There is no further evidence of the previous applications in the record, but apparently the first applications were terminated and the filing fee was waived upon re-submission. Nothing will prevent the Applicant from re-submitting the applications nor prevent the Department from again waiving the filing fee.

The Department limited its analysis to Lake Mary Ronan and did not consider the effect of the proposed appropriation on existing downstream water rights on Ronan Creek. The Department reached this conclusion by acknowledging the challenge of

measuring impacts on existing water rights below the dam, and arbitrarily concluded that the area of potential impact did not extend below the dam.

The Department did not perform any analysis of Ronan Creek downstream of Lake Mary Ronan and so it is impossible to know if the water applied for is legally available or whether withdrawing water from Lake Mary Ronan will adversely affect downstream appropriators. I find that the Department did not properly analyze the area of potential impact and so, as a matter of law, that Applicant has not satisfied all of the required elements of § 85-2-311, MCA.

I hereby GRANT Summary Judgment to Objectors Michael J. Meuli, Nancy J. Meuli, and Meuli Limited Partnership.

### **NOTICE**

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

IT IS SO ORDERED.

Dated this 3<sup>rd</sup> day of August 2022.

/Original signed by Martin Balukas/  
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**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT was served upon all parties listed below on this 3<sup>rd</sup> day of August 2022 by first class United States mail and/or by electronic mail (e-mail).

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