

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

**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 40S 30066181)
BY ATLANTIS WATER SOLUTIONS LLC } PRELIMINARY DETERMINATION TO
DENY PERMIT**

On April 29, 2013, Atlantis Water Solutions, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30066181 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 5 CFS up to 3800 Acre-Feet (AF) per annum. The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated June 28, 2013. The Applicant requested a 15 day extension on the statutory time period to submit a deficiency response in order to keep their priority date. The Applicant provided responses to the identified deficiencies dated August 9, 2013 and September 23, 2013. The Application was determined to be correct and complete as of September 30, 2013. A draft Preliminary Determination to Deny was drafted and sent to the Applicant December 9, 2013. The Applicant requested a meeting with the Department and submitted a waiver of timelines December 20, 2013. The meeting between the Applicant and Department occurred on January 30, 2014. On the day of the meeting, the Applicant requested a 60 day extension in which to provide additional information; a written request for the extension was provided February 2, 2014. Additional information was received by the Department March 24, 2014. An Environmental Assessment for this Application was completed November 21, 2013.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Aerial imagery showing planned POD and POU

- Documentation of possessory interest at the POU
- Letters of Intent to Purchase Water

Information received after application filed

- Deficiency Response dated August 9, 2013
 - Design plans and specifications including pump make/model and curve
 - Water Marketing Purpose Addendum
 - Possessory interest documentation for POD and POU
- Additional Deficiency Response dated September 23, 2013
 - Documentation that establishes the authority of Scott Formolo to sign for Atlantis Water Solutions, LLC
 - Letters of Intent to Purchase Water including service area maps
- Information received during meeting with Applicant on January 30, 2014
 - CDM-Smith Addendum #1 prepared for Atlantis Water Solutions, LLC by Jay V. Accashian dated January 30, 2014
 - Letters of Intent to Purchase Water
- Information received March 24, 2014
 - Amendment to Application (reduced volume requested to 3622 AF)
 - Applicant's responses to proposed findings of fact
 - CDM-Smith Inc. Addendum #1 prepared for Atlantis Water Solutions, LLC by Jay V. Accashian dated January 30, 2014
 - Revised Letters of Intent to Purchase Water
 - Large service area map

Information within the Department's Possession/Knowledge

- USGS gaging station records from July 1941- September 2012: USGS gaging station #06185500, Missouri River near Culbertson, MT
- Department Records of existing water rights

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1- December 31 at 5 CFS up to 3622 AF, from a point in Government lot 3 of Section 3, T27N, R56E, Roosevelt County, for Water Marketing use from January 1- December 31. The place of use is generally located NESE Section 28, T28N, R56E, Roosevelt County.
2. None of the water diverted will return to the source, therefore the use is considered 100% consumptive.
3. Diverted water will be available for marketing to oil and gas service companies, oil and gas operators, rural municipalities, and other private and public entities. In order to substantiate the beneficial use criteria and ensure that the requested flow rate and volume is not exceeded during years of high oil field activity, monitoring and flow rate reporting is necessary. Design plans included with the application call for a magnetic flowmeter at the river pump station which will be used to monitor flow rate and volume diverted.
4. 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.

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

GENERAL CONCLUSIONS OF LAW

5. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

6. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

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

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal

demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

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

the evidence. *Id.* A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

7. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

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

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

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

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

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

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

10. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

11. The Applicant is requesting a maximum flow rate of 5 CFS up to 3622 AF annually from the Missouri River. The proposed point of diversion is located approximately 0.2 miles upstream of USGS gaging station #06185500 near Culbertson, MT. The median of mean monthly flows were obtained from the gaging station records as well as median of mean volumes, which were calculated by converting CFS to Acre-Feet (CFS x 1.98 x days per month).

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of monthly mean (CFS)	10870	10935	9171	8000	8375	8844	9068	9676	8779	8455	7751	9742

12. The following is a list of existing water rights between the requested point of diversion and the specified USGS gaging station.

Rights between POD and gaging site						
Water Right #	Flow (CFS)	Volume (AF)	Q Section	Section	Township/Range	Period of Diversion
40S 77646 00	0.68	365	SENW	3	27N56E	01/01 to 12/31
40S 1549 00	1.78	257	SWNENW	3	27N56E	01/01 to 12/31

13. This list was used to evaluate the flow rate physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights, and adding these values to the median of mean flow values for the gaging station since the requested point of diversion is upstream of the gaging station. The result is the monthly median of mean flow rate for the Missouri River physically available at the point of diversion specified by the Applicant.

Physical Availability-Flow Rate (CFS)			
Month	Median Monthly Flows	Water Rights Between POD and Gage	Flow Rate Physically Available
Jan	10870	2	10872
Feb	10935	2	10937
Mar	9171	2	9173
Apr	8000	2	8002
May	8375	2	8377
Jun	8844	2	8846
Jul	9068	2	9070
Aug	9676	2	9678
Sep	8779	2	8781
Oct	8455	2	8457
Nov	7751	2	7753
Dec	9742	2	9744

14. The list of existing water rights between the specified USGS gaging station (USGS Station #06185500) and the point of diversion was also used to evaluate the volume physically available each month by determining the monthly volume being diverted. This was done by dividing the total volume for each existing right by the number of months each diversion takes place. The

sum of these values was then added to the median of mean monthly volumes measured at the USGS gaging station for each month the use occurs to determine volume physically available at the point of diversion specified by the Applicant.

Physical Availability-Volume (AF)			
Month	Median Monthly Volumes	Water Rights Between POD and Gage	Volume Physically Available
Jan	667201	52	667252
Feb	606236	52	606288
Mar	562885	52	562937
Apr	475200	52	475252
May	514058	52	514109
Jun	525334	52	525385
Jul	556594	52	556646
Aug	593913	52	593965
Sep	521473	52	521524
Oct	518968	52	519020
Nov	460409	52	460461
Dec	597964	52	598016

15. The Department finds that surface water on the Missouri River is physically available at the proposed point of diversion in the amount requested by the Applicant.

CONCLUSIONS OF LAW

16. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

17. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

18. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

19. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 11-15)

Legal Availability:

FINDINGS OF FACT

20. Legal availability of surface water on the Missouri River was determined from the proposed point of diversion to a point approximately five miles downstream of the gaging station. For the Missouri River below Fort Peck Dam, the Department has historically identified an area of potential impact 3-5 miles downstream of a proposed point of diversion. The following list shows water rights located up to 5 miles downstream of the gaging station which may be affected by the proposed appropriation.

Water Right #	Flow (CFS)	Volume (AF)	Q Section	Section	Township/Range	Period of Diversion
40S 186743 00	2	300	N2	19	27N57E	01/01 to 12/31
40S 137580 00	0	0.24	S2	13	27N56E	01/01 to 12/31
40S 114654 00	3	451	SESWSE	13	27N56E	04/01 to 10/15
40S 106914 00	5	804		13	27N56E	04/15 to 10/15
40S 106915 00	4	520		13	27N56E	04/15 to 10/15
40S 171255 00	16	5647	NENESW	19	27N57E	04/15 to 10/19
40S 186742 00	3	544		13	27N56E	04/15 to 10/19
40S 97742 00	3	543	SESWSE	13	27N56E	05/01 to 09/30
40S 13498 00	2	324		13	27N56E	05/01 to 10/01
40S 106990 00	4	636	NESWNW	11	27N56E	04/01 to 10/15
40S 77646 00	1	365	SESW	3	27N56E	01/01 to 12/31
40S 1549 00	2	257	SWNENW	3	27N56E	01/01 to 12/31

*Right with a designated flow of 0 is an instream stock right, which has a claimed diversion rate of 0.

21. The list of existing legal demands within the area of potential impact, including the Montana Department of Fish, Wildlife, & Parks instream flow reservation, was then used to compare the physical availability (median of mean monthly flows and volumes) of water to the amount of water already appropriated under the existing water rights and reservations. The monthly volumes of downstream water rights were calculated by dividing the claimed volumes of the downstream rights by the number of months of the claimed period of use. The Applicant is requesting a flow of 5 CFS up to 3622 AF per year. The legal availability is summarized in the tables below.

Legal Availability-Flow Rate (CFS)				
Month	Flow Rate Physically Available at POD	FWP Instream Flow	Downstream Water Rights	Flow Rate Legally Available
Jan	10872	5178	4	5690
Feb	10937	5178	4	5755
Mar	9173	5178	4	3991
Apr	8002	5178	39	2786
May	8377	5178	44	3156
Jun	8846	5178	44	3625
Jul	9070	5178	44	3849
Aug	9678	5178	44	4457
Sep	8781	5178	44	3560
Oct	8457	5178	41	3238
Nov	7753	5178	4	2571
Dec	9744	5178	4	4562

Legal Availability-Volume (AF)				
Month	Volume Physically Available at POD	FWP Instream Flow	Downstream Water Rights	Volume Legally Available
Jan	667252	317826	77	349350
Feb	606288	287068	77	319143
Mar	562937	317826	77	245035
Apr	475252	307573	1306	166373
May	514109	317826	1479	194805
Jun	525385	307573	1479	216333
Jul	556646	317826	1479	237341
Aug	593965	317826	1479	274660

Sep	521524	307573	1479	212472
Oct	519020	317826	1370	199824
Nov	460461	307573	77	152811
Dec	598016	317826	77	280113

22. The comparison in the following tables shows water is legally available throughout the proposed period of diversion at the planned point of diversion. The monthly volumes for the comparison are equal to the total requested volume divided by the period of use (3622 AF/12 months=AF/month).

Comparison-Flow Rate (CFS)			
Month	Flow Rate Legally Available at POD	Flow Rate Requested	Flow Rate Remaining
Jan	5690	5	5685
Feb	5755	5	5750
Mar	3991	5	3986
Apr	2786	5	2781
May	3156	5	3151
Jun	3625	5	3620
Jul	3849	5	3844
Aug	4457	5	4452
Sep	3560	5	3555
Oct	3238	5	3233
Nov	2571	5	2566
Dec	4562	5	4557

Comparison-Volume (AF)			
Month	Volume Legally Available at POD	Volume Requested	Volume Remaining
Jan	349350	301.8	349048
Feb	319143	301.8	318841
Mar	245035	301.8	244733
Apr	166373	301.8	166071

May	194805	301.8	194503
Jun	216333	301.8	216032
Jul	237341	301.8	237039
Aug	274660	301.8	274358
Sep	212472	301.8	212171
Oct	199824	301.8	199522
Nov	152811	301.8	152510
Dec	280113	301.8	279812

23. The Department finds that surface water on the Missouri River is legally available during the entire proposed period of diversion at the proposed point of diversion in the amount requested by the Applicant.

CONCLUSIONS OF LAW

24. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

25. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that

those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

26. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 20-23)

Adverse Effect

FINDINGS OF FACT

27. The Applicant has shown legal availability of surface water from the Missouri River during all months of the proposed period of diversion. Design plans include multiple flow meters which will allow the Applicant to measure total diverted water at the pump station (flow rate and volume) and total water purchased at the depot. The Applicant indicated in their application materials that if there were a shortage of water they could cease diversions until flow is adequate as reflected at the gaging station. The Department finds there will be no adverse effect due to water being physically and legally available in the amount requested and the Applicant's ability to shut off their pumps during times of water shortage.

CONCLUSIONS OF LAW

28. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for

the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

29. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

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

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

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

33. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

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

Adequate Diversion

FINDINGS OF FACT

35. The proposed diversion is a surface water diversion from the Missouri River just upstream of the MT Hwy 16 Bridge. The means of diversion is three pumps set in a pump station consisting of a circular concrete wet well adjacent to the river. Water from the river will be transferred to the wet well via a 16 inch diameter intake pipe. The intake screen will be fitted with a compressed air-burst system for periodic cleaning and will be installed below the normal low level of the river. The pumps used in the wet well will be Flowserve 12EMM or 12JKH pumps which are both 100 horsepower pumps each capable of diverting 780 gallons per minute at 290 feet of head. The pumped water will be manifold together once leaving the wet well and will pass through a 10 inch magnetic flow meter to measure flow and volume withdrawn. Diverted water will then be transported to the water depot via a 14 inch diameter HDPE pipeline. There will be two above ground storage tanks which will receive water from the pump station. The tanks will be capable of storing a total of 10.74 AF and will have safety overflows that pipe water to an overflow pond if pumps do not shut off when the tanks are full. Water level instrumentation in the storage tanks will control the pump station using high and low set points.

36. Water from the storage tanks will be pumped from the storage tanks through the truck bay water loop using 4 Peerless C1250A centrifugal pumps each capable of transporting 1000 GPM, for a maximum flow of 4000 GPM through the truck bay water loop. Water will be sent through filtration units prior to reaching fill stations. Each filling station will be capable of filling trucks at a rate up to 400 GPM.

37. The water depot itself will have 10 filling stations. Pressure will be maintained in the truck bay loop so that after a tanker truck pulls into a bay and pays for the water, an automated valve on the fill line will open and fill the truck. Each fill station will be equipped with a flow meter

that will control the adjacent valve to dispense the correct volume of water. A hot water boiler system will be set up to provide heated water at five of the filling stations.

38. Any exposed parts of the system will be properly insulated to ensure that operation can occur during winter.

39. The Department analyzed the flow rate and volume requested. At a constant diversion rate of 5 CFS over the course of a year, the Department finds that the requested volume of 3622 AF is attainable. The requested volume assumes the river pump is continuously diverting water at a rate of 5 CFS throughout the entire year. While the pump may theoretically be capable of producing the requested volume, the plan for operation is unreasonable in assuming that filling the trucks would be timed such that the river pump would pump continuously. (See FOF 44)

CONCLUSIONS OF LAW

40. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

41. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

42. Applicant has not proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use of 3622 acre-feet. § 85-2-311(1)(c), MCA. (FOF 35-39)

Beneficial Use

FINDINGS OF FACT

43. The Applicant proposes to use water for water marketing which is a recognized beneficial use (§85-2-102(4), MCA), at a rate of 5 CFS up to 3622 AF per annum. In order to achieve the requested volume of 3622 AF per year, constant pumping at the requested rate of 5 CFS is

necessary. Marketing 3622 AF calculates out to one 5000 gallon tanker truck being filled every 2.2 minutes, or 10 trucks filled simultaneously every 22 minutes, continuously throughout the year (3622 AF x 325,851 gal/AF = 1,180,232,322 gallons ÷ 5000 gallons/truck = 236,046 trucks. 525,600 min/year ÷ 236,046 trucks = 2.2 minutes).

44. Montana Code Annotated (MCA) 85-2-310 (9)(v)(D) states that if water will be marketed to other users, a firm contractual agreement must be provided, which is to include the specified amount of water for each person using the water. The Department has previously recognized that it is difficult to obtain contractual commitments when an applicant does not yet have a water right to sell water, so the Department requires letters of intent to purchase water with applications for water marketing use in which the total volume of the letters is equal to or greater than 50% of the volume requested in the application.

45. Six letters of intent to purchase water were included in additional information provided by the Applicant following the January 30, 2014 meeting: Culbertson Volunteer Fire Department (500 acre-feet); Bainville Volunteer Fire Department (500 acre-feet); Sidney Volunteer Fire Department (500 acre-feet); Big Horn Leasing LLC (300 acre-feet); Trustland Oil Field Services (1000 acre-feet); and Halliburton (1000-1500 acre-feet). Three of the letters of intent provided were from volunteer fire departments for the purchase of 500 AF per annum for use in “various domestic uses which includes but not limited to firefighting, irrigation and lawn and gardening and for livestock.” As the volunteer fire departments are not in the business of irrigating, lawn and gardening or watering livestock, the letters of intent are for purchasing water for resale. The Halliburton letter of intent states “It is anticipated that Halliburton’s customers would use the water for various industrial purposes” indicating they are purchasing water for resale. The Montana Water Use Act does not support speculation in water rights. Applicants must come forward with a defined plan for beneficial use. While water for sale is a recognized beneficial use, it is marketing for a specific end use. This is consistent with the intent of the Montana Water Use Act to facilitate the provision of water for actual end use for the benefit of its residents. Speculation in water rights was addressed by the Department in the deficiency letter sent to the Applicant.

46. The Department finds that the letters of intent to purchase water by volunteer fire departments for “various domestic uses” do not constitute marketing for a specific end use and therefore do not support a bona fide intent to appropriate water by the Applicant. Likewise, the

letter of intent from Halliburton not only involves marketing for resale, it is speculative and does not support bona fide intent by the Applicant.

47. The letters of intent provided by the Applicant failed to meet Department requirements in that a minimum of 50% of the requested volume is accounted for through letters of intent to purchase water which will support a bona fide intent to appropriate water by the Applicant.

48. The letters of intent do not explain the nature of the relationship between the applicant and each person using the water.

49. The letters of intent to purchase water also include the stipulation “it is understood” the purchaser’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” without defining what those “certain commercial and technical assumptions” are. Based upon this language, it appears that the amount of water identified in the letter of intent is speculative in that it is based upon assumptions rather than a specified and identifiable need.

50. The application was signed by Scott Formolo. In the deficiency response a letter was submitted by Forest Dorn stating that Scott Formolo is the Chief Operating Officer of Atlantis Water Solutions LLC. All of the letters of intent were addressed to Forest Dorn, President, Atlantis Water Solutions but signed by George Lantz, CEO, Atlantis Water Solutions, Inc. It is unknown who actually has signing authority for the Applicant, Atlantis Water Solutions LLC, and whether the water will actually be sold by Atlantis Water Solution, Inc., which appears to be a different company and would again indicate sale for resale.

51. Based on the information within the application, the Department finds that the criteria for beneficial use have not been met.

CONCLUSIONS OF LAW

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

53. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13,

60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

54. 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); see also Royston; Ciotti.

55. 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).

56. 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).

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; ...

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 previously recognized that it is difficult to obtain contractual commitments when an applicant does not yet have the water right to sell water. *In the Matter of Application Nos. 42B-30011045 and 42B-30014358 for Beneficial Water Use Permit by Fidelity Exploration and Production Company* (DNRC 2007), *rev'd on other grounds, Northern Plains Resources Council et al. v. Montana Department of Natural Resources et al.*, Cause No. CDV-2007-425, Montana First Judicial District Court *Memorandum and Order on Petition for Judicial Review* (December 15, 2008). Accordingly, the Department has accepted less than full contractual commitment at the permitting stage 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.

57. Section 85-2-310(9)(c)(v)(A), MCA, requires identification of "each person who will use the water and the amount of water each person will use." The language of the statute is clear,

unambiguous, direct and certain, and consequently the statute speaks for itself; no further interpretation is required, and there is nothing left for the court to construe. E.g., Ravalli County v. Erickson, 2004 MT 35, ¶ 12, 320 Mont. 31, 85 P.3d 772. The letters of intent for Culbertson Volunteer Fire Department, Bainville Fire Department, and Sidney Fire Department do not constitute a “person who will use the water and the amount of water each person will use,” as these organizations are clearly not in the business of providing water for “various domestic uses”, the purported beneficial end use of the water. The Halliburton letter indicates that Halliburton’s customers are the beneficial end-users who Halliburton “anticipates” would use the water for various industrial purposes, but does not identify those end users. It is also unclear who or what “Big Horn Leasing LLC” is and whether it is a beneficial end-user of water and thus this purported letter of intent fails this requirement also. Applicant has not complied with §85-2-310(9)(c)(v)(A), MCA.

58. Section 85-2-310(9)(c)(v)(C), MCA, requires identification of “the nature of the relationship between the applicant and each person using the water.” The language of the statute is clear, unambiguous, direct and certain, and consequently the statute speaks for itself; no further interpretation is required, and there is nothing left for the court to construe. E.g., Ravalli County v. Erickson, 2004 MT 35, ¶ 12, 320 Mont. 31, 85 P.3d 772. None of the letters of intent submitted with the Application provide the requested information. Applicant has not complied with §85-2-310(9)(c)(v)(C), MCA.

59. Section 85-2-310(9)(c)(v)(D), MCA, requires “each firm contractual agreement for the specified amount of water for each person using the water.” The language of the statute is clear, unambiguous, direct and certain, and consequently the statute speaks for itself; no further interpretation is required, and there is nothing left for the court to construe. E.g., Ravalli County v. Erickson, 2004 MT 35, ¶ 12, 320 Mont. 31, 85 P.3d 772. None of the letters of intent by their own terms constitute a “firm contractual agreement.” Applicant has not complied with §85-2-310(9)(c)(v)(D), MCA.

60. Section 85-2-310(9)(c)(iv), MCA, requires applicant submit information “for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use.” Because Applicant failed to provide the information

required under 85-2-310(9)(c)(v), Applicant has also failed to comply with Section 85-2-310(9)(c)(iv), MCA.

61. The State of Montana does not consider water marketing simply for resale to be a bona fide beneficial use, but rather speculation in water. Anti-speculation was the impetus for the water marketing sections currently found in §85-2-310, MCA and is supported by the Montana Constitution which provides that the water is owned by the State for use of its people for beneficial use (Art. IX, §3). While the language of the statute is clear and requires no further interpretation, 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.

As recognized by the Supreme Court in 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. We recognize the doctrine that right to the use of water may be owned without regard to the title to lands upon which the water is to be used; that is, that a right to the use of water is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another. But, as every appropriation must be made for a beneficial or useful purpose (section 1881, Civ. Code), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof ...

See also Bailey v. Tintinger, 45 Mont. 154, 122 P. 575, 583 (1912) (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); 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.”).

62. Applicant did not comply with the requirements of §85-2-310(9)(c)(iv) and (v), MCA, and the Department finds that this Application is speculative and does not show good faith or bona fide intent to appropriate water for a beneficial use.

63. The letters of intent received following the January 30, 2014 meeting specified water would be used in Montana counties of Dawson, McCone, Richland, Roosevelt, and Sheridan. An attached map of the service area depicts a 50 mile radius covering all or parts of the five counties named in the letter of intent but not extending into North Dakota.

64. Applicant proposes to use water for Water Marketing which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has not proven by a preponderance of the evidence that the beneficial use of Water Marketing is needed or that 3622 AF of diverted volume and 5 CFS of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 43-51)

Possessory Interest

FINDINGS OF FACT

65. This application is for instream flow, sale, rental, distribution, or is a municipal use application 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. 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.

CONCLUSIONS OF LAW

66. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

67. 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.

The place of use for sale or marketing is the point at which the ownership of the use of the water transfers. *In the Matter of Application Nos. 42B-30011045 and 42B-30014358 for Beneficial Water Use Permit by Fidelity Exploration and Production Company (DNRC 2007), rev'd on other grounds, Northern Plains Resources Council et al. v. Montana Department of Natural Resources et al.*, Cause No. CDV-2007-425, Montana First Judicial District Court *Memorandum and Order on Petition for Judicial Review* (December 15, 2008); see also *Masters Report*, Water Court Case No. 76HE-166 (“place of use” for water marketing at State-owned Painted Rocks Reservoir is the dam because the ownership of the water transfers at the dam). In this case, this point is the depot where the water trucks are filled. The ultimate place of use of the water is represented in the contracts for sale of the water. The Applicant has provided a general service area to further describe where the water will ultimately be used for oil field production. This water may only be used in the State of Montana.

68. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 65)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30066181 should be DENIED. The Applicant did not prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate (§ 85-2-311(1)(c)) or that the proposed use of water is a beneficial use (§ 85-2-311(1)(d)).

NOTICE

The Department has determined your application should be denied based upon findings specified in the above Final Preliminary Determination Decision. Pursuant to § 85-2-310, Mont. Code Ann. (MCA), if the Department proposes to deny an application for a permit or a change in appropriation right under § [85-2-307](#), MCA, unless the applicant withdraws the application, the Department shall hold a hearing pursuant to § [2-4-604](#), MCA, after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

Your Application has been forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why the Application should not be denied. A hearing date will be set within 45 days of the date of this letter and a notice of hearing and appointment of Hearing Examiner will be forwarded to you. You may contact the Department to cancel the hearing if you do not wish to proceed with a hearing. **If you do not proceed to hearing and complete the hearing process, the Department's Preliminary Determination Decision will become a Final Decision.**

To exhaust your administrative remedies under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) on a denial of an application, you must proceed to the show cause hearing, complete the hearing process and receive a final order from the Department. Only a person who has exhausted his or her administrative remedies available within the agency and is aggrieved by a final order of the Department is entitled to judicial review under Montana Administrative Procedure Act (§2-4-702, MCA).

DATED this 17th day of April, 2014.

Original Signed by Denise Biggar
Denise Biggar, Regional Manager
Glasgow Water Resources Office
Department of Natural Resources and Conservation