

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

IN THE MATTER OF APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NO.)	
40S-30066181 BY ATLANTIS WATER)	FINAL ORDER
SOLUTIONS LLC)	

On April 29, 2013, Atlantis Water Solutions, LLC (hereinafter “Applicant” or “Atlantis”) submitted Application for Beneficial Water Use Permit No. 40S 30066181 (hereinafter “Application”) to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 5 cubic feet per second (CFS) up to 3622 acre-feet per year (AF) for the purpose of water marketing¹. Atlantis plans to build a water depot in the town of Culbertson, Montana. Atlantis proposes to pump water from the Missouri River and pipe it to a system of storage tanks. The water will be sold to third parties who fill tanker trucks at “fill stations” and deliver water where it is needed. The Applicant’s proposed water depot may be visualized as a high volume gas station that dispenses water rather than fuel to customers.

After a lengthy process of meetings, analysis, and exchanges of information, the DNRC Glasgow Water Resources Office issued a Preliminary Determination to Deny Atlantis’ permit (hereinafter “PD to Deny”) on April 17, 2014. Atlantis received a hearing on July 15, 2014, to show cause by a preponderance of the evidence why the permit should not be denied. Following the show cause hearing, Department Hearing Examiner David Vogler issued a Preliminary Determination to Grant following Preliminary Determination to Deny Application on October 15, 2014 (hereinafter “PD to Grant”).

Subsequently James D. Carlisle filed a valid objection to the Application specifically regarding the beneficial use criteria for marketing found at §§ 85-2-310(9) and 311, MCA (2013). Pursuant to its authority under §§ 85-2-307 through 310, MCA (2013), and Mont. Admin. R. 36.12.201 et. seq, a contested case hearing was conducted in this matter on February 19, 2015 in Billings, Montana. The purpose of the contested case hearing was to hear

1 Atlantis originally requested 3800 acre-feet per year, but Atlantis reduced this figure when DNRC pointed out that the requested flow rate of 5 cfs at 24 hours per day for 365 days per year could not produce 3800 acre-feet. (See #40 of (Draft) sic. Preliminary Determination to Deny accompanying Letter dated 12/9/2013). One CFS is equal to 448.8 gallons per minute, or around 646,316 gallons per day. An acre-foot is the amount of water required to cover one acre of land one foot deep, or 325,851 gallons.

evidence and argument related to Carlisle's objection to the Application.

This Final Order only addresses the Objector's valid objection on the subject of beneficial use. The other criteria, including physical availability, legal availability, adverse effect, and possessory interest did not receive valid objections and are adopted from the PD to Grant into this order by reference. This Final Order must be read in conjunction with the PD to Grant.

APPEARANCES

Atlantis appeared at the hearing by and through counsel John Bloomquist. The following witnesses testified on behalf of the Applicant: Forest Dorn, executive of Iofina Resources (owner of Atlantis) and Scott Formolo, geologist for Iofina Resources. James D. Carlisle appeared *pro se*, and testified on his own behalf.

EXHIBITS

The Department considered the following information submitted by the Applicant and Objector:

Application as filed

- Application for Beneficial Water Use Permit, Form 600 (complete file)
- Attachments (including maps and expanded answers)
- Preliminary Determination to Deny dated April 17, 2014 (referred to in this Order as "PD to Deny")
- Preliminary Determination to Grant following hearing on Preliminary Determination to Deny dated October 10, 2014 (referred to in this Order as "PD to Grant")
- Objection
- Applicants and Objector's discovery requests and responses

Information Received at Hearing

Applicant provided "Application Hearing Exhibits" notebook consisting of 16 numbered exhibits. They were admitted into evidence and are listed individually below:

Applicant Atlantis' Exhibits

No.	DOCUMENT
1.	DNRC Application and Administrative Record, Application No. 40S 30066181 by Atlantis Water Solutions, LLC
2.	Preliminary Determination to Grant following Show Cause Hearing October 3, 2014
3.	SPE International, SPE 16679. The Value Proposition for Applying Advance Completion and Stipulation Designs to the Bakken, Griffin et al., 2013
4.	Continental Resources, 2015 Bakken Drilling Program Synopsis
5.	Oasis Petroleum, 2015 Premier Asset Position
6.	Triangle Petroleum, 2015 Montana Prospect Paper, Appendix
7.	Whiting Petroleum, 2015 Bakken/Williston Basin Activities
8.	EnerPlus, 2015 Bakken Activities
9.	Truck Filling Spreadsheet analysis, existing water marketing permit(s)
10.	DNRC Tabulation Provisional Permits for Water Marketing
11.	Water Depot Activity Maps, Atlantis Fresh Water Depot Service Area (2); Marked as 11a and 11b
12.	Atlantis Water Depot Service Area, Fracking Volume Map (1)
13.	Permitting Matrix, Atlantis Water Delivery Project, Roosevelt County, MT
14.	DNRC Preliminary Determination to Grant Permit Nos. 40S 30063842, Pease Ranch; 40S 30048631, Culbertson Depot; 40S 30063074, Ames and Hardy; 40S 30051664, Iverson
15.	Legal description service area, Culbertson Water Depot
16.	Well Volume Spreadsheets, Richland and Roosevelt Counties

Objector referred to and produced 18 numbered exhibits which are a combination of discovery production and information referenced at hearing. None of the exhibits were objected to by Applicant and those which were not formally admitted are now hereby admitted into evidence and are listed individually below:

Objector Carlisle's Exhibits

No.	DOCUMENT
1.	News article "ND versus MT: Oil Rig Counts" (from website: http://www.northernbroadcasting.com/)
2.	News article " Bakken Shale Drilling: Bakken Shale Rig Count Decreases by Seven to 180" (from website: http://bakkenshale.com)
3.	News article "Baker Hughes Investor Relations" (from website: http://gis.bakerhughesdirect.com)

4.	Depths and areas where Bakken Shale is found (from website: http://www.undeerc.org/Bakken/geology.aspx)
5.	Displays Bakken Shale Area (from website: http://bakkenshale.com/geology)
6.	Bakken location comparison to Williston Oil Basin (from website: http://bakkenshale.net/bakkenshalemap.html)
7.	Location of Horizontal Wells (from website: http://www.bogc.dnrc.mt.gov)
8.	Water Marketing Permits within 50 mile radius of Culbertson, MT
9.	Copy of Continental Resources vs United Trucking, Parka Trucking, et al
10.	Copy of Petro-Chemical v Trustland Oilfield Service, LLC et al and other documentation pertaining to Trustland Oilfield Services (from website: http://dockets.justia.com)
11.	Halliburton Letter of Intent (signed by George Lantz, Chief Executive Officer, dated 2/14/14)
12.	Bloomquist response to Carlisle Request No. 1 for discovery
13.	Reserved for Response from Carlisle's second request for Discovery.
14.	Business entity search for Big Horn Trucking (from website: https://app.mt.gov)
15.	Map of water depot areas of influence; Maps of Oil drilling activity in areas surrounding AWS service area
15A	James Carlisle Response to Atlantis's Request for Disclosure
16.	News article "Beckoning the Bakken: Will the oil boom reach Montana's impoverished Fort Peck Tribes?" (from website: http://buffalofire.com)
17.	News article "Native companies say 'fronts' are epidemic" (from website: http://www.missoulian.com)
18.	News article "Tribes looking into water depot business" (from website: http://fortpeckjournal.net)

PROPOSED APPROPRIATION AND OBJECTION

Findings of Fact

1. The Applicant plans to pump water from the Missouri River year-round at 5 CFS up to 3622 AF, from a point in Government lot 3 of Section 3, T27N, R56E, Roosevelt County, for water marketing within the state of Montana. The place of use is generally located in the NESE Section 28, T28N, R56E, Roosevelt County. (PD to Grant)
2. Applicant plans to market and sell water to oil and gas service companies, oil and gas operators, rural municipalities, other private and public entities, and whatever other uses could be eventually identified from a water depot located in NESE Sec. 28, T28N, R56E, Roosevelt County. (PD to Grant),(Testimony of Forest Dorn Audio Record #05 @ 1:00:10 through 1:01:20)
3. The loadout stations at the water depot will be equipped with individual key code instrumentation which will be tied into the central software station to track purchaser volumes.

Once a trucker pays for water, an automated valve on the fill line will open and fill the truck. This will allow Atlantis Water Solutions, LLC to control access to only those with water purchase contracts. (PD to Grant)

4. After a lengthy process of meetings, analysis, and exchanges of information, the DNRC Glasgow Water Resources Office issued its PD to Deny Atlantis' permit on April 17, 2014. The PD to Deny determined that Atlantis did not meet its burden of proof regarding adequate means of diversion and beneficial use. The PD to Deny found that Atlantis' explanation of the capacity and operation of the diversion works was insufficient, and that the appropriation appeared to be speculative and contemplate selling water for resale. (PD to Deny)

5. Atlantis requested and received a hearing to show cause by a preponderance of the evidence why the permit should not be denied. § 85-2-310(1)(a), MCA. The hearing was held on July 15, 2014 in front of Department Hearing Examiner David Vogler.

6. On October 15, 2014, Hearing Examiner Vogler issued a Preliminary Determination to Grant. Hearing Examiner Vogler determined that the Applicant provided sufficient evidence that the diversion works were capable of delivering the water Atlantis requested to satisfy the adequacy of diversion criteria. With regard to beneficial use, Hearing Examiner Vogler agreed with the PD to Deny determination that some of Atlantis' proposed use was speculative and involved selling water for resale (specifically proposed sales to local volunteer fire departments). However, Hearing Examiner Vogler found that other proposed uses satisfied the beneficial use criteria under the standards of the department, noting that "the department has approved such marketing applications in the past." (PD to Grant). The PD to Grant was published for public notice in accordance with § 85-2-307, MCA, and received one valid objection by James D. Carlisle (Objector in the instant action).

7. James D. Carlisle is a part owner of the Culbertson Water Depot, LLC, a business in the same town and providing similar water marketing services as the proposed Atlantis water depot. Culbertson Water Depot, LLC operates under a permit from DNRC to pump and sell water from the Missouri River. (Cross Examination of James Carlisle Audio Record #08 @0:08)

8. Carlisle's objection was deemed "correct and complete" and accepted as valid on the basis of the beneficial use criteria in § 85-2-311(d), MCA. Carlisle's objection argues that Atlantis did not meet the beneficial use criteria of Montana's water permitting requirements for two reasons. First, the market for water in eastern Montana is saturated and thus the water

cannot be beneficially used (sold) by Atlantis. Second, Atlantis did not provide firm contracts for the sale of the entire amount of the water as required by statute and the letters of intent submitted are speculative and are insufficient to establish the water requested will be put to beneficial use.

9. Carlisle's Objection (Department form 611) and attached pages are lengthy and wide-ranging in subject and scope. Carlisle's specific beneficial use objection is confusingly found after heading #5, though it is his first contention:

The first area of contention is whether or not there is a need for an additional water reservation (sic.) of 3662 acre feet within an area with a fifty mile radius of Culbertson. Generally it takes 40,000 barrels to frack a well once. (The Atlantis Water Solution's provisional request for water is a sufficient quantity to frack 702 wells in a year.) The amount requested exceeds the oil industry's ability in Montana to drill oil wells.

- a) In addition there are no less than 18 water marketing permits and three municipal water rights within the radius of this circle reserving in excess 12,000 acre feet of water a year.
- b) Clearly the oil service companies signing these letters of intent are not knowledgeable of the amount of water in the area and are signing letters of intent solely speculating about the availability of water for their own needs and the fact is *there is no binding act of intent on their part*

(Department File, Page 2 of Attachment of Objection filed by Carlisle)²

10. The Objection further alleges that the proposed use is purely speculative with regard to demand, availability, need, and beneficial use. (Pages 1- 2 of Attachment to Objection filed by Carlisle)

11. The rest of the assertions in Carlisle's objection are a mixture of objections to the adverse effect criteria, smatterings of beneficial use material, and general alleged "misrepresentations" by Atlantis. Carlisle's objection on the basis of adverse effect was deemed invalid by DNRC, as his basic premise is that his business (selling water) will be adversely affected by competition. Montana law requires that issuance of a permit not adversely affect the water rights of a prior appropriator. § 85-2-311(1)(b), MCA. Carlisle's argument confuses the exercise of a water right (protected by § 85-2-311(1)(b), MCA) with the exercise of his business.

² Carlisle repeatedly confuses the terms water reservation and water use permit both in his Objection and in his testimony. A reservation is a volume of water which has a protectable priority date and may be put to use in the future. State based water reservations are typically granted to municipalities, governmental entities and agencies, and conservation districts all of whom have a foreseeable need for water but no immediate need. A Beneficial Water Use Permit issued by DNRC is a permit to appropriate a specific amount for a specific purpose, and the water must be "perfected" or all put to use within a reasonable period.

Conclusions of Law

12. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA. Section 85-2-311, MCA, reads in pertinent part:

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

- (a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
- (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
 - (A) identification of physical water availability;
 - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
 - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
- (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use[.]

13. The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35. It is the Applicant’s burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC*. (DNRC Final Order 2005).

14. The PD to Grant issued by Hearing Examiner Vogler determined that the Applicant satisfied the applicable criteria for issuance of a permit. (PD to Grant)

15. An objection to an application must state facts indicating that one or more of the criteria in § 85-2-311, MCA are not met. Although the applicant has the burden of proof at all stages of the proceeding, an objector bears the burden of production to show how the Department's preliminary determination to grant the application does not satisfy the beneficial use criteria of § 85-2-311, MCA. Because an applicant retains the ultimate burden of proof, the applicant may present evidence at the contested case hearing to rebut any evidence that the objector proffers at the hearing.³

16. In the present case, the Department determined that Carlisle presented a valid objection to the beneficial use criteria of §§ 85-2-311(1)(d) and 85-2-310(9), MCA. For the purposes of this analysis and Order, this Hearing Examiner specifically considers two theories pursuant to which Carlisle maintains the Application fails to satisfy the beneficial use criteria based on Carlisle's Objection, subsequent discovery, and testimony and questioning at hearing:

- a) The market for water in the oilfield is saturated and thus the additional water cannot be beneficially marketed or used.
- b) The letters of intent fail to establish that the amount of water requested in the Application will be put to beneficial use because the letters of intent do not constitute binding contracts and are insufficient to establish the water requested will be put to beneficial use.

³ See generally, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT96, 112 P.3d 964 (2005) (MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim."

§ 26-1-401 states "[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."

§ 26-1-402 states "[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

BENEFICIAL USE/MARKETING CRITERIA

Findings of Fact

17. First, Carlisle argues that market forces will prevent Atlantis from successfully marketing water from its water depot. To this end he submitted as evidence numerous articles describing the slowdown in the eastern Montana oilfields based upon “rig count” numbers and other indicators. (See Objector’s Exhibits 1, 2, 16, and 17.) To counter, Atlantis produced witness testimony that the oil rig count is not an accurate indicator of future oilfield activity in eastern Montana, and that they anticipate increasing demand for water associated with oilfield activities.

18. Forest Dorn (Mr. Dorn) testified that there is not a direct correlation between rig counts (as evidenced in Objector’s Exhibit No. 1) and the number of “fracks” (hydro-fracking well development) that are being done.⁴ Therefore, the number of drill rigs does not correlate to the amount of water being used or needed in the service area. (Testimony of Forest Dorn Audio Record #05 @ 10:08)

19. Mr. Dorn testified that oil well development activity is projected to increase for a significant period of time into the future due to efforts to recover additional oil from the various oilfields in the proposed service area of the depot. (Testimony of Forest Dorn Audio Record #05 @ 8:40 and 38:40, Applicant’s Exhibit nos. 3 - 8)

20. Mr. Dorn testified that although distance, amount, and quality are all important factors in determining where an oil well development company will purchase water, cost is the ultimate determinative factor. (Testimony of Forest Dorn Audio Record #05 @ 48:09). Atlantis did not know what price would be charged for the water. (Cross Examination of Forest Dorn Audio Record #07 @ 33:09)

21. This Hearing Examiner finds that there will be an ongoing need for water in the oilfield and service area for the proposed permit. Once Atlantis has built infrastructure, it will be capable of providing water for this need. The testimony of Forest Dorn and Scott Formolo, in conjunction with Applicant’s Exhibits 3-8, indicates that Atlantis could *theoretically* market 3,622 acre-feet per year to the oilfield.

22. Next, Objector argues that the letters of intent do not constitute a binding intent on the part of the Applicant and are insufficient to demonstrate an actual need and actual end use of

⁴ “Fracking” is the major use of water in the oilfield. Applicant’s exhibit 12 shows recent oil well development activity in the service area using from 2.6 AF (840,000 gallons) to 31 AF (10,080,000 gallons) of water per well.

the Applicant's water. (Department File, Page 2 of Attachment of Objection filed by Carlisle, Testimony of Carlisle Audio Record #03 @ 38:20)

23. Atlantis relied on letters of intent as evidence of beneficial use of water from the depot pursuant to § 85-2-310(9)(c)(v)(A-D), MCA. DNRC has approved water marketing permits for oil and gas development in the past. (PD to Grant)

24. The letters of intent submitted by Atlantis were written at the direction of the DNRC Glasgow office personnel. Atlantis reviewed other water depot water permit applications and used a similar format. Atlantis maintains that it revised its letters of intent to be less specific and more general in accordance with advice from the Department. (Testimony of Scott Formolo Audio Record #06 @ 1:46 and 3:48)

25. Hearing Examiner Vogler's PD to Grant the Atlantis permit relied on three letters of intent to purchase water from Halliburton, Big Horn Leasing LLC, and Trustland Oil Field Services. All three letters are drafted from the same basic form, using generally the same language with different names and volumes. (PD to Grant)

26. Atlantis has communicated with Halliburton for many years concerning this proposed Atlantis water depot. (Testimony of Forest Dorn Audio Record #05 @ 54:41). Mr. Dorn testified that the water would be marketed for oilfield services and whatever other uses could be eventually identified. Atlantis is still identifying new customers and will continue do so in the future. (Testimony of Forest Dorn Audio Record #05 @ 1:00:10 through 1:01:20).

27. As the letters of intent are at the heart of the issue presented, and because of the evidence that Atlantis and Halliburton had been in discussions regarding the proposed depot for years, the body of the Halliburton letter of intent is reproduced below as an example:

Pursuant to our conversations concerning Atlantis Water Solutions, Inc. ("AWS) intent to apply for certain water rights in the state of Montana, Halliburton offers this letter as an expression of intent to enter into a contract with AWS for the purchase of 1,000 to 1, 500 acre feet of water per year. AWS is offering to provide a source of supply of water at a readily accessible location. Halliburton provides hydraulic fracturing and other services to industry in eastern Montana. It is anticipated that Halliburton's customers would use the water for various industrial purposes which includes but not limited to hydro-fracturing, fresh water treatment of oil and gas wells for improved production, fresh water for drilling fluids used in oil, gas, and water well drilling. The water will be used in the Montana Counties of Dawson, McCone, Richland, Roosevelt, and Sheridan.

It is understood that the parties would enter into a mutually acceptable Purchase and Sale Agreement that would define the commercial terms for the delivery and sale of water once AWS's Water Right Application is approved. It is also understood that Halliburton's intent to purchase water is predicated on the timely approval of the AWS's water right application and is based on certain commercial and technical assumptions by Halliburton.

(See Applicant's Show Cause Exhibit #4)

28. Each of these letters of intent describes the parties' intent to enter a contract to buy water from Atlantis at some point in the future for oilfield services including fracking, well development, and other oilfield activities. The letters of intent to enter a contract are contingent upon the parties reaching a mutually agreeable purchase and sales agreement after Atlantis obtains a permit. (id.)

29. The Big Horn Leasing, LLC letter references a volume of 300 acre-feet of water per year, the letter from Trustland Oilfield Services, LLC references a volume of 1000 acre-feet of water per year, and the Halliburton letter of intent references a volume of 1000 to 1500 acre-feet of water per year. The volume of water identified in each of the letters of intent is based upon "certain commercial and technical assumptions." No information about the basis or reasonableness of those assumptions is provided. (id.)

30. Together the three letters only amount to 2300 to 2800 acre-feet of water per year. Atlantis has requested 3622 acre-feet of water per year. There are no letters of intent for the additional 822 to 1322 acre-feet per year of water Atlantis proposes to appropriate. (id.)

31. All the potential water purchasers are using the water to frack oil wells. However, Forest Dorn testified that Halliburton might frack wells in Montana but would not haul its own water. Trustland Oil Services and Bighorn Leasing may actually truck water for Halliburton. (Testimony of Forest Dorn Audio Record #05 @55:22.) Thus the water that Trustland Oil Services uses to frack an oil well might be trucked by Bighorn Leasing and have been bought originally by Halliburton. Furthermore, Halliburton's Letter of Intent indicates that Halliburton's customers, not Halliburton, will be the end user of any water.

32. This Hearing Examiner finds that the letters of intent are speculative in that they merely reflect the intent to enter a contract for water at some future date if the parties can reach agreeable terms.

33. This Hearing Examiner finds that there is insufficient evidence about how the volume for each letter of intent was calculated because each letter of intent is based upon assumptions rather than a specified and identifiable need. Furthermore, the letters of intent do not account for the full 3622 acre-feet per year requested in the application.

34. This Hearing Examiner finds that the Applicant does not specifically identify the end users of the water requested. While three separate entities provided letters of intent, it appears from Mr. Dorn's testimony that at least a portion of the volume identified may have been double counted water destined for the same well site or end user. However, because the end user is not identified in the letters of intent I find it is not possible to resolve these uncertainties based upon the evidence of record.

35. The letters of intent are vague and indefinite in identifying the end user of the water and thus provide no assurance that Atlantis has a bona fide intent to appropriate the requested volume of water.

Conclusions of Law

36. An appropriator may appropriate water only for a beneficial use. § 85-2-301, MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohy v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003)(*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518). 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). 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, with the threat of out-of-state interests appropriating Montana water and concern over the marketing of water, the Montana Legislature expressly altered 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).

Montana law imposes additional criteria upon applicants who apply for a water marketing permit as found in § 85-2-310(9)(a)(v), MCA:

(v) except as provided in subsection (10), 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; ...

These marketing criteria are analyzed as part of the beneficial use criteria in a permit proceeding.

37. Statutory construction is a holistic endeavor that must account for statute's text, language, structure, and object. Statutes must be read and considered in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole. State v. Heath, 2004 MT 126, ¶¶ 24 and 27, 321 Mont. 280, 90 P.3d 426; Pilgeram V. Greenpoint 2013 MT 354, 373 Mont. 1, 313 P.3d 839; § 1-2-102, MCA. In order to establish the requisite bona fide intent with regard of marketing water for sale, the plain language of § 85-2-310(9)(c), MCA, requires proof regarding each person using the water, the amount of water each person will use, and "the existence of a firm contractual agreement" for the amount of water being used by each person.

38. Although the term "firm contractual agreement" is not defined, the legislative purpose of § 85-2-310(9)(c)(v), MCA, was to prevent speculation in water rights. See Chapter 399, Laws of Montana 1985. It is well settled under Montana law that applicant must prove that the amount of water requested in an application is necessary for the proposed beneficial use with precision before a permit is granted:

Under the pre-1973 legal framework for acquiring water rights in Montana, a valid appropriation could be accomplished by posting and filing a notice of appropriation and then proceeding to divert the water for a beneficial use.

Sections 89-810 to 812, R.C.M. (1947); *Intake Water*, 171 Mont. at 430, 558 P.2d at 1118. The process left many of the details of appropriation to be worked out during the excavation and construction phase of the project. For example, other than an affidavit signed by the appropriator, no other proof was required to show what quantity of water was actually required to support its intended beneficial use. See *Intake Water*, 171 Mont. at 419, 558 P.2d at 1112-13.

The 1973 Water Use Act fundamentally changed the process for obtaining a new water right by requiring a permit before appropriating water for beneficial use. Section 85-2-302, MCA. The permit process is front-end loaded in that a prospective appropriator must provide detailed information regarding project design in order to meet the rigorous criteria set forth in §85-2-311, MCA, before obtaining a permit to begin work. Any appropriation undertaken prior to obtaining a permit is illegal under the Act. Section 85-2-302(1), MCA.

Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, ¶¶ 34-35, 326 Mont. 241, 108 P.3d 518 (emphasis added); see also Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (the district court affirmed denial of permit where applicant requested permit to appropriate 800 acre-feet when the evidence only supported use of 200-300 acre-feet per year). The requirement that an applicant prove the amount of water needed for the proposed beneficial use reflects the prohibition of speculation otherwise known as the anti-speculation doctrine. Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900) (“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses”) See also Bailey v. Tintinger, 45 Mont. 154, 122 P. 575, 583 (1912) (the law will not encourage anyone to play the part of the dog in the manger, and therefore the intention must be bona fide and not a mere afterthought).

39. For example, the Department routinely denies permits and applications when applicants cannot demonstrate why a specific amount of water is necessary to maintain a fish pond; the “more is better for fish” argument is insufficient. See *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, (DNRC Final Order 1995); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000), *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003).

40. Montana water law also prohibits an individual from receiving a water right permit without a specific plan for how they intend to use the water and how much water they intend to use. See

In the Matter of Application for Beneficial Water Use Permit No. 65689-76LJ by Roger and Donna Worth (DNRC Final Order 1990) (Applicant not sure what he would do with irrigation, held to be no bona fide intent to appropriate.) In Sitz Ranch, of the 800 AF/yr requested by the applicant, the evidence only supported beneficial use of 200 – 300 AF/yr. The applicant argued that it should be granted a permit for the full 800 AF/yr, and at some point of time in the future the amount actually needed could be determined and the permits could be reduced to actual beneficial use at that time. The district court rejected this argument and concluded:

The statutory scheme and *Bitterroot River Protective Ass 'n. Inc. v. Siebel*, 2005 MT 60; 326 Mont. 241 clearly require that applicants demonstrate the amount of water to be applied to beneficial use before receiving a permit. If the Sitz approach were accepted, every applicant could obtain a permit for all of the water legally available, regardless of need.

It is clear that Sitz wants 800 acre feet as insurance against future need. That concern would never cease. It would be naive to expect that an applicant would abandon later a permit that it spent many years and many dollars to obtain. Sitz's argument that the permit be modified in a few years is unpersuasive. The statute instructs that the amount of water to be diverted must be shown precisely. Even if later amendment were to be allowed to relate back to the original application *Bitterroot* clearly shows that an amendment changing the amount 3 or 4 fold (800 acre feet *cf* 2-300 acre 8 feet) is not sufficiently precise.

Sitz Ranch at Pgs 2-3.

41. Other prior appropriation states that follow the anti-speculation doctrine have imposed similar “firm contractual agreement” requirements on appropriators who seek water for marketing. In Colorado River Water Conservation District v. Vidler Tunnel Water Company, 594 P.2d 566 (Colo. 1979), the Colorado Supreme Court looked at an application by a private enterprise seeking to market water for municipal use and determined the applicant failed to establish the necessary intent to put water to beneficial and was speculative:

We hold that the evidence presented regarding future needs and uses of the water by the municipalities contacted by Vidler falls short of what is necessary to indicate an intent to appropriate. Vidler has no firm contractual commitment from any municipality to use any of the water. Even the City of Golden has not committed itself beyond an option which it may choose not to exercise. The mere negotiations with other municipalities clearly do not rise to the level of definite commitment for use required to prove the intent here required.

Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for *use*, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of *others* not in privity of contract, or in any

agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would -- as a practical matter -- discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains. Twenty-five years ago this Court emphatically rejected the "claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." Denver v. Northern Colorado Water Dist., 130 Colo. 375, 408, 276 P.2d 992, 1009 (1954).

While Vidler's efforts possibly went beyond mere speculation, there was no sufficient evidence that it represented anyone committed to actual beneficial use of the water not intended for use on its own land. Indeed, there is not even evidence of firm sale arrangements. In essence, water rights are sought here on the assumption that growing population will produce a general need for more water in the future. But Vidler has no contract or agency relationship justifying its claim to represent those whose future needs are asserted.

Vidler at 568-69. See also Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C., 249 P.3d 794, 798-99 (Colo. 2011)(anti-speculation doctrine requires firm contractual commitments with one with a specific plan and intent to put water to a beneficial use, including the need for water); Bd. of Cnty. Comm'rs v. United States (In re the Application for Water Rights of the Bd. of Cnty. Comm'rs), 891 P.2d 952, 959 (Colo.1995) ("To prevent speculation, Vidler requires a firm contract or agency relationship with a proposed user who is committed to beneficially use the water.")

42. Read in the context of the § 85-2-311, MCA, criteria along with the above case law addressing beneficial use and the anti-speculation doctrine, this Hearing Examiner concludes that an applicant must provide "firm contractual agreements" for the full volume of water requested in a permit proceeding in order to satisfy the marketing and beneficial use criteria of §§ 85-2-310(9)(c) and 311, MCA. At a minimum, the terms of a "firm contractual agreement" must include sufficient certainty to ensure that a specific volume of water will actually be put to beneficial use by the contracting party in order to comply with the anti-speculation doctrine and satisfy the requirement of bona fide intent to put the water to beneficial use. Furthermore, whether based upon one firm contract or many, the total volume of water for which firm contracts have been entered with an applicant must be equal to the total amount of water requested in the permit application.

43. In the present case, the letters of intent simply indicate that *if* the parties can reach a mutual agreement regarding the terms of the contract and the price for the water, the parties intend to enter a Sale and Purchase contract at some future date. (FOF #28). The volume of water identified in all three letters of intent is based upon unknown technical and commercial assumptions. (FOF #29). There is no evidence as to what the assumptions are, whether they are reasonable, or whether they reflect an actual need. In the case of Halliburton, the volume varies by 500 acre-feet per year. (FOF #27). Finally, the language of the letters of intent along with the testimony of Mr. Dorn creates a cloud of uncertainty with regard to who the actual end-user will be. (FOF #26)

44. This Hearing Examiner concludes that the letters of intent fail to satisfy the requirement that an applicant submit firm contractual agreements for the amount of water being used by each person. § 85-2-310(9), MCA.

45. The Applicant also failed to prove that 3622 acre-feet per year is the amount needed and will be put to actual beneficial use. Similar to Sitz Ranch, even if letters of intent were construed to satisfy the plain language requiring firm contractual agreements, at best Atlantis has proven there is possible interest in purchasing between 2300 and 2800 acre-feet of water per year. The evidence further establishes that Atlantis has not identified end users for the remaining 822 to 1322 acre-feet of water per year. It plans to do so at some indefinite time in the future. However, the Sitz Ranch Court made it abundantly clear that beneficial use requires an applicant to prove both the need and actual use for all of the water requested in a permit under Montana law.

46. This Hearing Examiner recognizes that as a matter of practice, the Department has accepted less than firm contractual commitments for the full volume of water requested at the permitting stage as evidence of *bona fide* intent to appropriate if the applicant could provide letters of intent to buy water for an amount of at least 50% of the volume sought. (See Applicant's Show Cause Exhibit #4.) The hearing examiner's decision in the present case is a departure from that past practice.

47. The Montana Supreme Court has held that an agency must provide a reasonable explanation for departure from prior decisions. See Waste Management Partners of Bozeman, Ltd. v. Montana Dept. of Public Service Regulation, 284 Mont. 245, 944 P.2d 210 (1997). The persuasiveness of past administrative decision depends upon the thoroughness evident in its

consideration, the validity of its reasoning and its consistency with earlier and later pronouncements of the same agency. Montana Dept. of Highways v. Midland Materials Co., 204 Mont. 65, 662 P.2d 1322 (1983).

48. Prior to Carlisle's objection, it does not appear that the Department's practice was subject to challenge or objection. Having considered the nature of Carlisle's objection and evaluated the evidence against the statutory criteria of §§ 85-2-310(9)(c) and -311(1)(d), this Hearing Examiner concludes that despite DNRC's practice in past marketing permit decisions and its resultant reliance upon "letters of intent," Montana law requires an applicant to include "each firm contractual agreement for the specified amount of water for each person using the water" and to prove, with precision, the amount of water that will actually be used pursuant to §§ 85-2-310(9)(c)(v)(D) and 311, MCA. The statement found in § 85-2-310(9)(a)(v)(A) and (D), MCA, that the Department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if the application does not document information detailing each person who will use the water and the amount of water each person will use, and each firm contractual agreement for the specified amount of water for each person using the water, is not ambiguous. It arises from an express legislative intent to prevent speculation in water marketing and cannot be ignored.

49. The letters of intent submitted by the Applicant in this case do not provide sufficient information to prevent speculation as required by the plain language of § 85-2-310(9)(c)(v)(D), MCA.

50. Further, the Montana Water Use Act permit criteria read in conjunction with § 85-2-310(9), MCA, require that an applicant prove the amount that will actually be put to beneficial use before a permit is granted. Not only do the letters of intent provide insufficient information to ensure that Atlantis is not engaging in speculative activity, but they do not even reference the entire amount requested.

51. Accordingly, this Hearing Examiner concludes that the Applicant has not proven by a preponderance of the evidence that 3622 AF of diverted volume and 5 CFS of water requested is the amount needed to sustain the beneficial use of water marketing and has not met its burden of proof with regard to §§ 85-2-310(9)(c)(v) and 311(1)(d), MCA.

Subject to the terms, analysis, and conditions in this Order, the Department determines that Application for Beneficial Water Use Permit No. 40S 30066181 by Atlantis Water Solutions LLC is **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.

Dated this 4th day of June 2015.

/Original signed by Martin L. Balukas/

Martin L. Balukas, Hearing Examiner
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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 4th day of June 2015 by first-class United States mail.

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