

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

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APPLICATION FOR BENEFICIAL WATER) USE PERMIT NO. 76M 30164389 BY) NORTHWEST DEVELOPMENT TRUST)	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On November 22, 2024, Northwest Development Trust (Applicant) submitted Application for Beneficial Water Use Permit No. 76M 30164389 to the Missoula Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 80 GPM and 61.04 AF for nonconsumptive power generation. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated December 3, 2024. The Applicant responded with information dated December 16, 2024. A preapplication meeting was held between the Department and the Applicant on September 4, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form on September 27, 2024. The Department delivered the department-completed technical analyses report on November 8, 2024. The application was determined to be correct and complete as of January 15, 2025. An Environmental Assessment for this application was completed on February 21, 2025.

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
- Attachments:
 - Water measurements from Sep. 2023 – Aug. 2024, submitted by Applicant.
 - Photographs of water measurement process, dated Sep. 2023 – Aug. 2024
- Maps:
 - Question 19 Water Right Map – 2021 NAIP Aerial Imagery
 - Question 38 Diversion Diagram – 2021 NAIP Aerial Imagery
- Department-completed technical analyses based on information provided in the Preapplication Meeting Form, dated November 7, 2024

Information within the Department's Possession/Knowledge

- USGS Water-Supply Paper 2365, (U.S. Geological Survey, 1990)
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Missoula Regional Office at (406) 721-4284 to request copies of the following documents.
 - Technical Memorandum: Physical Availability of Surface Water Without Gage Data, dated April 18, 2019

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 or 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; and AF/YR means acre-feet per year.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Madison Creek, a tributary of Petty Creek, by means of a pipeline from January 1 to December 31 at 80 GPM up to 61.04 AF, from a point in the NENESE Sec. 19, T14N, R22W, Missoula County, for nonconsumptive power generation use from January 1 to December 31. The Applicant proposes to run diverted water through a pipeline to a turbine to generate hydropower. The place of use (turbine house) is generally located in the NENWSE Sec. 19, T14N, R22W.
2. Provisional Permit 76M 103901-00 is owned by the Applicant and is used for domestic, lawn and garden, and power generation purposes. The proposed appropriation is to increase the volume that can legally be run through the existing hydropower generation system to ensure that power can be generated year-round. Thus, Provisional Permit 76M 103901-00 would be supplemental to this right by shared place of use (turbine house) and point of diversion.

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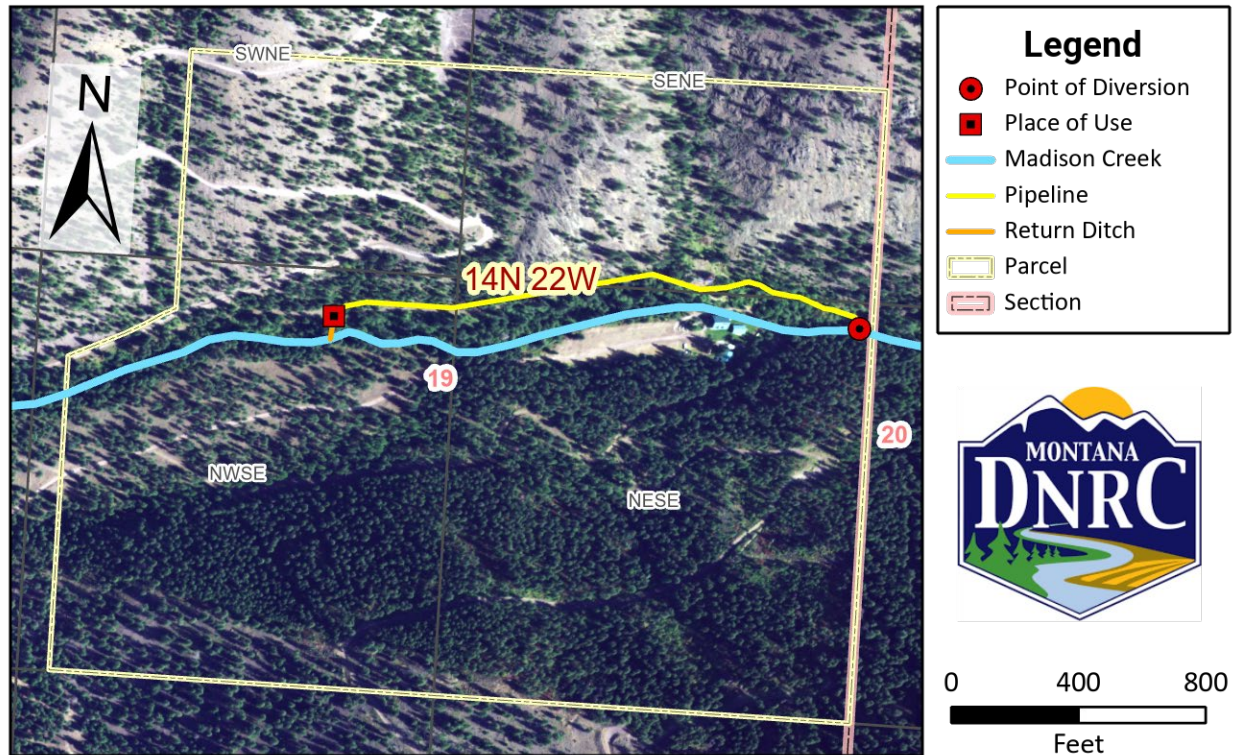


Figure 1. Map of Proposal.

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

GENERAL CONCLUSIONS OF LAW

3. 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 . . .

4. 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.

5. 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.

6. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier*, 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).

7. 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.

8. 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

9. The Applicant proposes to divert up to 61.04 AF at a flow rate of 80 GPM for nonconsumptive power generation. The Applicant provided bucket and stopwatch measurements of Madison Creek near the point of diversion to measure flow rates and demonstrate physical availability in the source. Streamflow was measured at a natural waterfall just upstream of the proposed point of diversion. Madison Creek is a small tributary of Petty Creek, and the configuration of the waterfall allowed for the use of this method. Measurements were taken once monthly for a year, from September 2023 to August 2024. Each month, between 4 and 7 buckets were used to access and measure different parts of the waterfall precisely. The Applicant used a stopwatch to record the amount of time taken to fill buckets of a known volume. The total flow rate of water in Madison Creek was calculated as the sum of all bucket and stopwatch measurements. The Department found the information submitted to be substantial and credible to prove physical availability. No State of Montana or USGS stream gages exist on or near Madison Creek. The Department attempted to estimate physical availability in Madison Creek using the USGS StreamStats program and again using the method described in USGS Water-Supply Paper (WSP) 2365. However, the drainage basin at the point of diversion is so small that the basin characteristics fell outside the acceptable parameters for both models, resulting in an unknown amount of error and an unreliable output.

10. The Department opted to quantify physical availability using the data provided by the Applicant's measurements. These measurements tend to show significantly lower physical availability than the numbers provided by the models, which may be due to 2024 being a particularly dry water year in Western Montana. Thus, the decision to use the Applicant's measurements will not decrease the chance that prior water rights will be adversely affected, as the Department is relying on more conservative estimates of physical availability. Table 1, below, describes the amount of water physically available at the proposed point of diversion. Flow rates were measured by the Applicant, and monthly volumes were calculated from the measured flow rates. A more comprehensive discussion of the models and measurements of physical availability can be found in the Department's technical analysis for this application.

Table 1: Physical Availability of Water in Madison Creek		
Month	Physically Available Flow Rate (GPM)	Physically Available Volume (AF)
January	140.79	19.29
February	152.59	19.05
March	158.46	21.71
April	137.70	18.26
May	142.14	19.47
June	162.72	21.57
July	210.63	28.86
August	222.04	30.42
September	184.08	24.40
October	164.95	22.60
November	111.96	14.84
December	98.26	13.46

11. The Department finds that surface water from Madison Creek is physically available during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

12. The Department determined legal availability by examining the legal demands of all existing surface water rights on Madison Creek. Although this is a relatively small area of analysis, the Department deemed that a review of lower Petty Creek water rights was unnecessary given the nonconsumptive nature of the proposal. Only one surface water right exists in Madison Creek: Provisional Permit 76M 103901-00, which is owned by the Applicant, and used for nonconsumptive hydropower, domestic, and lawn and garden irrigation purposes. The nonconsumptive hydropower use of Provisional Permit 76M 103901-00 would be supplemental to the proposed use.

13. The Department compared physical availability on Madison Creek with the existing demands of Provisional Permit 76M 103901-00. The monthly volume demands for this permit were determined by dividing the volume associated with each purpose evenly across its period of use for that purpose. Thus, hydropower and domestic volumes were distributed over the whole year, while lawn and garden irrigation was distributed over the months of May through October.

14. The comparison between physically available and legally available water in Madison Creek is shown in Table 2 below.

Table 2: Legal Availability of Water in Madison Creek						
Month	Physically Available Volume (AF)	Physically Available Flow (GPM)	Existing Legal Demands (AF)	Existing Legal Demands (GPM)	Legal Availability (AF)	Legal Availability (GPM)
January	19.29	140.79	5.95	80	13.34	60.79
February	19.05	152.59	5.37	80	13.68	72.59
March	21.71	158.46	5.95	80	15.76	78.46
April	18.26	137.70	5.75	80	12.51	57.70
May	19.47	142.14	6.79	80	12.68	62.14
June	21.57	162.72	6.57	80	15.00	82.72
July	28.86	210.63	6.79	80	22.07	130.63
August	30.42	222.04	6.79	80	23.63	142.04
September	24.40	184.08	6.57	80	17.83	104.08
October	22.60	164.95	6.79	80	15.81	84.95
November	14.84	111.96	5.75	80	9.09	31.96
December	13.46	98.26	5.95	80	7.51	18.26

15. The proposed appropriation is to supplement the volume of water permitted for power generation under Provisional Permit 76M 103901-00. The combined flow rate of the existing and proposed water rights is not to exceed 80 GPM, as the proposed use and Provisional Permit 76M 103901-00 are to be operated under the same system. Thus, the proposed appropriation will not increase the legal demands for flow rate on Madison Creek.

16. Upon issuance, the proposed permit will be subject to the following condition:

THE WATER RIGHT NUMBERS 76M 103901-00 AND 76M 30164389 SHARE A FLOW RATE OF 80 GPM. THE WATER RIGHT WILL BE OPERATED IN THE FOLLOWING MANNER: THE COMBINED FLOW RATE OF PROVISIONAL PERMITS 76M 103901-00 AND 76M 30164389 MAY NOT EXCEED 80 GPM.

17. The Department finds that the proposed appropriation of 80 GPM and up to 61.04 AF to be legally available during the proposed period of use of January 1 through December 31.

ADVERSE EFFECT

FINDINGS OF FACT

18. The proposed appropriation diverts water from Madison Creek and discharges the entire diverted volume back into the creek after its nonconsumptive use for power generation. Both the diversion and the discharge of water occur within the boundaries of the Applicant's property, and there are no downstream water users within the area of potential impact. Thus, there is no potential for any current or future water right either upstream or downstream of the Applicant's diversion and place of use to be affected by the proposed appropriation.

19. A valve in the turbine house controls the flow of water in the hydropower system. The valve can divert water either into or around the turbine. The Applicant will honor any legitimate call for water by setting the valve to bypass water around the turbine.

20. Upon issuance, the proposed permit will be subject to the following condition:

THE APPROPRIATOR SHALL USE A DEPARTMENT APPROVED WATER USE ESTIMATION TECHNIQUE TO DETERMINE THE FLOW RATE OR VOLUME OR BOTH OF ALL WATER DIVERTED. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF ALL WATER USED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

21. The Applicant has proven that enough water remains in Madison Creek to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 61.04 AF and 80 GPM. The Department finds that the proposed nonconsumptive use of 61.04 AF and 80 GPM will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

22. A weir with a 3-inch plastic intake pipe capable of carrying 112 GPM is located at the point of diversion. Water entering the intake is carried by gravity through a pipeline which drops 50 feet over a distance of 1775 feet. The pipeline enters a turbine house, where it becomes a 1.5" pipe capable of delivering 80 GPM to the power generating turbine. Once the pipeline is full, the maximum flow rate of water being diverted from Madison Creek is equal to the capacity of the turbine, which is 80 GPM. After water is routed through a turbine to generate hydropower it is then

discharged from a pipe into a ditch that flows back into Madison Creek. A valve in the turbine house allows water to bypass the turbine and return directly to the ditch, effectively ceasing diversion of water from the source. An overview of the diversion means can be found in Figure 1.

23. 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

24. The Applicant proposes to appropriate 80 GPM of water up to 61.04 AF annually for nonconsumptive hydropower generation by diverting water through a turbine. This application is proposed to supplement Provisional Permit 76M 103901-00, which is permitted for 80 GPM up to 68 AF for nonconsumptive hydropower. The hydropower system is designed for a flow rate of 80 GPM, and this water right would allow a total of 129.04 AF to be used annually, which is equivalent to a continuous diversion of 80 GPM throughout the year.

25. The Department finds that the proposed water use is beneficial, and that the requested flow rate of 80 GPM and annual volume of 61.04 AF are reasonable amounts to achieve this purpose.

POSSESSORY INTEREST

FINDINGS OF FACT

26. 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

27. 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.”

28. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

29. 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).

30. 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 9-12)

LEGAL AVAILABILITY

31. 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).

32. 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.

33. 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 [13-19].)

ADVERSE EFFECT

34. 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.

35. 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).

36. 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).

37. 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).

38. 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.

39. 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).

40. 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 20-22)

ADEQUATE DIVERSION

41. 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.

42. 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.

43. 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 23-24).

BENEFICIAL USE

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; 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).

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*, 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).

47. 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*.

48. Applicant proposes to use water for nonconsumptive power generation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that nonconsumptive power generation is a beneficial use and that 61.04 AF of diverted volume and 80 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 25-26)

POSSESSORY INTEREST

49. 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.

50. 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.

51. 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 27)

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 30164389 should be GRANTED.

The Department determines the Applicant may divert water from Madison Creek, by means of a pipeline, from January 1 to December 31 at 80 GPM up to 61.04 AF, from a point in the NENESE Sec. 19, T14N, R22W, for nonconsumptive power generation use from January 1 to December 31. The place of use is located in the NENWSE Sec. 19, T14N, R22W.

The application will be subject to the following conditions, limitations, or restrictions:

THE WATER RIGHT NUMBERS 76M 103901-00 AND 76M 30164389 SHARE A FLOW RATE OF 80 GPM. THE WATER RIGHT WILL BE OPERATED IN THE FOLLOWING MANNER: THE COMBINED FLOW RATE OF PROVISIONAL PERMITS 76M 103901-00 AND 76M 30164389 MAY NOT EXCEED 80 GPM.

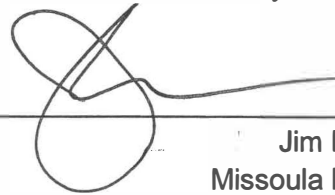
THE APPROPRIATOR SHALL USE A DEPARTMENT APPROVED WATER USE ESTIMATION TECHNIQUE TO DETERMINE THE FLOW RATE OR VOLUME OR BOTH OF ALL WATER DIVERTED. THE APPROPRIATOR SHALL KEEP WRITTEN RECORDS OF ALL WATER USED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT

OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 21st day of February, 2025.

A handwritten signature in black ink, consisting of a large loop followed by a horizontal stroke and a small upward flick.

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 DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 21st day of February, 2025, by first class United States mail.

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