

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 42M 30104121 BY CANDEE ANGUS FARM INC)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On October 13, 2015, Candee Angus Farm Inc (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30104121 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1047.4 GPM (Gallons per Minute) or 2.33 CFS (Cubic Feet per Second) up to 650 acre-feet (AF) diverted volume of groundwater for water marketing. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated November 16, 2015. Applicant responded with information dated December 28, 2015. A minor amendment to the Application was received on January 29, 2016. The Application was determined to be correct and complete as of February 18, 2015. An Environmental Assessment for this Application was completed on March 4, 2016.

INFORMATION

The Department considered the following information submitted by the Applicants.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Water Marketing Purpose Addendum
- Maps: aerial photo with the proposed wells and water depot site depicted.
- Electronic copy of Form 633
- Contracts with Whiting Oil & Gas Corporation and Rockwater WM North Dakota, LLC

Information Received after Application Filed

- Deficiency response received December 28, 2015
- Minor Amendment to the Application Received on January 29, 2016

Information within the Department's Possession/Knowledge

- Aquifer Test Report by DNRC ground water Hydrologist Attila Fohnagy, dated February 16, 2016
- Depletion Report by DNRC ground water Hydrologist Attila Fohnagy, dated February 17, 2016
- Department record of existing water rights
- USGS records for gaging station #06329500, Yellowstone River near Sidney, MT

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 a groundwater aquifer by means of three wells (well #1-3, 375-434 feet deep) from January 1-December 31 at 1047.4 GPM (2.33 CFS) up to 650 AF, from points in the NWNWSENE, SWNWSENE and NESESWNE Section 22, T24N, R59E, Richland County, for water marketing use from January 1-December 1. The place of use (water depot) is located in the SENESE Section 22, T24N, R59E, Richland County. The Applicant provided a general service area map which depicts an area with a radius of approximately 14 miles from the proposed project, limited to the state of Montana.
2. Water from the proposed diversion will be trucked from the site for use in oil well development. The consumptive use of the proposed diversion is considered 100 percent.

3. The water sold under this Application will be used in the oil field industry. Water sales will be dependent on oil field activity during the year. 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. The Applicant's design plans include the use of totalizing flow meters installed at each well to measure the flow rate and volume diverted. Flow meters will also be installed each of the four loadouts at the water depot that will measure the amount of water pumped into the trucks.

4. The Applicant provided a contract to purchase water which included a condition stating that water purchased will not be used outside the state of Montana. A condition which states that the water cannot be transported outside the state will also be added to the permit to limit use of the water to within Montana. Depot access will be limited to valid contract holders through a system where security codes must be entered into the system before water can be dispensed.

§ 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 provided aquifer test results for a 72-hour pump test on its proposed production well. An Aquifer Test Report and Depletion Report were completed by DNRC groundwater Hydrologist Attila Felnagy on February 16, 2016 and February 17, 2016, respectively. The Aquifer Test Report confirmed that the aquifer test and methods utilized were adequate.

12. This project will use three wells located approximately 800 feet apart. Well #1 is 375 feet deep, has a casing diameter of 8 inches, and a static water level of 141 feet. The screened portion of the well is from 255-375 feet below ground surface (BGS). Well #2 is 380 feet deep, has a casing diameter of 8 inches, and a static water level of 127.5 feet. The screened portion of the well is from 258-380 BGS. Well #3 is 434 feet deep, has a casing diameter of 8 inches, and a static water level of 167.6 feet. The screened portion of the well is from 313-434 feet BGS. The wells are completed in a confined sandstone aquifer of the Fort Union Formation between 75 feet to 120 feet locally. The confining unit above the aquifer is a low-permeability 100 foot thick shale unit.

13. Background groundwater monitoring of static water levels was performed on the Well #1 through Well#3. A 72-hour aquifer test was conducted on Well #1 with an average flow rate of 362.7 GPM. Eight hour drawdown tests were conducted on Well #2 and Well #3. A variance was requested and granted for conducting 8 hour tests on Well #2 and Well #3.

14. The 72-hour aquifer test started on November 22, 2014, at 4:41 P.M. and continued uninterrupted until 4:41 P.M. on November 25, 2014, at an average flow rate of 362.7 GPM for the duration of the test. Discharge was measured using a totalizing flow meter and was conveyed 200 feet down slope away from the site. The maximum drawdown in the pumping well (Well #1) was 184.7 feet from the static water level of 141.5 feet BGS leaving 48.8 feet of available drawdown. Well #2 and Well #3 are located 316 feet and 816 feet from the Well #1 and exhibited maximum drawdowns of 36.5 feet and 21.7 feet.

15. Cooper – Jacob Solution (1946) for a Pumping Test in a Confined Aquifer was used to analyze drawdown from the aquifer test to obtain estimates of aquifer properties for Well #1. The Theis (1935) Solution for a Pumping in a Confined Aquifer was used to analyze Well #2 and Well #3. Using the Theis (1935) solution at a constant pumping rate of 403 GPM (equivalent to the annual volume) for one year, the transmissivity = 580 ft²/day and a storativity = 4.4 x 10⁻⁴ for the aquifer. Based on the analysis, there is 292,320 ft³/day or 2449 AF per year of aquifer flux through the delineated area.

16. The Depletion Report identifies that surface water depletion by the proposed groundwater pumping of the proposed wells will manifest within the Yellowstone River throughout the year. As the proposed appropriation depletes surface water, physical availability of surface water will be quantified on the depleted source.

17. The following USGS gage was utilized to quantify median of mean monthly flows and volumes on the Yellowstone River: USGS Station #06329500, Yellowstone River near Sidney, MT. The depletions will manifest in the Yellowstone River within the reach between Sidney and the North Dakota border. The following table shows the median of mean monthly flows (CFS) at the gaging station during the year.

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
5355	6000	9327	9090	17420	40060	21400	7516	6789	7794	7295	5858

18. A list of all intervening water rights between the USGS gage and the location where depletions were identified to manifest was generated in order to calculate flow rate and volume physically available.

Water Right #	Flow Rate (CFS)	Volume (AF)	Township/Range	Section	Q Section	Period of Diversion
42M 137600 00	0.08	0.24	23N59E	36	SW	01/01 to 12/31
42M 137604 00	Stock Direct	0.34	23N59E	13	NE	01/01 to 12/31
42M 137605 00	Stock Direct	0.2	23N60E	18	SWNW	01/01 to 12/31
42M 137615 00	Stock Direct	1.01	24N60E	29	S2S2	01/01 to 12/31
42M 137617 00	Stock Direct	0.34	23N59E	36	W2W2	01/01 to 12/31
42M 165230 00	65.5	47422	22N59E	9	SWNESW	01/01 to 12/31
42M 30064201	2.5	578	22N59E	2	SWNWSE	01/01 to 12/31
42M 178328 00	2.65	105	23N59E	36	NWSWNW	04/01 to 09/30
42M 104509 00	2.1	412	23N59E	25	SWSESW	04/01 to 10/01
42M 104422 00	4.7	913	22N59E	2	SWNWSE	04/01 to 10/15
42M 30051296	1.1	136	22N59E	2	SWNWSE	04/01 to 10/15
42M 119268 00	133.22	37845	23N59E	25	NWSWSE	04/01 to 10/31
42M 119271 00	43	33.3	23N59E	25	NWSWSE	04/01 to 10/31
42M 114728 00	1.7	271	23N59E	25	SWSESW	04/01 to 11/01
42M 7146 00	9.8	330	24N60E	29	SWSE	04/01 to 11/01
42M 80579 00	8.7	870	23N59E	24	SWSESW	04/01 to 11/01
42M 10468 00	4.45	554	24N60E	31	SE	04/15 to 10/15
42M 11187 00	4.45	175	24N60E	32	SWSESW	04/15 to 10/15
42M 55525 00	13.37	275.4	24N60E	31	SE	04/15 to 10/15
42M 3656 00	3	118.3	22N59E	9	E2NWSE	05/01 to 09/01
42M 6815 00	12	2200	23N60E	18	NENE	05/01 to 09/15
42M 11655 00	5.57	270	24N60E	32	SESESW	05/01 to 10/15
42M 31493 00	8.91	6.63	22N59E	9	SENWSW	09/01 to 03/30
	326.8	92516.76				

*Rights with a designation flow stating Stock Direct are instream stock rights and have been assigned a cumulative flow rate of 0.08 cfs for the analysis.

19. The following tables show calculated monthly availability of flow and volume at the location where depletions will manifest. The volumes were calculated by multiplying the median of the mean monthly flow rate (CFS) by the number of days in the month by 1.98 AF/CFS/day .

Yellowstone River Physical Availability-Flow Rate (CFS)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median Monthly Flows	5355	6000	9327	9090	17420	40060	21400	7516	6789	7794	7295	5858
Water Rights between Gage and ND Border	77	77	77	297	318	318	318	318	324	307	77	77
Flow Rate Physically Available	5278	5923	9250	8793	17102	39742	21082	7198	6465	7487	7218	5781

Yellowstone River Physical Availability-Volume (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median Monthly Volumes	328690	332640	572491	539946	1069240	2379564	1313532	461332	403267	478396	433323	359564
Water Rights between Gage and ND border	4001	4001	4001	10001	10516	10516	10516	10516	10487	9961	4001	4001
Volume Physically Available	324689	328639	568490	529945	1058724	2369048	1303016	450816	392780	468435	429322	355563

20. The Department finds that both groundwater and hydraulically connected surface water is physically available in the amount proposed for diversion.

CONCLUSIONS OF LAW

21. 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.”

22. 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).

23. 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).

24. The Applicants have proven that water is physically available at the proposed point of diversion in the amount Applicants seek to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 11-20)

Legal Availability

FINDINGS OF FACT

25. Modeling results show that the 0.01 foot drawdown contour occurs at 18,000 feet from the Applicant’s wells.

26. There are 66 existing groundwater water rights within the identified zone of influence of 18,000 feet from the wells. After inputting 2 AF and 5 AF for each domestic right and stock right, respectively, that did not have an assigned volume; the groundwater legal demand calculated within the zone of influence is 302.8 AF per annum. Subtracting the legal demands from the calculated aquifer flux (2449 AF) leaves 2146.2 AF of groundwater per annum legally available. The full list of groundwater rights identified within the zone of influence is below.

WRNUMBER	VOLUME	WRNUMBER	VOLUME	WRNUMBER	VOLUME
42M 10352 00	2	42M 30021929	5	42M 4966 00	5
42M 10385 00	2	42M 30022181	2	42M 51834 00	16.13
42M 10437 00	5	42M 30024249	2	42M 51888 00	1.5
42M 104445 00	74.2	42M 30024251	2	42M 53324 00	1.5
42M 104460 00	2.5	42M 30049784	0.45	42M 55486 00	1.5
42M 114669 00	1.63	42M 30063247	9.66	42M 59606 00	1.51
42M 114748 00	1.73	42M 30064105	1	42M 61864 00	1.5
42M 114762 00	5	42M 30064348	3	42M 61873 00	1.5
42M 122070 00	5	42M 30065331	10	42M 66234 00	6
42M 13266 00	2	42M 30070052	1.26	42M 66243 00	1.5
42M 165223 00	5	42M 30070136	3.63	42M 69286 00	1.5
42M 165224 00	3	42M 32124 00	1.7	42M 71752 00	6
42M 165225 00	5	42M 32125 00	5	42M 71755 00	5.75
42M 168981 00	2	42M 33469 00	0.64	42M 71774 00	2.35
42M 18507 00	1.5	42M 34746 00	3.85	42M 71775 00	1.61
42M 19606 00	5	42M 34881 00	3.5	42M 72914 00	1.5
42M 20268 00	1.9	42M 38661 00	1.5	42M 74091 00	1.26
42M 21006 00	1.5	42M 39836 00	1.5	42M 8319 00	5
42M 26670 00	1.5	42M 40970 00	1.5	42M 88246 00	1.63
42M 26671 00	1.5	42M 41335 00	19.79	42M 91855 00	1.93
42M 30013349	5	42M 41543 00	16	42M 91877 00	3.4
42M 30017806	2	42M 44672 00	0.67	42M 91901 00	1.63
				TOTAL (AF)	302.8

27. The Depletion Report written by DNRC groundwater Hydrologist Attila Fohnagy identifies that surface water depletion from pumping Applicant's wells for the proposed water marketing use will manifest in the Yellowstone River in the reach between Sidney and the North Dakota border.

28. All individual water rights within the reach from Sidney to the North Dakota border were subtracted in the physical availability analysis (FOF 17-19). The Montana Department of Fish,

Wildlife, & Parks (FWP) instream flow reservation (at the Sidney gage) is included in the legal availability analysis.

29. The following tables show the existing legal demands and legal availability of water (flow and volume) after accounting for existing legal demands within the area of potential impact on the Yellowstone River.

Yellowstone River Legal Availability-Flow Rate (CFS)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Physically Available	5278	5923	9250	8793	17102	39742	21082	7198	6465	7487	7218	5781
FWP Instream Flow Right	3738	4327	6778	6808	11964	25140	10526	2670	3276	6008	5848	3998
Downstream Water Rights	0	0	0	0	0	0	0	0	0	0	0	0
Flow Rate Legally Available	1,540	1,596	2,472	1,985	5,138	14,602	10,556	4,528	3,189	1,479	1,370	1,783

Yellowstone River Legal Availability-Volume (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Physically Available	324689	328639	568490	529945	1058724	2369048	1303016	450816	392780	468435	429322	355563
FWP Instream Flow Right	317826	287068	317826	307573	317826	307573	317826	317826	307573	317826	307573	317826
Downstream Water Rights	0	0	0	0	0	0	0	0	0	0	0	0
Volume Legally Available	6,863	41,571	250,664	222,372	740,898	2,061,475	985,190	132,990	85,207	150,609	121,749	37,737

30. The following tables show the timing and amount of depletion caused by the proposed appropriation compared to flow rate and volume legally available on the Yellowstone River at the point in which the depletion will occur.

Comparison-Flow Rate (CFS)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Legally Available	1540	1596	2472	1985	5138	14602	10556	4528	3189	1479	1370	1783
Flow Rate Requested	2	2	2	2	2	2	2	2	2	2	2	2
Flow Rate Remaining	1,538	1,594	2,470	1,983	5,136	14,600	10,554	4,526	3,187	1,477	1,368	1,781

Comparison-Volume (AF)												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Volume Legally Available	324689	328639	568490	529945	1058724	2369048	1303016	450816	392780	468435	429322	355563
Volume of Depletion	54	54	54	54	54	54	54	54	54	54	54	54
Volume Remaining	324,635	328,585	568,436	529,891	1,058,670	2,368,994	1,302,962	450,762	392,726	468,381	429,268	355,509

31. The Department finds that both groundwater and hydraulically connected surface water is legally available in the amount requested.

CONCLUSIONS OF LAW

32. 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).

33. 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.

34. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water,

citing Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

35. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H*

30012025 and 41H 30013629 by Utility Solutions LLC (DNRC Final Order 2006)(permits granted), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007)(permit granted), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); 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 analyze legal availability outside of irrigation season (where mitigation applied)); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, Memorandum and Order, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

36. Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicants seek 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 25-31)

Adverse Effect

FINDINGS OF FACT

37. If a shortage of water exists, the Applicant has the ability to make the necessary adjustments to the amount of water they pump so that they do not create an adverse effect to existing users. This includes the ability to stop diverting water in the event that a valid call is made.

38. Attila Fohnagy, groundwater Hydrologist for the Water Management Bureau of the DNRC, modeled drawdown of the aquifer by the proposed pumping of the Applicant's wells. The evaluation of drawdown was completed using the Theis (1935) solution with the following parameters: $T=580 \text{ ft}^2/\text{day}$ and $S=4.4 \times 10^{-4}$. All three wells were modeled as one well with a constant pumping rate due to their close proximity. Drawdown in excess of 1 foot occurs in wells that are 17,500 feet from the applicant's wells. There are 58 water rights that are predicted to experience drawdown greater than 1 foot. Of those, 46 water rights have a known well depth and static water level. Wells predicted to have the least available water level after pumping the Applicant's wells would have 16 feet available water column.

39. The Depletion Report identifies that the Yellowstone River is hydraulically connected to the source aquifer and will be subject to surface depletions from pumping the Applicant's wells. Evaluations of the rate and timing of surface water depletions are based on the assumption that groundwater pumping eventually is offset by an equivalent increase in recharge or decrease in discharge. The source aquifer consists of confined sandstone in the Tertiary Fort Union Formation. Modeling of depletion was carried out using the annual consumption of 650 AF. The following table shows the calculated consumption and net depletion to the Yellowstone River.

Month	Consumption (AF)	Depletion (AF)	Depletion (gpm)
January	54.2	54.2	395.6
February	54.2	54.2	438
March	54.2	54.2	395.6
April	54.2	54.2	408.8
May	54.2	54.2	395.6
June	54.2	54.2	408.8
July	54.2	54.2	395.6
August	54.2	54.2	395.6
September	54.2	54.2	408.8
October	54.2	54.2	395.6
November	54.2	54.2	408.8
December	54.2	54.2	395.6
Total	650	650	

40. The Department finds that there will be no adverse effect to existing water users due to the proposed appropriation. There are 46 ground water rights that have a known well depth and static water level that are predicted to experience drawdown greater than 1 foot. There are no wells that have an available water column less than 16 feet. Water is both physically and legally available in the Yellowstone River in the amount which will be depleted.

CONCLUSIONS OF LAW

41. 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.

42. 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).

43. 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.

44. 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.

45. 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.

46. 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.

47. The Applicants have 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 37-40)

Adequate Diversion

FINDINGS OF FACT

48. The Applicant proposes to divert water from a groundwater aquifer by means of three wells (Well #1-375 feet deep, Well #2-380 feet deep and Well #3-434 feet deep) from January 1-December 31 at 1047.4 GPM (2.33 CFS) up to 650 AF, from points in the NWNWSENE, SWNWSENE and NESESWNE, Section 22, T24N, R59E, Richland County, for water marketing from January 1-December 31. The place of use is located in the SENESE Section 22, T24N, R59E, Richland County. The wells were drilled by Solid Waterwell Drilling, a licensed well driller in the State of Montana (Lic. No. WWC-676). All three wells have a casing diameter of 8 inches. Well #1 has a static water level of 141 feet and the screened portion of the well is from 255-375 feet below ground surface (BGS). Well #2 has a static water level of 127.5 feet and the screened portion of the well is from 258-380 feet below ground surface (BGS). Well #3 has a static water level of 167.6 feet and the screened portion of the well is from 313-434 feet below ground surface (BGS). The wells are completed in a confined sandstone aquifer of the Fort Union Formation between 75 feet to 120 feet locally.

49. The adequacy of diversion analysis was done by evaluating a one year period of pumping each well at a constant rate of 134.3, applying a calculated well efficiency to the theoretical drawdown, and adding interference drawdown. The result of the analysis is outlined in the table below. Drawdown analysis indicates the well is adequate in providing the requested flow and volume.

Well	Total Available Drawdown	Calculated Well Efficiency	Predicted Additional Drawdown including well loss		Predicted Additional Drawdown from Interference from Well-1	Predicted Additional Drawdown from Interference from Well-2	Predicted Additional Drawdown from Interference from Well-3	Total Drawdown	Remaining Available Water Column
	(ft)	%	<i>theoretical</i>	<i>actual (with w/well loss)</i>	(ft)	(ft)	(ft)	(ft)	(ft)
Well #1	233.5	83	74	89.2	0	31.7	26.2	147.1	86.4
Well #2	236.5	77	74	96.1	31.5	0	30.7	158.3	78.2
Well #3	265.5	67	74	110.4	26.4	30.8	0	167.6	97.9

50. Water will be pumped from each well using a Grundfos 385S600-8 60 horsepower submersible pump. Water will be conveyed from each of the three wells through individual 8 inch pipelines to a 12 inch mainline. The mainline will transport the water approximately 2100 feet to a storage tank at the depot site. Water will be conveyed from the storage tank to two depot buildings via a 10 inch pipeline. Each building will have two loadouts. Each of the four loadouts will have a totalizing flow/volume meter to track sales.

CONCLUSIONS OF LAW

51. 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.

52. 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.

53. Applicants have 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. § 85-2-311(1)(c), MCA. (FOF 48-50)

Beneficial Use

FINDINGS OF FACT

54. The purpose of the proposed diversion is water marketing which is a recognized beneficial use (§85-2-102(4), MCA). The volume requested is 650 AF per year, which is supported by a copy of a signed contract between Candee Angus Farm Inc (seller) and Whiting Oil & Gas Corporation (purchaser) for the entire requested volume.

55. Large quantities of water are needed for oil well development and hydraulic fracturing, frequently within a relatively short period of time. The requested flow rate of 1047.4 GPM (2.33 CFS) along with the storage tanks are needed to supply enough water to the system during times of peak demand.

CONCLUSIONS OF LAW

56. An applicant must prove by a preponderance of the evidence that the proposed use is a beneficial use. §§ 85-2-102(4), -311(1)(d), MCA; Admin.R.M. 36.12.1801. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana” McDonald, 220 Mont. at 532, 722 P.2d at 606. The amount of water that may be authorized for a permit is limited to the amount of water necessary to sustain the beneficial use. E.g., Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(A water user may not appropriate water for mere future speculative profit or advantage; “He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); St Onge v. Blakely, 76 Mont, 1, 245 P. 532 (1926)(beneficial use may be prospective or contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and due diligence in putting water to actual use); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing Bitterroot River Protective Ass'n v. Siebel, 2005 MT 60, ¶¶33-35, 326 Mont. 241, 108 P.3d 518, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

57. Applicant seeks a permit to market water to others for beneficial use, which is a recognized beneficial use. § 85-2-102(4), and -310(9)(c)(v), MCA; Mont. Const. Art. IX, § 3(2) (1972). The Montana Legislature enacted additional requirements upon applicants seeking permits to market water to others for use, codified at § 85-2-310(9)(c)(v), MCA, which provides:

- (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;

Failure to satisfy these criteria mandates 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. . . .” § 85-2-310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(4), and -311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

58. The legislative purpose of § 85-2-310(9)(v), MCA was to prohibit the appropriations of water based upon a speculative intent. Chapter 399, Laws of Montana 1985. To that end § 85-2-310(9), MCA, includes express criteria for the DNRC to consider when evaluating an application for a permit to market water to others for use. See DNRC Written Testimony, HB No. 396 (Mar. 25, 1985). These criteria ensure that other water users are committed to the beneficial use of the full quantity of water requested by the applicant. 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. See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566 (Colo. 1979) (applicant failed to prove intent to appropriate water for beneficial use where it did not have firm contractual commitments or other evidence of privity between the applicant and the actual beneficial user of the water).

59. Applicant proposes to market water to others for beneficial use, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has provided firm contractual agreements which identify each person who will use the water and the amount each person will use, in addition to information identifying the proposed place of use of all water used, and the relationship between the applicant and each person using the water. (FOF No. 54) Whether based upon one firm contract or many, a permit may only be granted for the total volume of water for which firm contracts have been entered with an applicant. Accordingly, applicant has proven by a preponderance of the evidence that the specific water marketing use proposed in the application

is a beneficial use, and that 650 acre-feet of diverted volume and 1047.4 GPM (2.33 CFS) flow rate of water requested is the amount needed to sustain the beneficial use proven by the applicant. §§ 85-2-310(9)(c), and -311(1)(d), MCA; (FOF Nos. 54-55)

Possessory Interest

FINDINGS OF FACT

60. 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

61. 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.

62. 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.

63. The Applicant has proven by a preponderance of the evidence that they have 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 60)

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. 42M 30104121 should be GRANTED.

The Department determines the Applicant may divert water from a groundwater aquifer, by means of three wells (375, 380 and 434 feet deep), from January 1-December 31 at 1047.4 GPM (2.33 CFS) up to 650 AF, from points in the NWNWSENE, SWNWSENE and NESESWNE Section 22, T24N, R59E, Richland County, for water marketing from January 1-December 31. The place of use (water depot) is located in the SENESE Section 22, T24N, R59E, Richland

County. The Applicant provided a general service area map which depicts an area with a radius of approximately 14 miles from the proposed project, limited to the state of Montana.

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

1. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
2. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.
3. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.
4. THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT OF THE WORK COMPLETED UNDER THIS RIGHT BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL COMPLETION OF THE PROJECT. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE REPORTS MUST BE SENT TO THE GLASGOW WATER RESOURCE OFFICE.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid

objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 9th day of March, 2016.

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