

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

**IN THE MATTER OF CHANGE APPLICATION)
NO. 40S-30065911 BY JOHN M. AMES AND)
MILES G. PANASUK)**

FINAL ORDER

Pursuant to its authority under §§ 2-4-601 et seq., 85-2-310, 85-2-402, MCA and Mont. Admin. R. 36.12.201 et. seq., the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on March 4, 2015, to allow John M. Ames and Miles G. Panasuk (Applicants) to show cause why the Application to Change Water Right No. 40S-30065911 should not be denied under the terms of the “Final Determination to Deny Change” issued by the Glasgow Water Resources Regional Office, dated August 18, 2014. (PD to Deny or (PDD))

APPEARANCES

John (Mike) Ames and Miles G. Panasuk appeared at the hearing through counsel John Bloomquist. Mike Ames, Ames Water Depot, and Lee Yelin, Water Rights Inc. testified on behalf of the Applicants. Denise Biggar, Glasgow Regional Office Regional Manager, was called and answered questions presented by Mr. Bloomquist.

EXHIBITS

Department File 40S 30065911 by Ames, John M. & Panasuk, Miles G. is included as part of the record in this proceeding. Information in this file was available to the Regional Office in making the “Final Determination to Deny Change.”

Applicants offered one notebook titled “Applicant’s Show Cause Hearing Exhibits, March 4, 2015: 9:00 AM” which was admitted in its entirety. The notebook includes 18 tabbed items described as follows:

Preliminary Determination: A copy of the Department’s “Preliminary Determination to Grant Change, Application to Change Water Right No. 40S 30063269.” This is an initial

application to change the underlying Beneficial Water Use Permit No. 40S 30048277. This change, which was granted on July 13, 2012, allowed the Applicants to add a place of use (point of sale) to the underlying Beneficial Water Use Permit. Upon granting this change the Applicants were permitted to have a second water depot located approximately 5 miles north of the originally permitted water depot. This change did not expand the service area under the existing permit but only provided for a second point of sale. This document is an existing part of Department File 40S 30065911 as of the date of the instant hearing.

Final Determination: A copy of the Department's "Final Determination to Deny Change, Application to Change Water Right No. 40S 30065911 by John M Ames & Miles G Panasuk." This is a copy of the Department's determination that is the subject of this show cause hearing and is already contained in Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-1: "Response to Final Determination to Deny Change 40S 30065911" consisting of 14 pages, dated March 2, 2015. This document was not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-2: A copy of a two page memorandum and one page map entitled "OFFICE OF THE NORTH DAKOTA STATE ENGINEER INTRA-OFFICE MEMORANDUM, MEMO TO: Robert B. Shaver, Director, Water Appropriations Division" dated March 22, 2013. This document is an existing part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-3: A one page copy of a letter dated March 8, 2013 entitled "Re: Basic Energy Letter of Intent to Purchase Water Supply" between Basic Energy and Ames Water Depot. This document is an existing part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-4: A five page copy of a form document entitled "Water Purchase Agreement." This document is simply an unsigned form and is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-5: A 14 page copy, undated, described as "Daily Transaction Reports" apparently from the Bainville 2 water depot to various water purchasers. This document contains no dates, volumes or other information besides the depot name and very limited

information on the purchasers. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-6: A copy of a six page document entitled “Facts About North Dakota Fracking and Water Use” dated February 2014 by the North Dakota State Water Commission. This document is part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-7: A copy of a Biennial Report for the period July 1, 2011 to June 30, 2013 produced by the North Dakota State Water Commission and Office of the State Engineer dated January 1, 2014 containing approximately 57 pages. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-8: A copy of approximately 178 pages of a report entitled “Water Appropriation Requirements, Current Water Use, & Water Availability for Energy Industries in North Dakota: A 2010 Summary” dated August 2010 and issued as Water Resources Investigation No. 49 by the North Dakota State Water Commission. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-9: A copy of a six page report entitled “Bakken Water Opportunities Assessment – Phase 2 Evaluation of Brackish Groundwater Treatment for use in Hydraulic Fracturing of the Bakken Play, North Dakota” issued by the Energy & Environmental Research Center, University of North Dakota, dated December 2011. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-10: A copy of a one page article appearing in “Fedgazette” on April 9, 2013 entitled “The other Bakken pipelines: Water for fracking.” This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-11: A copy of seven pages from “Final Engineering Report – Fort Peck Assiniboine and Sioux Water Supply System Dry Prairie Rural Water System” dated January 2002. These pages address pipeline costs and are not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-12: is described as “Map of Strip Service Area in North Dakota” similar to maps that are part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-13: one page entitled “North Dakota Industrial Permit Index Within Strip Service Area (SSA).” This document is a subset of Industrial Permits which are part of

Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-14: a three page copy of an article entitled “The Slickwater Story” dated July 14, 2014, by the editor of *The Bakken* magazine. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-15: a two page copy of a document entitled “Flowing Well Pressure Changes in McKenzie County” dated 2007, by the North Dakota State Water Commission. This document is not part of Department File 40S 30065911 as of the date of the instant hearing.

Exhibit A-16: a one page map entitled “Basin Closure Map” created by Montana DNRC WRD on September 13, 2010. This document is part of Department File 40S 30065911 as of the date of the instant hearing.

The Hearing Examiner has taken notice of the entire application file in this matter and all evidence and exhibits received at the show cause hearing. The Hearing Examiner notes that the entire Department File 40S 30065911 in which Applicants’ show cause Exhibits “Preliminary Determination,” “Final Determination,” and A-2, A-3, A-6, A-12, and A-16 were previously presented to the Department and were considered in the August 18, 2014 PD to Deny. In addition, upon review, the Hearing Examiner finds that show cause Exhibits A-4 and A-5 contain little probative value for purposes of the instant matter.

Being fully informed in the premises, the Hearing Examiner makes the following Findings of Fact, Conclusions of Law, and Order:

PRELIMINARY MATTERS

On April 8, 2013, John M Ames and Miles G Panasuk (Applicants) submitted Application to Change Water Right No. 40S 30065911 to change Beneficial Water Use Permit No. 40S 30048277 (“Permit No. 40S 30048277”) to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated August 14, 2013. The Applicants responded with information dated October 28, 2013. The Application was determined to be correct and complete as of November 26, 2013. A Draft Preliminary Determination to Deny was sent to the Applicants on March 24, 2014. The Applicants requested a meeting with the

Department and submitted a waiver of timelines on March 31, 2014. The meeting between the Applicants and the Department occurred on May 15, 2014. On the day of the meeting the Applicants requested 60 days to provide additional information. Additional information was received on July 14, 2014. (PD to Deny)

Upon review of Department File 40S 30065911, a “Final Determination to Deny Change” was issued by the Glasgow Water Resources Regional Office on August 18, 2014. That “Final Determination to Deny Change” was based upon the Department’s determination that the Applicants had failed to prove by clear and convincing evidence that:

1. “100 AF is the amount of water needed to sustain the proposed beneficial use.” (PDD p. 20)
2. “[t]he 100 AF [of] water proposed for transport to North Dakota . . . cannot feasibly be transported to alleviate water shortages within the state of Montana.” (PDD p. 28)
3. “water supplies in North Dakota are not available to the Applicants for industrial use by the oil industry in North Dakota.” (PDD p. 29)
4. “that [the Applicants] plan to transport 100 AF to North Dakota to market for industrial use for oil production is not contrary to water conservation in Montana; and is not otherwise detrimental to the public welfare of the citizens of Montana.” (PDD p. 30)

“If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307 . . . the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause . . . as to why the permit or change in appropriation right should not be denied.” § 85-2-310, MCA.

The Applicants were given the opportunity to show cause why “Final Determination to Deny Change” No. 40S 30065911 should not be denied. A show cause hearing was scheduled and held on March 4, 2015 before this Hearing Examiner. At the show cause hearing, the Applicants, in addition to addressing the above four reasons for denial, argued that the burden of proof applied by the Department was beyond that required by ‘clear and convincing’ evidence.

The Department has followed the proper procedure as provided in §§ 85-2-307, 85-2-310 and 2-4-604, MCA in this matter.

This Order is structured the same as the PD to Deny. This Hearing Examiner adopts and includes in this order those Findings of Fact and Conclusions of Law from the PD to Deny with which he agrees. Those Findings of Fact and Conclusions of Law are identified in this order by the parenthetical (PDD).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Permit No. 40S 30048277 is an unperfected permit that authorizes the Applicants to divert water from the Missouri River year round at a flow rate of 4.5 CFS up to 1000 AF per year for marketing and use in Montana. The priority date for Permit No. 40S 30048277 is June 19, 2010, and the Applicants are required to “complete” or “perfect” the authorized use by December 31, 2014 (subsequently extended to December 31, 2015). The service area is generally located in all of Roosevelt and Richland counties, the east half of McCone county and the north half of Dawson county. The place of use authorized in the original grant of this permit is located in the NESWNW, Section 30, T27N, R59E, Roosevelt County. Although water can be marketed for any beneficial use, the primary use associated with this permit is for industrial use related to oil and gas development in northeastern Montana. (PDD)

2. As granted, Permit No. 40S 30048277 is subject to the following conditions: a measurement condition, controlled access condition, and a condition that water shall not be transported outside the state. These conditions were added to ensure the permitted flow rate and volume is not exceeded, that only contract holders have access to obtain water, and that the water cannot be transported out of state. (PDD)

Table 1: WATER RIGHTS PROPOSED FOR CHANGE

| Water Right # | Completion Date | Flow Rate (CFS) | Volume (AF) | Consumptive Volume (AF) | Priority Date |
|---------------|-----------------|-----------------|-------------|-------------------------|---------------|
| 40S 30048277 | 12/31/2014 | 4.5 | 1000 | NA-unperfected | 6/29/2010 |

3. The Applicants share an undivided interest in the water right. (PDD)

4. The place of use does not include any other water rights. (PDD)

5. A previous change authorization, Change Authorization No. 40S 30063269 was granted on August 17, 2012 to add a place of use (Bainville #2 - Hwy 2 depot location). (PDD)

6. The water right to be changed is the same as the water right considered in the PDD. Applicants made no argument regarding the water right to be changed during the show cause hearing.

CONCLUSIONS OF LAW

7. Upon review of the entire record in this proceeding the Hearing Examiner concludes that the Applicants have an unperfected permit that authorizes the Applicants to divert water from the Missouri River year round at a flow rate of 4.5 CFS up to 1000 AF per year for marketing and use in Montana which is capable of being changed in the present matter. (FOF 1 – 6)

CHANGE PROPOSAL

FINDINGS OF FACT

8. The Applicants are requesting a change in purpose to water marketing/out-of-state for a portion (100 AF) of unperfected Permit No. 40S 30048277 to market water that will be transported to North Dakota. The remaining 900 AF would be used within the state of Montana. The point of diversion and places of use (depot locations) will not change. Water will be trucked from the water depots located in the NESWNW, Section 30, T27N, R59E and NENENE, Section 31, T28N, R59E to the proposed additional service area that is generally located within portions of western Williams and McKenzie Counties, and the southwestern portion of Divide County, North Dakota for industrial use (oil field development). The Applicants provided a letter of intent to contract 100 AF from Basic Energy Services. A computer system has been installed to monitor sales. Each contracted customer has a unique identification number to access water at the sites. The computers will be programmed to monitor the North Dakota and Montana sales at each fill location, including the final usage site, to ensure only 100 AF is sold and transported to North Dakota each year. There will be no increase in the diverted flow rate or volume. (PDD)

9. North Dakota requires a temporary water use permit for the amount of water transported from Montana to North Dakota. Per letter dated March 26, 2013 to Agri-Industries Inc. (John M

Ames-owner), from Robert B Shaver, Director, Water Appropriations Division, North Dakota Office of the State Engineer, the Applicants would be required to apply for a Temporary Water Permit (less than 12 months) for the water transported into North Dakota from the Bainville depots. The North Dakota State Engineer's Office would allow the Applicants to apply for additional temporary water permits until the North Dakota review process is completed for the pending conditional water permit applications. Additionally, the letter states when the North Dakota Conditional Water Permits are issued for the depots already under the permitting process, the need for a temporary water permit for the Bainville depots will be reviewed. Attached to the letter is a North Dakota Application for a Temporary Water Permit. (PDD)

10. Permit No. 40S 30048277 and Change Authorization No. 40S 30063269 were granted with conditions that would apply to the Applicants' proposed change if approved. These include a measurement condition, controlled access condition, a progress report condition, and a condition states that water shall not be transported outside the state. Measurement and reporting of flow rate and volume is necessary in order to substantiate the beneficial use criteria for water marketing and to ensure the requested flow rate and volume is not exceeded during years of high oil field activity. A progress report condition and controlled access condition was required to establish ongoing development of the water via contracts and to ensure that only contract holders have access to obtain water. (PDD)

11. Permit No. 40S 30048277 and Change Authorization No. 40S 30063269 were conditioned for in-state use only, including requirements for notifying contract holders that the water cannot be transported out of state. If granted, the out-of-state condition would need to be revised to allow 100 AF to be transported outside the state and a requirement for measurement differentiating between in-state and out-of-state use would need to be added. (PDD)

12. Applicants argue at hearing that the Department has misapplied the burden of proof in this matter. In a permit or change authorization for use of water out of state, an applicant must prove the applicable criteria by 'clear and convincing evidence' as opposed to 'a preponderance of the evidence', see ¶ 13, 14, *infra*. Applicant directs the Hearing Examiner to a line of prescriptive easement cases decided by the Montana Supreme Court for a definition of 'clear and convincing evidence.' In *Wareing v. Schreckendgust*, 280 Mont. 196; 930 P.2d 37 (1996), the Court held that for prescriptive easement cases

[c]lear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

quoting *Matter of J.L. (Mont. 1996)*, 277 Mont. 284, 922 P.2d 459, 462, 53 Mont. St. Rep. 649, 651. Applicants contend that the burden applied by the PD to Deny is higher than required by the Court's definition of 'clear and convincing.'

CONCLUSIONS OF LAW

13. A water user may not make a change in appropriation without the prior approval of the Department. § 85-2-402(1), MCA. An applicant in a change proceeding must affirmatively prove the applicable criteria set forth in § 85-2-402, MCA. This change application is unique in that it seeks to change an unperfected provisional permit and seeks authorization for out-of-state transport and use of Montana's publically owned water. Therefore, the Applicants' proposed change is subject to the change criteria found at §§ 85-2-402(2), -402(6), and -402(12), MCA. These sections provide in relevant part:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, 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 change involves 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

....

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

....

(12) A person holding an issued permit or change in appropriation right approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change in appropriation right pursuant to this section.

(PDD)

14. An applicant has the burden of proof with regard to the applicable change criteria in a change application. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75, 357 Mont. 438, 240 P.3d. 628; 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); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 8(2011)(*aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81, 364 Mont. 450, 276 P.3d 920). Where an applicant seeks authorization for the withdrawal and transportation of appropriated water for use outside of Montana in a change application, the criteria under §§ 85-2-402(2) and (6), MCA, must be proven by clear and convincing evidence. The PD to Deny concluded that "clear and convincing evidence" means evidence in which "there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt." Czajkowski v. Meyers, 2007 MT 292, ¶43, 339 Mont. 503, ¶43, 172 P.3d 94, ¶43; Seltzer v. Morton, 2007 MT 62, ¶159, 336 Mont. 225, ¶159, 154 P.3d 561, ¶159.

15. Montana water law provides that a change applicant may only change that to which it has the right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Town of Manhattan v. DNRC, Cause No. DV-09-872C, *Order Re Petition for Judicial Review*, at Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); Featherman v. Hennessy, 43 Mont. 310 (1911); Quigley v. McIntosh, 110 Mont. 495(1940); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002)(while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible "change" of an existing right); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water

right to cover the extra water; it cannot be appropriated under the guise of a change in the old right). (PDD)

16. Along these same lines, consumptive use of water may not increase when an existing water right is changed. An increase in consumptive use constitutes a new appropriation for which a permit is required. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, at Pg. 9; Featherman, 43 Mont. at 316-17; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision adopted by Final Order (2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003). (PDD)

17. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, *Order Re Petition for Judicial Review*, at Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). (PDD)

18. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. Admin. R. Mont. (ARM) 36.12.221(4) (PDD)

19. Upon review of the entire record in this matter and the argument presented at the show cause hearing, this Hearing Examiner concludes that the authority cited by both the Department and the Applicants regarding the 'clear and convincing evidence' standard provides a decision maker with broad discretion to ascertain when that standard has been met. In the instant matter this Hearing Examiner concludes that the Department's application of 'clear and convincing evidence' did not constitute error. (FOF 8- 12, COL 14)

HISTORIC USE

FINDINGS OF FACT

20. The underlying right for this application is the unperfected permit 40S 30048277 with a completion date of 12/31/2014 (currently extended to 12/21/2015). The water will continue to be marketed for industrial purposes. There will not be an increase in the permitted amount of 4.5 CFS up to 1000 AF. The consumptive use is 100% of the diverted volume. The Department determined the Applicants may divert water from the Missouri River, by means of a pump, from January 1 through December 31 at 4.5 CFS up to 1000 AF, from a point in the NWSENE Section 31, T27N, R59E, Roosevelt County for water marketing use from January 1 through December 31. The places of use (water depots) are located in the NESWNW Section 30, T27N, R59E and NENENE Section 31, T28N, R59E, Roosevelt County. The service area is generally located in all of Roosevelt and Richland counties, the east half of McCone county and the north half of Dawson county. The Applicants provided a list of all water sales by month from August, 2010 through March, 2012. Measurement records reported to the Department by the Applicants show 288 AF diverted in 2012 and 443 AF in 2013. (PDD, audio transcript #04 @ 8:30)

CONCLUSIONS OF LAW

21. Typically, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 BY MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)). In this case, however, proof of historic use is not critical because this is an unperfected permit. (PDD)

22. The water right proposed for change is Beneficial Water Use Permit Number 40S 30048277 (issued on December 20, 2010 with a priority date of March 17, 2010). The use has not been perfected on the permitted place of use. The Notice of Completion deadline is

December 31, 2014 (currently extended to December 31, 2015). “A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change.” § 85-2-402(12), MCA. See also In the Matter of the Applications for Change of Appropriation Water Rights 40G(P) 066271-00 by Smith Farms, Inc. (U.S.A. v. DNRC and Smith Farms, Inc.), Cause No. CDV 99 – 28 (First Judicial District - decided Nov. 9, 1999) (where a water use permit has been granted, but not yet fully perfected, the Department has allowed, and the First Judicial District has upheld, a change of the permit up to the full amount granted by the permit). (PDD, FOF 18)

23. Upon review of the entire record in this matter, the Hearing Examiner concludes that the Applicants have proven by clear and convincing evidence that the Applicants have an unperfected permit that can be changed and that the change in service area, to include out of state use, will not increase the consumptive use granted for Beneficial Water Use Permit Number 40S 30048277. (PDD, FOF 1 – 6, 8 – 11, 20)

ADVERSE EFFECT

FINDINGS OF FACT

24. The underlying right for this application is the unperfected Permit No. 40S 30048277 with a completion date of December 31, 2014. (PDD)

25. Prior to granting Permit No. 40S 30048277, the Department analyzed the proposed new use to ensure that the amount of water was physically available, legally available, and the plan for operation of the permit would ensure that other water users would not be adversely affected. In doing so, it determined that 100% of the diverted volume under Permit No. 40S 30048277 would be consumed by the Applicants’ use. Therefore, there would be no return flows from the 1000 AF diverted under the permit. (PDD)

26. On September 8, 2010, the Department issued its Preliminary Determination to Grant Permit No. 40S 30048277 which provided a detailed analysis of the § 85-2-311, MCA, criteria and the conditions discussed above. (PDD)

27. This application requests that 100 AF of the permitted volume be authorized for transport out of state. The point of diversion and places of use (depot sites) will not change. (PDD)

28. The Applicants installed a flow meter between the river pump and the depot #1, prior to any withdrawal, to measure all water diverted. Additionally, each of the loadouts has a flow meter that measure individual sales. A computer system has been installed to monitor sales. Each contracted customer has a unique identification number to access water at the sites. The computers will be programmed to monitor the North Dakota and Montana sales at each fill location, including the final usage site, to ensure only 100 AF is sold and transported to North Dakota each year. The Applicants also stated they would continue to monitor the stream flows at the USGS gaging station near Culbertson (06185500) during lower flow periods and stop appropriating water during times of water shortage. (PDD)

29. The Permit authorized 100 percent consumption of the 1000 acre-feet permitted. The 100 AF proposed for change would continue to be 100 percent consumed. There is no return flow to be analyzed for the purposes of this change authorization. (PDD)

30. The pattern of pumping from the source would remain the same. The only change in operation would be the destination of the marketed water. (PDD)

31. Applicants presented no new evidence or testimony at the show cause hearing related to the criteria of adverse effect.

CONCLUSIONS OF LAW

32. The Applicants bear the affirmative burden of proving that a proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation. § 85-2-402(2)(a), MCA. Royston, 249 Mont. at 428, 816 P.2d at 1057; Hohenlohe, at ¶¶33-35. (PDD)

33. When a proposed change involves an unperfected provisional permit, historic use information is typically not available. While the failure to provide historic use information would ordinarily require denial of a change application, an unperfected provisional permit issued pursuant to the MWUA provides a unique circumstance in which historic use information is not required because the parameters and extent of the use authorized in the provisional permit were established based upon proof of the exacting requirements of the § 85-2-311, MCA, criteria. Hohenlohe, at ¶ 61 (the Department has the authority and discretion as both the agency charged with administration of the change provisions of the MWUA and as fact finder in a

change proceeding to determine the type evidence required to evaluate whether a proposed change will result in expansion of the original right, or adversely affect water users); United States v. Smith Farms, Montana First Judicial District Court, CDV 99-28, *Memorandum and Order* (1999)(confirming that a water user may change the unperfected portion of its water rights within flow rate, volume, and period of use set forth in the permit). For example, a provisional permit sets forth a volume and flow rate based upon the permittee's proof regarding the flow rate, diverted volume, consumed volume, and amount of water needed for the permitted use. § 85-2-311(1)(d), MCA; §§ 36.12.115, -1701, and – 1801, ARM. A permittee must also prove that water is physically available, legally available, and that the water use under the provisional permit will not adversely affect other water users prior to issuance of the permit. § 85-2-311(1)(a-b), MCA; §§ 36.12.1702 through -1707, ARM. Therefore, when an applicant seeks to change an unperfected provisional permit, rather than evaluating actual historic use for adverse effect, the Department conducts a comparative analysis of the purpose of use, place of use, period of diversion, diverted flow rate and volume, and consumed volume *authorized* in the provisional permit to the proposed change for purposes of determining whether the proposed change will cause adverse effect. United States v. Smith Farms, Montana First Judicial District Court, CDV 99-28, *Memorandum and Order* at Pgs. 4-7. (PDD)

34. It is well settled under Montana law that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Hohenlohe ¶ 43. Accordingly, a change applicant must prove that other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change in order for the change to be approved by the Department. The right to protect stream conditions substantially as they existed at the time of appropriations, and an applicant's burden to prove lack of adverse effect is reflected in §§ 85-2-401, and -402(2), MCA. Hohenlohe, at ¶¶ 43, 45, 51, 68-69 ; Town of Manhattan v. DNRC, Cause No. DV-09-872C, *Order Re Petition for Judicial Review*, at Pg. 9; See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185 Mont. 409, 605 P.2d 1060(1979), *following* Lokowich v. Helena, 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963(1913); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972; Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896). (PDD)

35. Once water leaves the control of the original appropriator and reaches a water course, it is subject to appropriation as return flow. E.g., Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077(1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401(1929); Head v. Hale, 38 Mont. 302, 100 P. 222(1909); Alder Gulch Con. Min. Co. v. King, 6 Mont. 31, 9 P. 581(1886); Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; §36.12.101(56), ARM. Analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator as a change in the amount, timing, or location of return flows may alter the amount of water available for other water users who rely upon maintaining conditions on the source for their use. E.g., Hohenlohe, supra; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe, ¶¶ 45-46, 55-56. Because the proposed new use will continue to 100 percent consumptive, the Department finds that there will be no change in return flows from the proposed new use out-of-state. (PDD)

36. In the present case, clear and convincing evidence establishes that the proposed change in use will not change the point of diversion, place of use, diverted flow rate, or diverted or consumed volume authorized under Permit No. 40S 30048277. Because the Permit No. 40S 30048277 was granted based upon a determination that there would be no adverse effect based upon 100% consumption of the diverted volume, there are no return flows to analyze for adverse effect. While the purpose of use for 100 AF is being changed from in-state marketing to out-of-state marketing, this change in purpose does not change the consumed volume authorized by Permit No. 40S 30048277. Likewise, there will be no change in the stream conditions as a result of this proposed change. (PDD)

37. Upon review of the entire record in this proceeding, the Hearing Examiner concludes that Applicants have proven by clear and convincing evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been

issued or for which a state water reservation has been issued. § 85-2-402(2)(a), MCA. (PDD, FOF Nos. 24-31)

ADEQUATE DIVERSION

FINDINGS OF FACT

38. The proposed means of diversion were previously found to be reasonable in the proceeding for Permit No. 40S 30048277 and Change Authorization No. 40S 30063269. The proposed means of diversion is a Cornell 5HH pump with a 200 hp motor for the summer intake and will utilize a variable frequency drive. Similarly a Goulds 9THC (two stage) pump with a 125 hp motor will be used for the winter intake system. Both intakes cannot and will not be operated simultaneously due to permitted appropriation restrictions and system design constraints. The variable frequency drive will vary the speed of the pump motor to meet the required demand. Water will be pumped through a 10" buried pipeline approximately 1 mile to a "tee" that directs to the two water depot outlets at Depot #1, or to the booster pump (Cornell 5HH with 200 hp motor) station that sends water through a 12" buried pipeline approximately 7 miles north to Depot #2 sited on US Highway 2 at the NENENE ¼ of Section 31 T28N R59E. Depot #2 has two buildings with two outlets each. Inside each building the water will split via two 6" pipes and run through sand filters (Fresno model 248). Once filtered, the water will discharge through 4" outlets. The system is designed to deliver water by way of a 4" side load hookup. The Applicant provided design drawings and specification for the piping and buildings, pump curve, and sand filter specifications that were included in the previous permit and change applications. Each of the six outlets is equipped with a Micrometer flow meter that will measure flow rate and volume, for billing purposes and to monitor total usage. Additionally, there is a totalizing flow meter located before Bainville #1, prior to any water demands, that measures all water diverted. (Department File). (PDD)

39. Marvin Cross, DNRC Civil Engineer Specialist, of the Havre Water Resource Office reviewed the pump information and the project design specifications and found the means of diversion to be adequate. (PDD)

40. Applicants presented no new evidence or testimony at the show cause hearing related to the criteria of adequacy of diversion.

CONCLUSIONS OF LAW

41. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (PDD)

42. The adequate means of diversion statutory test merely codifies and encapsulates the common 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; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, 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; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior

appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied). (PDD)

43. Upon review of the entire record in this proceeding, the Hearing Examiner concludes that Applicants have proven by clear and convincing the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-402 (2)(b), MCA. (PDD, FOF No. 38 - 40)

POSSESSORY INTEREST

FINDINGS OF FACT

44. Applicants will market this water from the water depot to willing buyers. Transport of the water to North Dakota cannot occur without a willing buyer. (PDD)

45. This Application is for sale in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. ARM 36.12.1802. The Applicants have a 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. (PDD)

46. Applicants presented no new evidence or testimony at the show cause hearing related to the criteria of possessory interest.

CONCLUSIONS OF LAW

47. Pursuant to § 85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, MCA, the 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 change involves 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. (PDD)

48. 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.

(PDD)

49. Upon review of the entire record in this proceeding, the Hearing Examiner concludes that Applicants have proven by clear and convincing 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. § 85-2-402(2)(d), MCA. (PDD, FOF No. 44 - 46)

SALVAGE WATER

This Application does not involve salvage water. (PDD)

BENEFICIAL USE

FINDINGS OF FACT

50. Applicants propose to change 100 AF of water from Permit No. 40S 30048277 originally granted for use in Montana to market water for industrial use related to oil field development in

North Dakota. The proposed change will not result in an increase in the permitted flow of 4.5 CFS or volume of 1000 AF. (PDD)

51. The Department previously found that a flow rate of 4.5 CFS and total volume of 1000 AF was reasonable and necessary for marketing in Montana pursuant to Permit No. 40S 30048277. (PDD)

52. In order to prevent speculation, Permit No. 40S 30048277 included specific measuring and reporting conditions along with a completion date of December 31, 2014 (currently December 31, 2015), to ensure diligence in beneficial use of the water. Based upon the Applicants' measuring and reporting records submitted through 2013, of the 7 letters of intent totaling 635 AF for which Applicants had to support beneficial use for Permit No. 40S 30048277, only 228 AF was used in 2012 and 443 AF was used in 2013. (PDD)

53. Additionally, the Applicants provided a list of water sales by month from August, 2010 through March, 2012. The list includes the name of the purchaser, month the purchase was made, and the volume of water purchased. The list represents sales of water to 55 customers. Applicants had letters of intent to support beneficial use for Permit No. 40S 30048277 for only 5 of the customers. Based on the Applicants list of water sales, the 5 customers that signed letters of intent totaling 500 AF at the application stage, purchased a combined volume of 23.9 AF during the period of August 2010 through March 2012. No purchases were made during this period by the other two customers that had signed letters of intent. (PDD)

54. As part of the information received on July 14, 2014, the Applicants resubmitted a letter of intent to contract from Basic Energy for 100 AF for use in the North Dakota. While still dated March 8, 2013, the language within the letter was revised. The letter identified proposed service area consisting of a strip of land bordered by Hwy 2 to the south, Hwy 50 to the north, County Hwy 5 to the east, and the Montana/North Dakota border to the west. This strip of land is approximately 4 ½ miles wide by 33 miles long. The area identified in the letter is much smaller than the 50 mile radius from the point of sale submitted with the application. The letter was signed again by both the buyer and seller. Alongside the signature of the buyer is a hand written phrase stating they "will buy only if we need the water." (PDD)

55. At hearing, the Applicants allege “[t]he 100 AF proposed for use in North Dakota is a shift in the area of demand. This fact should not deprive the permit holder of the benefit of the originally permitted amount.” (Exhibit A-1 p.2)

CONCLUSIONS OF LAW

56. Under the change statute, § 85-2-402(2)(c), MCA, an applicant must prove that the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and 311(1)(d), MCA. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA except in the instant matter the burden of proof is raised to ‘clear and convincing.’ § 85-2-402(6).

57. 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 (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana 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); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff’d on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *Statement of Opinion, In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff’d on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in

part because of failure to support quantity of water needed for pond); see also § 85-2-312(1) (a), MCA. (PDD)

58. The Department may issue a change for less than the amount of water requested, but may not issue a change for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. § 85-2-312, MCA; see also, McDonald; Toohey. (PDD)

59. Water marketing is a recognized beneficial use. § 85-2-102(4), MCA. Water marketing as a beneficial use has its roots in the 1889 Montana Constitution and is again found in the 1972 Montana Constitution. Article 9, section 3(2) of the 1972 Constitution provides that the, “use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use ...are held to be a public use.” See also, Mont. Const. Art. III, § 15 (1889). (PDD)

60. Prior to 1973, appropriation for sale was complete at the time the appropriator completed the works and offered the water for sale for beneficial use by others. Bailey v. Tintinger, (1912) 45 Mont. 154, 122 P. 575. In 1985, the Montana Legislature expressly codified the requirements for appropriating water for the purpose of sale. See generally *Final Report of the Select Committee on Water Marketing to the 49th Legislature State of Montana* (January 1985). The Legislature passed what is now § 85-2-310(9)(a)(v), MCA:

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; ...

(PDD)

61. The purpose of the legislation was to address speculation in the appropriation of Montana’s resources, i.e., tying up water for speculative future use. The Department has accepted less than full contractual commitment at the permitting stage under the preponderance of the evidence standard so long as the applicant demonstrates a good faith and *bona fide*

intent to appropriate through commitments to purchase a substantial portion of the flow and volume sought. Potential speculation by an applicant is further addressed by the period of completion. At the end of the period of completion, the applicant will have a perfected right to market only that amount of water which he or she actually contracted and sold on annual basis during the period of completion, i.e., that amount of water put to actual beneficial use. E.g., McDonald supra. As explained above, the Montana Water Use Act does not support speculation in water rights. §§ 85-1-101, 85-2-101, 85-2-310, MCA. Applicants must come forward with a defined plan for beneficial use. The Applicants marketed 443 acre-feet of the 1000 acre-feet permitted in 2013. The Applicants date of completion is December 31, 2014 (currently extended to December 31, 2015). Applicants seek to change only 100 acre-feet of the un-marketed 557 AF. (PDD)

62. Section 85-2-310(9)(c)(v), MCA, requires in part that one who markets water must demonstrate “firm contractual agreement for the specified amount of water for each person using the water.” This requirement applies equally to the criterion of proof of beneficial use under a change application in § 85-2-402(2)(c), MCA. The Department has consistently used the § 85-2-310 (9)(c)(v), MCA requirement as an integral part of its analysis under the beneficial use criteria provided for in both §§ 85-2-311 and 85-2-402, MCA. *Application for Beneficial Water Use Permit NO. 40S 30048277, Preliminary Determination to Grant Permit, (DNRC 2010)*; *Application for Beneficial Water Use Permit No. 40S 30063842, Preliminary Determination to Grant Permit, (DNRC 2013)*; *Application for Beneficial Water Use Permit No. 40S 30048631, Preliminary Determination to Grant Permit, (DNRC 2010)*. All of the aforementioned Permits used a preponderance of the evidence standard to determine that the requirements of § 85-2-310(9) had been met as an integral part of the § 85-2-311 beneficial use criteria for water use within the state of Montana. The Applicants submitted a letter of intent to contract for the full 100 AF it seeks to change for marketing in North Dakota. As noted above, the burden of proof for transporting water for use outside of the state of Montana requires a higher evidentiary standard, that is, ‘clear and convincing evidence.’ Although the Department has accepted a letter of intent as sufficient to meet the requirements of § 85-2-310(9) under the preponderance of the evidence standard for marketing within the state of Montana, marketing water to be transported out of state requires the higher burden of proof. (PDD, § 85-2-402(6))

63. Applicants submitted a revised letter of intent from Basic Energy. The letter identified a

much smaller service area than that submitted with the application. The hand written phrase alongside the signature of the buyer stating they “will buy only if we need the water” also raises doubt about whether the 100 AF requested will be put to beneficial use. This Hearing Examiner is not aware of any other letters of intent that have been accepted by the Department with the caveat that they “will but only if we need the water.” To this Hearing Examiner, at best such a caveat implies that the actual need for water is unknown. The revised letter of intent fails to satisfy the Department’s requirements under § 85-2-402(2)(c) to prove a beneficial use by clear and convincing evidence. (PDD, Exhibit A-3)

64. Evidence that, of the 635 AF for which Applicants had letters of intent to support beneficial use for Permit No. 40S 30048277, only 228 AF was used in 2012 and 443 AF was used in 2013 raises additional and substantial concerns about whether the 100 AF requested will be put to beneficial use. Based on the Applicants list of water sales for the period of August, 2010 through March 2012, only 5 of the purchasers that signed letters of intent, totaling 500 AF, actually purchased a combined total of 23.9 AF and two of the purchasers that signed letters of intent purchased no water during that period. (PDD)

65. Applicants allegation that they will be deprived of the benefit of the originally permitted amount overstates Applicants case. The fact is, if the instant application is denied, the Applicants will not be denied the benefit of the originally permitted amount. The underlying permit would not change under the instant proceeding. The Applicants would retain the right to market 1000 AF of water in the state of Montana as originally granted. Changes in market conditions may affect the Applicants’ ability to benefit from the permit as issued, but the permit itself is not affected by market conditions. (FOF 55. COL 17)

66. While some evidence was elicited at hearing that specific water purchase agreements have been signed and filed with the Regional Office, no documentary evidence was included by the Applicants at the hearing to show actual bona fide purchasers. As previously noted (page 4, *ante*) the only documentation provided at hearing was a blank “Water Purchase Agreement” Form and a list of purported sales to various individuals from the Bainville 2 depot. At this time the only documentation presented to the hearing examiner is as outlined in ¶ 36 and 49, above.

67. Upon review of the entire record in this proceeding and the evidence and testimony provided at the show cause hearing, the Hearing Examiner concludes that Applicants have not proven by clear and convincing evidence that 100 AF is the amount of water needed to sustain

the proposed beneficial use. § 85-2-402(2)(c), MCA (FOF Nos. 50-55, COL 64, 66)

OUT-OF-STATE CRITERIA

FINDINGS OF FACT

68. In determining whether the proposed out-of-state use of water is not contrary to water conservation in Montana; and whether the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana, the Department must consider the Applicants' proof regarding the four factors set forth in § 85-2-402(6)(b), MCA, along with any other relevant evidence regarding water conservation in Montana and the public welfare of Montana citizens. (PDD)

69. At the outset, it is important to note that the flow rate and volume granted in Permit No. 40S 30048277 were authorized based upon the Applicants' proof that 1000 AF per year were needed for marketing and beneficial use in Montana. Whether the Applicants' proposal to market 100 AF of water from Permit No. 40S 30048277 in North Dakota is consistent with water conservation and public welfare in Montana must be considered in light of the fact that a determination was already made based on representations by the Applicants in the original permit application and proceeding that there was a need for the full 1000 AF of water in Montana, including the 100 AF Applicants now seek to transport out of state. Therefore, Applicants' proposal to transport 100 AF from Permit No. 40S 30048277 to North Dakota will deprive the very need in Montana that Permit No. 40S 30048277 was granted to serve.

Applicants respond to the fact that 100 AF would no longer be available in Montana by stating that should the demand return in Montana they would simply stop servicing North Dakota and only market water again in Montana. Applicants do not explain how they would cease service to North Dakota if they have contractual commitments to supply water there. (PDD, Exhibit A-1 p.14)

1) *Whether there are present or projected shortages within the state of Montana under § 85-2-402(b)(i), MCA.*

70. The Applicants acknowledge there are water shortages (closed basins) within Montana but not within the vicinity of this permit. The Applicants provided a copy of the DNRC basin closure map and stated most of the shortages (closures) are several hundred miles away. The

Applicants sited the South Pines CGWA (≈100 miles away), the Powder River Basin CGWA (≈200 miles away), the Fort Belknap Compact Closure (≈100 miles away), and the Crow Compact Closure (≈290 miles away). (PDD)

71. The PDD finds that the Applicants did not identify all present or projected shortages in Montana. There are additional water shortages in Montana, and specifically in the lower Missouri River Basin not identified by the Applicants of which the Department takes judicial notice. The Fort Belknap Compact closure (≈100 miles to the west) was discussed in the additional information received on July 14, 2014. The Applicants identified the Fort Belknap closure, however confused it with the Department ordered Milk River mainstem closure and Milk River Southern Tributaries closure. Applicants stated the closure is for surface water only on the sources and did not include any groundwater. The Fort Belknap closure became effective in 2001 and supercedes the pre-existing Department ordered closures. The Fort Belknap Compact closed the entire Milk River basin to any new appropriation of surface water or hydrologically connected groundwater unless the appropriation meets one of the exceptions. The Milk River is tributary to the Missouri River. (PDD)

72. Additionally, the PDD finds that the Fort Peck Indian Reservation, located east of the Fort Belknap Compact Closure, has instream flow rights on sources that border or flow through the reservation, as identified in the Fort Peck Compact. Surface water or hydrologically connected groundwater permit applications must be able to show legal availability on these sources. While not a closed basin, the area within and surrounding the Fort Peck Reservation is frequently water short. For example, the three most recent applications for new water use permits in this area were unable to show legal availability on these sources (40R30063433, 40R 30064190, 40R 30065734). One was withdrawn and the other two are looking for water to mitigate the depletion. This water short area was not addressed by the Applicants. (PDD)

73. To address the issues presented in paragraphs 71 and 72, above, at hearing, the Applicant's included the Fort Peck Indian Reservation as the closest water short area to the Applicants' water depot. The straight line distance from the water depot to the center of the Fort Peck Indian Reservation was estimated to be 75 miles or approximately 90 road miles. Analysis of the Fort Peck Indian Reservation shortage see ¶¶ 76-77, *ante*. (Exhibit A-1 p.4)

74. The Applicants stated there are un-used water reservations on Missouri and that water soon flows into North Dakota, out of reach for Montana use. The Applicants provided water

reservation information including all or parts of the Yellowstone Reservations, Upper Missouri River Reservations and Lower Missouri River Reservations final orders. These water reservations are by public entities for current and future use under § 85-2-316, MCA and not relevant to this application. In fact, water reservations represent an existing legal demand on the source of water further limiting future water appropriations. (PDD)

75. Based on information available to it, the Department finds that there have been four permits granted in the last five years for 4843 AF from the Missouri River in the same region as the permit subject to the proposed change. The Department further has one application pending before it to appropriate water from the Missouri River. (PDD)

2) Whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana under § 85-2-402(b)(ii), MCA

76. Applicants provided at hearing the following table of costs for trucking water to water short areas within Montana. While this table does not address all water short areas in Montana, it does address those closest to the Applicants' water depot. These costs are based on an American Transport Research Institute paper, a Montana Trucking Company, the Applicants own research of industry professionals, and Bakken Water Opportunities studies by North Dakota.

Trucking Costs

(One-Way Trip Estimates for an Acre-foot of Water)*

| Closure/Water Short Areas | One- Way Distance from POD | American Transport Institute (\$1.63 per mile per truck)** | Wayne Olson Trucking (\$3.00 per mile per truck) | Industry Professionals and Research (\$0.03 per barrel per mile)*** | Bakken Water Opportunities Assessment - 2011 (\$5.00 per barrel or about \$952.40 per truck) | The Other Bakken Pipelines: Water for Fracking (\$0.10 per gallon or \$798 per truck) |
|------------------------------|----------------------------|--|--|---|--|---|
| Fort Peck Indian Reservation | 90 | \$5,975.09 | \$10,997.10 | \$20,894.49 | \$38,791.25 | \$32,585.10 |
| South Pine CGWA | 140 | \$9,294.59 | \$17,106.60 | \$32,502.54 | \$38,791.25 | \$32,585.10 |
| Fort Belknap Compact Closure | 250 | \$16,597.48 | \$30,547.50 | \$58,040.25 | \$38,791.25 | \$32,585.10 |
| Powder River Basin CGWA | 310 | \$20,580.87 | \$37,878.90 | \$71,969.91 | \$38,791.25 | \$32,585.10 |
| Crow Compact Closure | 390 | \$25,892.06 | \$47,654.10 | \$90,542.79 | \$38,791.25 | \$32,585.10 |

• One (1)AF=40.73 tanker trips
 **minimum cost (\$1.63 per mile per truck)
 ***maximum cost (\$5.70 per mile per truck)

As can be seen, the cost of trucking water to the closest water short area in Montana from the Applicants' depot range from \$5,975 to \$38,791 per acre-foot. The only documentation of record for the estimates are from the Transport Research Institute and the North Dakota studies. The Hearing Examiner notes that while the first three estimate methods increase in cost as distance increases (as would be expected), the cost for the last two columns (North Dakota studies) remain steady despite increasing distance. No explanation for this discrepancy is provided. (Exhibit A-1 p. 4-6)

77. At hearing, the Applicants provided further information estimating of the costs of using a pipeline as opposed to trucking water to water short areas in Montana. Applicants provide information from the Final Engineering Report: Fort Peck Assiniboine and Sioux Water Supply System, Dry Prairie Rural Water System. Applicants estimate that the cost of a pipeline from their depot to the Fort Peck Indian Reservation would cost between \$11MM and \$15.7MM not including the costs of permitting and land acquisition and rights of way. (2002 costs). Applicants assert that the cost estimates "coincide with the applicant's statement that their 7.2 mile pipeline cost approximately \$2MM, which is within the range of the above calculations for this distance." Again, the Fort Peck Indian Reservation is the closest identified water short area in Montana. Costs would be higher over greater distances. (Exhibit A-1 p. 6-7, Exhibit A-11)

3) The supply and sources of water available to the applicant in the state where the applicant intends to use the water under § 85-2-402(b)(iii), MCA

78. The Applicants provided a copy of an Intra-Office Memorandum dated March 21, 2013 and attached map from Daniel J Farrell, Water Resources Engineer to Robert B Shaver, Director, Water Appropriation Division of the Office of the North Dakota State Engineer. The subject of the memo is "Use of water withdrawn in Montana in North Dakota Oil/Gas Industry". The memo references one currently permitted and four pending water depots from groundwater sources and existing reservoirs in the proposed North Dakota service area and that there currently no temporary water permits in or near proposed service area. The memo also states that "given the current backlog of water permit applications to be evaluated in western North Dakota issuance of pending water permits in or near the delineated service area are not expected in the near future" and that water transported from the Bainville, Montana, depot to Williams County, North Dakota would provide more efficient distribution of water. No further explanation was provided regarding the meaning of "more efficient distribution of water". The

memo was written based on an attached map of a proposed service area consisting of a strip of land bordered by Hwy 2 to the south, Hwy 50 to the north, County Hwy 5 to the east, and the Montana/North Dakota border to the west. This strip of land is approximately 4 ½ miles wide by 33 miles long. (PDD)

79. The Applicants researched the water permits for industrial use in the proposed service area within North Dakota. A list of the permits and printouts of each of them were provided (2 in Divide County, 66 in McKenzie County and 65 in Williams County). The Applicants calculated the total volume for these permits to be 39,286 AF. The Applicants then calculated a demand for the water based on 190 oil well drilling rigs statewide, each drilling 12 oil wells per year and each well using an average of 16.1 AF for drilling and hydraulic fracturing (fracking). They also stated there were 29,938 existing oil wells that would be using water at an average rate of ½ AF per year for dust abatement and well maintenance. Below is a comparison of the yearly supply vs demand in North Dakota based on the information supplied by the Applicants showing a deficit of 12,391 AF of available water.

| Statewide Demand Compared to the Supply in Three Counties | | | | | | | | | |
|--|------------------------------|-------------|-------------|--------|--------------------------|-----------------------------|---------------|-----------------------------|---------------------|
| Number of Oil Drilling Rigs | Average Number Wells per Rig | Total Wells | AF per Well | AF/Rig | Number of Existing Wells | 1/2 AF per Well to Maintain | Total AF/Year | Water Permitted (Available) | Supply Minus Demand |
| 190 | 12 | 2280 | 16 | 36708 | 29938 | 14969 | 51677 | 39286 | -12391 |

The Applicants compared statewide demands to supplies from parts of the three counties (Divide, McKenzie, and Williams) within the proposed service area. If authorized the Applicants would not be authorized to transport water out of their proposed service area. The table below compares the demand for the three counties to the supply of the same three counties. The number of oil drilling rigs was obtained from the “Current Active Drilling List” on the North Dakota website, www.dmr.nd.gov/oilgas/riglist.asp . The list provides the location of each drilling rig by section, township, range, and by county. As of July 16, 2014 there were 117 drilling rigs operating within Divide, McKenzie, and Williams counties. The number of existing, producing, oil wells is based on “County Monthly Oil Production Charts” on the North Dakota Drilling and Production Statistics webpage, www.dmr.nd.gov/oilgas/stats/statisticsvw.asp . By limiting the number of oil drilling rigs and existing wells to the three counties where the proposed service area is located, there is a surplus of 14,432 AF of water.

| Three County Demand Compared to the Supply in Same Three Counties | | | | | | | | | |
|--|------------------------------|-------------|-------------|--------|--------------------------|-----------------------------|---------------|-----------------------------|---------------------|
| Number of Oil Drilling Rigs | Average Number Wells per Rig | Total Wells | AF per Well | AF/Rig | Number of Existing Wells | 1/2 AF per Well to Maintain | Total AF/Year | Water Permitted (Available) | Supply Minus Demand |
| 117 | 12 | 1404 | 16 | 22604 | 4500 | 2250 | 24854 | 39286 | 14432 |

The Applicants state that each oil well will require 7.7 – 24.5 AF of water for drilling and fracking, with 16.1 AF as the average. Based on the article “Facts About North Dakota Fracking & Water Use” developed by the North Dakota State Water Commission and dated February, 2014, “oil wells of this type generally require approximately seven acre-feet of fresh water for the drilling and hydraulic fracturing process” (www.swc.nd.gov). The table below shows a surplus of 27,208 based on the average use of 7 AF per well.

| Three County Demand Compared to the Supply in Same Three Counties @ 7AF/Well | | | | | | | | | |
|---|------------------------------|-------------|-------------|--------|--------------------------|-----------------------------|---------------|-----------------------------|---------------------|
| Number of Oil Drilling Rigs | Average Number Wells per Rig | Total Wells | AF per Well | AF/Rig | Number of Existing Wells | 1/2 AF per Well to Maintain | Total AF/Year | Water Permitted (Available) | Supply Minus Demand |
| 117 | 12 | 1404 | 7 | 9828 | 4500 | 2250 | 12078 | 39286 | 27208 |

Applicants provided an analysis comparing the available North Dakota water supplies in the three counties where the proposed service area is located to the state wide demands for oil field development to demonstrate a need for water to be transported outside Montana. When the three county supplies are compared to the three county demands a surplus of water is demonstrated. (PDD)

80. At hearing, Applicants provided information and testimony that for the newer “slick water fracking” technology, 19.5 AF per well is becoming the industry standard. Even using that higher amount in the above analysis leaves a surplus of approximately 10,000 AF. (Exhibit A-1 p. 10, Hearing Examiner calculation)

81. Additionally, based on the listing of water permits in North Dakota provided by the Applicants, Mr. Ames has four water depots within the proposed service area with a combined volume of 650 AF. Three of these permits have reached their maximum combined volume of

250 AF. The last permit, for 400 AF has yet to be perfected and no water use was reported in 2013 according to the permit printouts provided by the Applicants. The location of the four Ames water depots were confirmed on the map of existing Ames depot locations obtained from www.ameswater.com. (PDD)

82. The Applicants state “there are significantly more oil wells and development than there is available water and North Dakota publishes a brochure detailing this fact”. The Applicants provided a copy of a pamphlet prepared by the North Dakota Office of the State Engineer titled “Water Theft & Unauthorized Water Sales For Industrial Uses In North Dakota”. The pamphlet provides answers to frequently asked questions and describes the criminal and civil penalties that apply to illegal water use in North Dakota. It is not reasonable to assume that illegal water use occurs only because water is not available. (PDD)

83. At hearing Applicants address the fact that the confluence of the Yellowstone River and main stem of the Missouri River lies just inside the state of North Dakota, above Lake Sakakawea. Applicants state that the US Army Corps of Engineers (COE) require a minimum outflow from Lake Sakakawea at Garrison Dam of 9,000 cfs. Applicants state that the inflow to Lake Sakakawea (the combined flows of the Yellowstone and Missouri Rivers) were over 15,000 cfs in 2012 and over 16,000 cfs in 2013, amounting to a surplus of at least 6,000 cfs over COE requirements. By the Hearing Examiner’s calculation, that 6,000 cfs amounts to over 4.3MM acre-feet per year.

Applicants’ response is that “the fact that the ACOE and the North Dakota Water Commission both require separate permits for surface flows within North Dakota make it extremely difficult and expensive to acquire authorization to divert Missouri/Yellowstone River water within the boundaries of North Dakota.” Interestingly, the Hearing Examiner notes that that the file contains correspondence from Office of the North Dakota State Engineer’s Office dated March 26, 2013 indicating that in order for water to be transported into North Dakota from Montana a permit from the state of North Dakota is required. No indication of the time and expense of such a permit is provided. The Applicants clearly have a source and supply available to them in North Dakota. The fact that accessing that source of supply is made difficult by entities in North Dakota does not diminish the fact that the supply exists. (PDD, Dept. File 1, Exhibit A-1 p. 7-9)

84. North Dakota is currently studying numerous options for supplying water to the energy industry from sources within North Dakota. Those studies also show ample supplies of water which are limited only by administrative constraints. (Exhibit A-8)

85. This Hearing Examiner finds the Applicants analysis of supply and sources in North Dakota does not prove that surface or groundwater availability in or near the proposed service area is not available in North Dakota.

4) The demands placed on the applicant's supply in the state where the applicant intends to use the water under § 85-2-402(b)(iv), MCA

86. At hearing, Applicants state that as of June 14, 2014 there is one drilling rig within the SSA with 0 active drilling sites. Applicants assert that the single drilling rig "can complete 12 wells per year." They go on to state that because a rig can complete 12 wells per year for a total demand of 234 AF per year combined with water for maintenance of existing wells, there exists a demand of 300 AF. Applicants attempt to explain away the fact that there are 0 active drilling sites by stating "[h]owever, the oil industry is constantly changing, and the use within the SSA will increase as the industry continues trending west."

87. The Applicants submitted a letter of intent to contract for the 100 AF proposed for marketing and transport to North Dakota. For a detailed discussion of the letter of intent see the Beneficial Use section of this decision. (FOF No. 33-37, COL No. 38-48)

CONCLUSIONS OF LAW

88. An applicant may not change a water right for the withdrawal and transport of water outside Montana unless the applicant proves the criteria in § 85-2-402(6), MCA, by clear and convincing evidence. (COL No. 13)

89. The Department will consider the criteria under § 85-2-402(6)(b)(i)-(iv), MCA, in determining whether the proposed out-of-state use of water is not contrary to water conservation in Montana and not otherwise detrimental to the public welfare of the citizens of Montana under §§ 85-2-402(6)(a)(ii) and (iii), MCA. E.g. Ravalli County v. Erickson, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31, ¶¶ 11-12, 85 P.3d 772, ¶¶ 11-12 (intention of the legislature determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further); Hilands Golf Club v. Ashmore, 2002 MT 8, ¶ 20,

308 Mont. 111, ¶ 20, 36 P.3d 697, ¶ 20 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. § 1-2-101). *In The Matter Of Application For Beneficial Water Use Permit Nos. 42B 30011045 and 42B 30014358 By Fidelity Exploration, Final Order* (May 2007), *rev'd on other grounds, Fidelity Exploration Company v. Montana DNRC et al.*, CDV-2007-612, Montana First Judicial District Court, *Order on Petition for Judicial Review* (2008). (PDD)

Whether There Are Present or Projected Water Shortages Within The State Of Montana

90. Based upon the evidence regarding South Pines CGWA and the Powder River Basin CGWA along with the Fort Belknap Compact Closure and the effect of the Fort Peck Compact on permitting of new uses in the region, the Department concludes that there is clear and convincing evidence of present and projected water shortages in Montana. (PDD, FOF Nos. 70 - 75)

Whether The Water That Is The Subject Of The Proposed Change In Appropriation Might Feasibly Be Transported To Alleviate Water Shortages Within The State Of Montana

91. To support approval of out-of-state transport of water, the Department must find that the transport of water to alleviate shortages is not “feasible.” The Legislature used the term “feasible” to qualify transport, and thus, it is reasonable to conclude that transport must be more than possible in theory. However, the Legislature did not add any qualifiers to “feasible” such as “economically,” “financially” or “technically,” which it has chosen to do in other statutes. E.g., §§ 85-1-509 (“economically feasible” construction of power facility) and 90-2-1103, MCA (definitions of “financially feasible” and “technically feasible” in grant and loan program);¹ In City of El Paso by and Through Public Service Bd. v. Reynolds, 597 F.Supp. 694, 703 (N.M. 1984), the Court implicitly read a similar “feasible” requirement to mean “economically and technologically” feasible. A general definition of the term is to be, “capable of being done or carried out; practicable.” *Webster’s New World College Dictionary*, Fourth Edition (2005). The Department believes that a reasonable reading of the statute would be consistent with the City

¹ For reference, “financially feasible” in Mont. Code Ann. §90-1-1103(2) means that “adequate funds are available to complete the project as approved,” and “technically feasible” in subsection (9) means “that a project or activity can be designed, constructed, operated, or carried out to accomplish its objectives, utilizing accepted engineering and other technical principles and concepts.”

of El Paso Court's implicit understanding as supported by the general usage of the term, "economically and technologically" feasible. *In The Matter Of Application For Beneficial Water Use Permit Nos. 42B 30011045 and 42B 30014358 By Fidelity Exploration, Final Order* (May 2007). (PDD)

92. The closest areas of shortage would be within the Fort Belknap Compact Closure and the area within and surrounding the Fort Peck Indian Reservation. The Applicants allege that it would not be feasible to use the water being changed to alleviate water shortages elsewhere in Montana and provided an analysis to support its contention. The Applicants contentions regarding transportation costs or economic feasibility of transporting water to water short areas in Montana are not supported by the evidence or analysis provided. While one method to estimate transportation costs had supporting documentation, the other two methods had no supporting documentation. (FOF 71-72)

93. Applicants conclude that:

The above calculations and enclosed documentation prove the fact that trucking and pipeline costs are excessive and not a viable option to transport water from the POD to water short areas within the State of Montana. It is not economically feasible to transport water via truck or pipeline to the reservation, or any other water short area within Montana.

While Applicants cost estimates certainly show that the costs of either trucking water or utilizing a pipeline to transport water are very high, this Hearing Examiner disagrees with the statement that such costs "prove the fact" that those methods are not viable. Without an economic analysis comparing costs of alternatives it is not possible to say that transporting water to water short areas is not feasible.

94. Upon review of the entire record in this proceeding, the Hearing Examiner concludes that Applicants have not proven by clear and convincing evidence that the 100 AF water proposed for transport to North Dakota under the Application cannot feasibly be transported to alleviate water shortages within the state of Montana. (Exhibit A-1 p.7, FOF 73 – 77, 91 - 93)

The Supply And Sources of Water Available to The Applicant in The State Where The Applicant Intends to Use The Water.

95. Applicants provided an analysis comparing the available North Dakota water supplies in the three counties where the proposed service area is located to the state wide demands for oil

field development to demonstrate a need for water to be transported outside Montana. When the three county supplies are compared to the three county demands a surplus of water is demonstrated. (PDD, FOF 73-79)

96. Upon review of the entire record in this proceeding the Hearing Examiner concludes the Applicants have not proven by clear and convincing evidence that water supplies in North Dakota are not available to the Applicants for industrial use by the oil industry in North Dakota. Further, the Applicants have failed to prove that water supplies in North Dakota are not available to the Applicants for industrial use by the oil industry in North Dakota even if a lower preponderance of the evidence standard is applied. (PDD, FOF Nos. 73-79)

The Demands Placed On The Applicant's Supply In The State Where The Applicant Intends To Use The Water

97. The Department requires a clear letter of intent from an applicant in order to prove the requirements of § 85-2-310 (9)(c)(v), MCA. Applicants provide only a letter of intent with the caveat that the buyer “will only by [sic] if we need the water.” This letter of intent does not rise to the level of clear and convincing evidence that the water will be put to beneficial use. The lack of a firm contractual commitment leaves significant doubt as to whether this water is needed in North Dakota. See COL Nos. 44-47. The Applicants have not proven by clear and convincing evidence that there is a demand for the 100 AF Applicants intend to market for industrial use for oil production in North Dakota. (PDD, FOF No. 54, COL 62 - 67)

98. Applicants’ own evidence suggests that the supply of water in the state of North Dakota is adequate for purposes within North Dakota. The fact that accessing that supply of water is administratively difficult does not in actuality diminish the supply. (FOF 78 - 85)

Whether The Proposed Out-Of-State Use Of Water Is Not Contrary To Water Conservation In Montana; And Whether The Proposed Out-Of-State Use Of Water Is Not Otherwise Detrimental To The Public Welfare Of The Citizens Of Montana.

99. The term “conservation” is generally defined to be “planned management of a natural resource to prevent exploitation, destruction, or neglect.” Webster’s New Collegiate Dictionary, G.& C. Merriam Co. The phrase “contrary to water conservation in Montana” is interpreted to mean to minimize the use of water that would create or exacerbate a shortage of water available for beneficial use in Montana. This interpretation is consistent with the policy of the

State to conserve and maximize the use of its water resources for the people of the State of Montana. See e.g., § 85-1-101(2), MCA (“The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens”) and § 85-2-101(3), MCA (. . . “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 The Matter Of Application For Beneficial Water Use Permit Nos. 42B 30011045 and 42B 30014358 By Fidelity Exploration, Final Order* (May 2007). (PDD)

100. There is an existing demand for water in the current service area for Permit No. 40S 30048277 as established through the original application and determination that 1000 AC/FT was the amount of water reasonably necessary to market and serve the needs of customers in Montana for Permit No. 40S 30048277. Transporting 100 AF of water from Permit No. 40S 30048277 to North Dakota will deprive that need of water. Additionally, the Department continues to receive applications for new uses in the region, of which at least three were unable to prove water is available as a result of water shortages created by the Fort Peck Compact. The Applicants failed to prove it would not be feasible to satisfy those Montana water needs with the 100 AF it intends to transport to North Dakota. (PDD)

101. Based on a review of the entire record in this proceeding, and analysis of the factors in §§ 85-2-402(6)(b)(i)-(iv), MCA, the Hearing Examiner concludes that the Applicants have not proven by clear and convincing evidence that its plan to transport 100 AF to North Dakota to market for industrial use for oil production is not contrary to water conservation in Montana; and is not otherwise detrimental to the public welfare of the citizens of Montana. §§ 85-2-402(6)(a)(ii) and (iii), MCA. (PDD)

FINAL ORDER

The Applicants did not prove by clear and convincing evidence that all of the required criteria for a change authorization to market water out-of-state are satisfied. (§ 85-2-310(9), MCA and § 85-2-402(6), MCA)

Application to Change Water Right No. 40S 30065911 is hereby **DENIED**.

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

IT IS SO ORDERED.

Dated this 13th day of May 2015.

/Original signed by David A Vogler/

David A Vogler, Hearing Examiner
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and Conservation
Water Resources Division
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 13th day of May 2015 by first class United States mail.

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