

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30148233 BY BRIDGER PIPELINE, LLC))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On February 18, 2020 Bridger Pipeline, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30148233 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4.9 CFS and 3 AF. 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 April 23, 2020. The Applicant responded with information dated May 26, 2020. The Applicant submitted an Amendment to the Application May 26, 2020. The Application was determined to be correct and complete as of June 29, 2020. An Environmental Assessment for this Application was completed on June 30, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Aerial photos depicting the points of diversion and places of use.

Information Received after Application Filed

- Documentation for signing authority received by DNRC via email on April 20, 2020.
- Amendment to the Application May 26, 2020: Volume was increased.

Information within the Department's Possession/Knowledge

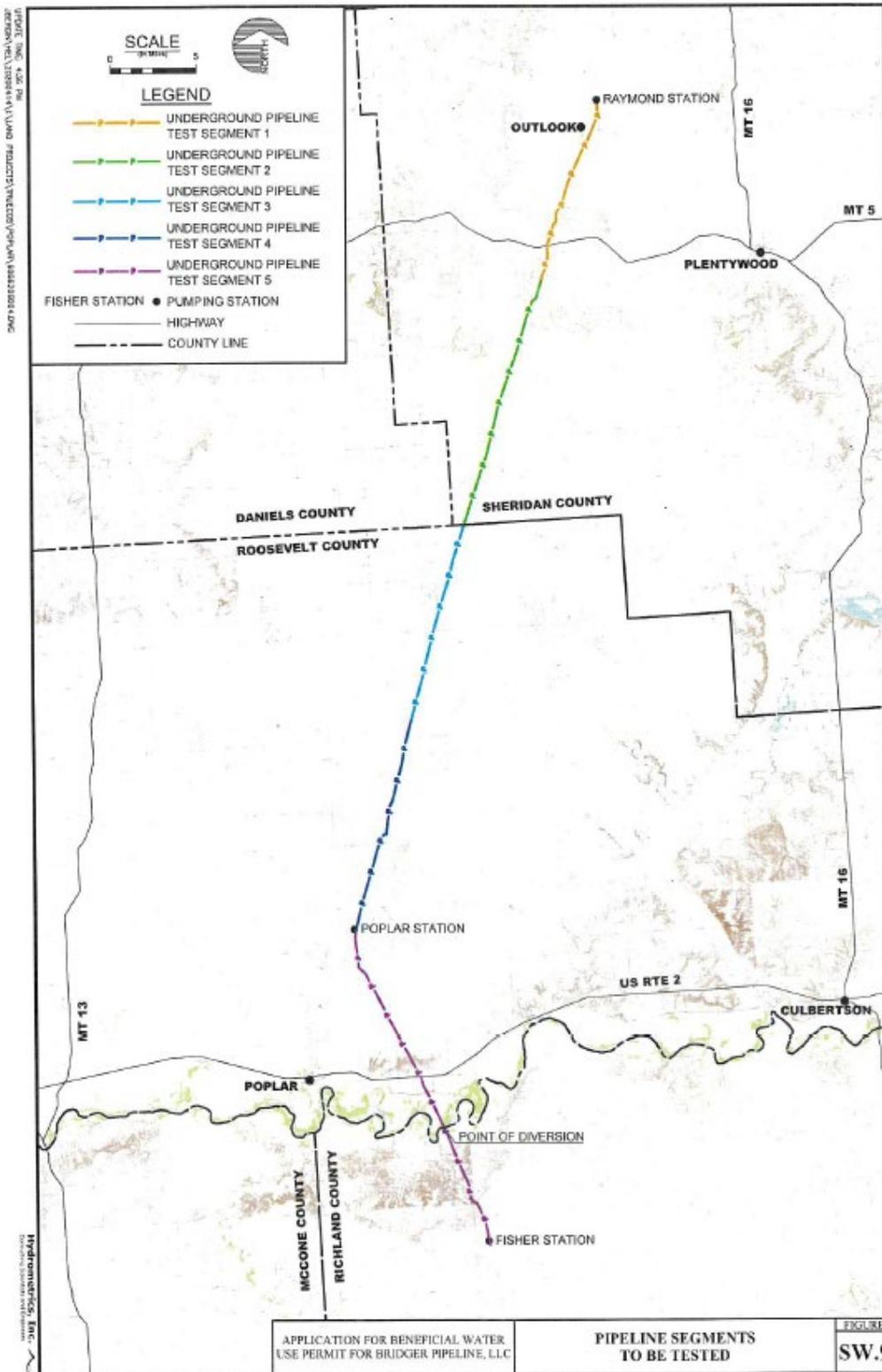
- USGS gaging station records (Station # 06177000, Missouri River near Wolf Point MT) from October 1942-May 2017.
- Department water right records of existing rights

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. The requested surface water diversion is for 2,200 GPM (4.9 CFS) up to 3 AF, from a point on the south bank of the river in the SWSWNE Section 29, T27N, R52E, Richland County, for industrial use from January 1-December 31. The industrial use is comprised of hydrostatic testing (HST). The HST water will enter the pipeline approximately 2,350 feet south of the point of diversion to fill and test the pipeline located within Richland, Roosevelt, and Sheridan Counties. This temporary use of water will expire 12/31/2025.
2. The water used for this project is not expected to return to the source; therefore, the consumptive use is 100% for the proposed diversion.



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 40S 30148233.

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

GENERAL CONCLUSIONS OF LAW

3. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

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

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

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

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

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

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 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.

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

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

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

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

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

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

Physical Availability

FINDINGS OF FACT

9. The Applicant is requesting a maximum flow rate of 2,200 GPM (4.9 CFS) from the Missouri River. The proposed point of diversion is located approximately 24 linear miles downstream from the USGS gaging station Missouri River near Wolf Point, MT (USGS Station # 06177000). The medians of mean monthly flow rates were obtained from the gaging station records as well as medians of mean monthly volumes, which were calculated by converting CFS to AF (CFS x 1.98 x days per month = AF).

Table 1 Median of the mean monthly gage data

	January	February	March	April	May	June
Flow Rate (CFS)	10030	9982	8263	7601	8276	8982
Volume (AF)	615641	573166	507183	451499	507981	533531

	July	August	September	October	November	December
Flow Rate (CFS)	9163	9758	8347	8261	7880.5	9063
Volume (AF)	562425	598946	495812	507060	468102	556287

10. The following is a list of existing water rights between the USGS gaging station (USGS Station # 06177000) and the proposed point of diversion.

Table 2

Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion
40S 187281 00	80	8800	01/01 to 12/31	40S 104421 00	4	590	04/01 to 10/15
40S 135787 00	0.1	1	01/01 to 12/31	40S 111429 00	4.9	628	04/01 to 10/15
40S 172384 00	0.1	5	01/01 to 12/31	40S 111430 00	4.9	677	04/01 to 10/15
40S 30141747	0.1	0	01/01 to 12/31	40S 215784 00	4.11	325	04/01 to 10/31
40S 30141750	0.1	1	01/01 to 12/31	40S 170297 00	5	13	04/01 to 10/31
40S 30141744	0.1	3	01/01 to 12/31	40S 215783 00	15.18	1203	04/01 to 10/31
40S 30141751	0.1	0	01/01 to 12/31	40S 77141 00	7.79	189	04/01 to 10/31
40S 30141745	0.1	3	01/01 to 12/31	40S 15984 00	2.22	351	04/01 to 10/31
40S 135788 00	0.1	2	01/01 to 12/31	40S 57388 00	2.89	720	04/01 to 10/31
40P 30141707	0.1	1	01/01 to 12/31	40S 30041682	6	802	04/01 to 11/01
40S 30142627	0.1	0	01/01 to 12/31	40S 171300 00	3.03	216	04/01 to 11/30

40S 6417 00	0.1	7	01/01 to 12/31	40S 166063 00	1.41	378	04/01 to 11/30
40S 171302 00	0.1	4	01/01 to 12/31	40S 214734 00	0.16	5	04/01 to 11/30
40S 135785 00	0.1	0	01/01 to 12/31	40S 71788 00	7.79	540	04/10 to 10/10
40S 135786 00	0.1	0	01/01 to 12/31	40S 18593 00	5.57	77	04/15 to 10/15
40S 214733 00	0.16	3	01/01 to 12/31	40S 91841 00	4.34	140	04/15 to 10/15
40S 30132346	0.1	34	01/01 to 12/31	40S 104484 00	2.7	364	04/15 to 10/15
40S 74573 00	13.4	370	01/01 to 12/31	40S 11394 00	2.22	465	04/15 to 10/15
40S 30064200	9.33	2843	01/01 to 12/31	40S 30005493	6	768	04/15 to 10/15
40S 4236 00	12	30	03/01 to 10/31	40S 102763 00	5.7	980	04/15 to 10/15
40S 165479 00	2.65	360	03/01 to 11/30	40S 106983 00	6.9	1114	04/15 to 10/15
40S 42690 00	14.9	0	03/01 to 11/30	40S 102771 00	9	1420	04/15 to 10/15
40S 16093 00	0.89	95	03/01 to 11/30	40S 17220 00	11.14	2222	04/15 to 10/19
40S 34798 00	10	4450	03/01 to 11/30	40S 106040 00	12	318	04/15 to 10/19
40S 171349 00	12.3	423	03/15 to 11/04	40S 168893 00	9.7	368	04/15 to 11/19
40S 5257 00	3.34	600	03/15 to 11/15	40S 215786 00	3.56	468	05/01 to 09/04
40S 113898 00	6.68	180	04/01 to 09/04	40S 384 00	7.13	300	05/01 to 09/15
40S 2400 00	4.23	210	04/01 to 09/30	40S 171295 00	3	162	05/01 to 09/30
40S 117928 00	14.2	36	04/01 to 09/30	40S 171321 00	1.33	340	05/01 to 09/30
40S 30006005	2.67	240	04/01 to 10/15	40S 3220 00	1.44	95	05/01 to 09/30
40S 30001844	2.6	364	04/01 to 10/15	40S 168962 00	6.68	248	05/01 to 10/31
40S 30044048	12	571	04/01 to 10/15	40S 15093 00	0.37	115	05/01 to 11/30

11. The list in Table 2 was used to evaluate the flow rate and volume physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights and subtracting these values from the median of mean values for the gaging station. The result is the monthly median of mean flow rate for the Missouri River physically available at the proposed point of diversion.

Table 3

Physical Availability-Flow Rate (CFS)			
Month	Median Monthly Flows	Water Rights Between Gage and POD	Flow Rate Physically Available
Jan	10030	104	9926
Feb	9982	104	9878
Mar	8263	160	8103
Apr	7601	347	7254

May	8276	371	7905
Jun	8982	371	8611
Jul	9163	371	8792
Aug	9758	371	9387
Sep	8347	371	7976
Oct	8261	329	7932
Nov	7881	163	7718
Dec	9063	104	8959

12. The list of existing water rights between the USGS gaging station (USGS Station # 06177000) 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 water right by the number of months each diversion takes place. The sum of these values was then subtracted from 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.

Table 4

Physical Availability-Volume (AF)			
Month	Median Monthly Volumes	Water Rights Between Gage and POD	Volume Physically Available
Jan	615641	1006	614635
Feb	573166	1006	572160
Mar	507183	1702	505481
Apr	451499	4206	447293
May	507981	4537	503444
Jun	533531	4537	528994
Jul	562425	4537	557888
Aug	598946	4537	594409
Sep	495812	4537	491275
Oct	507060	4042	503018
Nov	468102	1802	466300
Dec	556287	1006	555281

13. The Department finds water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate.

CONCLUSIONS OF LAW

14. 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.”

15. 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).

16. 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).

17. Use of published upstream gage data minus rights of record between gage and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001).

18. 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 9-13)

Legal Availability:

FINDINGS OF FACT

19. The Department determined the area of potential impact on the Missouri River as approximately 5 miles downstream of the proposed point of diversion. For notice purposes the department has historically identified an area of potential impact of 3-5 miles downstream of the proposed point of diversion for the Missouri River below Fort Peck Dam. A list of existing legal demands within the area of impact, was generated and used by the Department to compare the legal availability of water to the amount of water already appropriated under the existing water rights, water reservations and the Fort Peck Tribal right. The volume of downstream water rights was calculated by dividing the claimed volumes of the downstream water rights by the number of months of the claimed period of use (Table 5). The Applicant is requesting a flow rate of 4.9 CFS up to 3 AF per year.

Table 5

Water Rights Downstream of the Gage			
Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion
40S 30142617	0.1	0.9	01/01 to 12/31
40S 30142620	0.1	1.6	01/01 to 12/31
40S 89101 00	3.34	0.0	04/01 to 10/31
40S 70237 00	7.79	454	04/01 to 10/31
40S 30024907	2.2	272	04/15 to 10/15
40S 89100 00	3.89	293	05/01 to 10/31
40S 137 00	5.57	500	05/01 to 10/31
40S 46465 00	11.14	511.0	05/10 to 10/19
40S 171834 00	6.68	150.0	06/01 to 09/19
40S 171835 00	5.79	153.0	06/01 to 09/19

20. The legal availability is summarized in the tables 6 and 7 below.

Table 6

Legal Availability-Flow Rate (CFS)					
Month	Flow Rate Physically Available at POD	FWP Instream Flow Right	Fort Peck Tribes Reserved Right	Downstream Water Rights	Flow Rate Legally Available
Jan	9926	5178	651	0.2	4097
Feb	9878	5178	695	0.2	4004
Mar	8103	5178	651	0.2	2274
Apr	7254	5178	840	13.5	1222
May	7905	5178	1708	34.1	985
Jun	8611	5178	2437	46.6	950
Jul	8792	5178	3497	46.6	71
Aug	9387	5178	2927	46.6	1235
Sep	7976	5178	1765	46.6	987
Oct	7932	5178	813	34.1	1907
Nov	7718	5178	672	0.2	1868
Dec	8959	5178	651	0.2	3130

Table 7

Legal Availability-Volume (AF)					
Month	Volume Physically Available at POD	FWP Instream Right	Fort Peck Tribes Reserved Right	Downstream Water Rights	Volume Legally Available
Jan	614635	317826	40000	0.2	256809
Feb	572160	297321	40000	0.2	234839
Mar	505481	317826	40000	0.2	147655
Apr	447293	307573	50000	103.9	89616
May	503444	317826	105000	321.2	80297
Jun	528994	307573	145000	396.9	76024
Jul	557888	317826	215000	396.9	24666
Aug	594409	317826	180000	396.9	96187
Sep	491275	307573	105000	396.9	78305
Oct	503018	317826	50000	321.2	134871
Nov	466300	307573	40000	0.2	118726
Dec	555281	317826	40000	0.2	197455

21. The comparison in the following tables shows water is legally available throughout the proposed period of diversion. The monthly volumes for the comparison are equal to the total requested volume if the entire diverted volume was done in a single month.

Table 8

Comparison-Flow Rate (CFS)			
Month	Flow Rate Legally Available at POD	Flow Rate Requested	Flow Rate Remaining
Jan	4097	4.9	4092
Feb	4004	4.9	4000
Mar	2274	4.9	2269
Apr	1222	4.9	1217
May	985	4.9	980
Jun	950	4.9	945
Jul	71	4.9	66
Aug	2344	4.9	2337
Sep	1877	4.9	1870
Oct	2056	4.9	2049
Nov	2235	4.9	2228
Dec	3862	4.9	3855

Table 9

Comparison-Volume (AF)			
Month	Volume Legally Available at POD	Volume Requested	Volume Remaining
Jan	256809	3.0*	256806
Feb	234839	3.0*	234836
Mar	147655	3.0*	147652
Apr	89616	3.0*	89613
May	80297	3.0*	80294
Jun	76024	3.0*	76021
Jul	24666	3.0*	24663
Aug	96187	3.0*	96184
Sep	78305	3.0*	78302
Oct	134871	3.0*	134868
Nov	118726	3.0*	118723
Dec	197455	3.0*	197452

*The Applicant may divert the entire volume in a single month.

22. The Department finds calculated flows and volumes in the tables below show legal availability of water for appropriation during the proposed period of diversion.

CONCLUSIONS OF LAW

23. 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).

24. 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.

25. Use of published upstream gage data minus rights of record between gage and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

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 9-22).

Adverse Effect

FINDINGS OF FACT

27. The entire 3 AF of requested volume will be diverted for the hydrostatic testing of an existing pipeline on a short-term basis (i.e., hours to days). Each of the two potential diversions are anticipated to last less than a single day.

28. During times of water shortage, diversion operations will either be delayed till water is available or an alternate source of water will be obtained.

29. The Applicant will monitor water withdrawal rates through the use of flow meters on pumps and as such can direct the contractor to cease operations if needed.

30. The Department finds there will be no adverse effect because the amount of water requested is legally available at the point of diversion on the Missouri River and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

CONCLUSIONS OF LAW

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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 27-30)

Adequate Diversion

FINDINGS OF FACT

37. The pipeline to be hydrostatically tested is an existing 10-inch buried pipeline. The Applicant is proposing to test a roughly 70-mile-long reach of the pipeline in five segments. The largest of the five segments will be about 20 miles and have an internal volume equivalent to 1.3 AF.

38. The diversion will consist of a pump from Rain for Rent with up to a 75 HP diesel motor (or equivalent). Water will be diverted at a maximum rate of 2,200 GPM (4.9 CFS) depending on total dynamic head at the pump site. The pump and motor will be placed in a secondary containment to prevent accidental fuel spillage onto the ground or into the river. A temporary above ground pipeline will be used to transport the diverted into a 21,000-gallon portable storage tank located about 2,350 feet south of the diversion. There will be no permanent disturbance to the stream bed or banks of the river.

39. A second high head pump such as a 6" XHH125 pump from Rain for Rent with up to a 400 HP diesel motor (or equivalent) will divert water from the storage tank into an injection port of the pipeline to be tested. This second pump is rated to 1,500 gpm at 720 feet of head. The pump and motor will be placed in a secondary containment to prevent accidental fuel spillage onto the ground or into the river. A transfer pump between the storage tank and the high head pump may be necessary depending on the needs of the high head pump.

40. Water will be pumped into the first segment of the pipeline at an injection port in the S2SE of Section 29, T27N, R52E, Richland County. The water in the pipeline will then pushed into the segments to be of pipeline to be tested using pigs and pressurized compressed air or nitrogen. The diversion from the source to filling of the pipeline is anticipated to take less than a day. The entire test is anticipated to take less than a month to complete.

41. Water will either be discharged in at the Fisher Station (NE Section 34, T26N, R52E, Richland County) or trucked to an approved disposal facility depending on a water quality analysis and the Applicants ability to obtain a discharge permit.

42. The Department finds the diversion means are adequate for the proposed industrial use.

CONCLUSIONS OF LAW

43. 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.

44. 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.

45. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 37-42).

Beneficial Use

FINDINGS OF FACT

46. The Applicant proposes to use the water for industrial purposes in the hydrostatic testing of an existing oil pipeline. Pressurized water will be used to ensure that the weld joints and flanges that joint the pipe are fitted properly and the materials used in the pipeline had the required tensile strength to sustain operating pressure.

47. The project will consist of hydrostatically testing about 70 miles of the existing pipeline. The pipeline has an internal diameter of 10 inches. The test will be broken down into 5 test segments. The longest test segment is about 20 miles long and has an internal volume equivalent to 1.3 AF. The water used to test this segment will be reused in the other four test sections. The Applicant is requesting a volume equal to two times the internal volume of the largest segment in case a second test is required, plus an additional 10 percent contingency to account for losses and the potential difference in the actual internal pipe volumes vs calculated volumes.

48. The flow rate of 2,200 GPM is required to ensure the pipeline can be filled and tested in a timely manner.

49. To monitor the withdrawal volumes, the Applicant will install inline flow meters with totalizers, conduct field measurements based on the end of pipe flow rates and/or time to fill/volume measurements of the holding tanks. Flow rate and volume records will be maintained by the Applicant.

CONCLUSIONS OF LAW

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

51. 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).

52. 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).

53. Applicant proposes to use water for an industrial purpose which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence industrial is a beneficial use and that 3 AF of diverted volume and 4.9 CFS of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 46-49)

Possessory Interest

FINDINGS OF FACT

54. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. This appropriation is specifically for hydrostatic testing along the pipeline. No water can be used in the absence of right-of-way agreements which constitute written consent.

CONCLUSIONS OF LAW

55. 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.

56. 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.

57. 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 54)

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 30148233 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from January 1-December 31 at 4.9 CFS up to 3 AF, from a point on the south bank of the river in the SWSWNE Section 29, T27N, R52E, Richland County, for industrial use from January 1-December 31. The place of use is generally located along the proposed pipeline route located within Richland, Roosevelt, and Sheridan Counties.

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 28th day of July, 2020.

/Original signed by Steven B. Hamilton/
Steven B Hamilton, Deputy Regional Manager
Glasgow Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 28th day of July, 2020, by first class United States mail.

BRIDGER PIPELINE, LLC
PO DRAWER 2360
CASPER, WY 82602

JOHN BERGIN
5602 HESPER RD
BILLINGS, MT 59106

NAME

DATE