

THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

Glasgow Water Resources Regional Office
222 6th St South
PO Box 1269
Glasgow, MT 59230-1269
(Office) 406-228-2561
(Desk) 406-808-7075
ashley.kemmis@mt.gov

July 25, 2025

ASWS, LLC
C/O NEIL IVERSEN
PO BOX 1166
WILLISTON, ND 58802-1166

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 40S 30164889

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit authorization found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no response is received by August 15, 2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA. Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, appearing to read "AK", followed by a period.

Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division

Cc: Lee Yelin of Water Rights, Inc. via email



DNRC.MT.GOV

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

* * * * *

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30164889 BY ASWS, LLC)	DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT
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On March 26, 2025, ASWS, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30164889 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 12 CFS and 860.17 AF for Water Marketing. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated April 16, 2025. The Applicant responded with information dated May 1, 2025. A preapplication meeting was held between the Department and the Applicant on November 19, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Checklist on February 7, 2025. The Department delivered the Department- completed Technical Analysis on March 21, 2025. The application was determined to be correct and complete as of May 27, 2025. An Environmental Assessment for this application was completed on July 25, 2025.

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
- Addenda:
 - Water Marketing Purpose Addendum, Form 600-WMA
- Attachments:
 - Commercial Water Purchase Agreement between ASWS, LLC and Phoenix Operating, LLC, dated December 20, 2024

Draft Preliminary Determination to Grant

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Application for Beneficial Water Use Permit No. 40S 30164889

- Service Area Map on 2021 NAIP aerial imagery depicting Phoenix Operating, LLC's service area
- Resolution of Signing Authority, Completed November 8, 2024
- Articles of Amendment to Articles of Organization to Ames Savage Water Solutions, LLC, dated October 4, 2022
- Business Limited Liability Company Articles of Amendment, dated October 27, 2022
- Business Search Results, North Dakota Secretary of State
- Water Depot/Pipeline Easement and Temporary Construction Easement, John Ames, dated May 1, 2010
- Lease Agreement (Water Depot), dated April 23, 2012
- Cornell Pump Data Sheet, Agri Industries, Inc, dated October 17, 2024
- Storage Pond Schematics, Uintah Engineering & Land Surveying, dated August 7, 2019
- Hamlin Water Bainville Pond Layout & Design, D&E earthwork Solutions
- Maps: 2021 NAIP aerial imagery depicting the point of diversion, conveyance, and place of use
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated March 21, 2025

Information Received after Application Filed

- Deficiency Response, dated May 1, 2025

Information within the Department's Possession/Knowledge

- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents.
 - Flow records for USGS Gage #06185500, Missouri River near Culbertson, MT
 - Department water right records of existing rights
 - Gridded Net Evaporation Layer, Converge, ArcGIS Web Application
 - DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019

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).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1 through December 31 at 12 CFS up to 860.17 AF annually, from a point in Gov't Lot 3, NWSENE, Section 31, T27N, R59E, for water marketing use from January 1 through December 31. The place of use is the point of sale, which will be from the storage ponds located in the NESWNE, Section 31, T28N, R59E, Roosevelt County. The place of use consists of two reservoirs, one with a capacity of 24 AF located in the NESWNE, Section 31, T28N, R59E, and the other 45 AF located in the NWSENE, Section 31, T28N, R59E. The Applicant proposes to sell water to a purchaser who has signed a firm contract. Water will be used for oil field development, with the general service area covering portions of Roosevelt County as depicted in Exhibit A of the Commercial Water Purchase Agreement, dated December 20, 2024.
2. Of the requested 860.17 AF requested, up to 850 AF will be sold to water marketing contract and 10.17 AF accounts for net evaporation from the storage ponds.
3. This permit will not be supplemental to any other water rights nor share a place of use but will be associated with water right 40S 30048277. The conveyance pipeline for the project granted under water right 40S 30048277 will be temporarily used for the proposed appropriation until construction of the new pipeline is complete. No infrastructure will be shared once the proposed conveyance pipeline for this application is complete.
4. Water sold under this appropriation will be used in the oil field industry. The volume of water sold will vary with oil field activity during the year, not to exceed 850 AF per year. In order to substantiate the beneficial use and ensure that the requested flow rate and volume are not exceeded during years of high oil field activity, the Applicant will be required to submit measurement reports each year. The Applicant's design plans include the use of a totalizing flow meter.

5. The Applicant provided a water purchase contract with Phoenix Operating LLC, including a service area map. Customers must agree to use water solely in the state of Montana and access to the water extraction point will be limited to valid contract holders through landowner-controlled access.

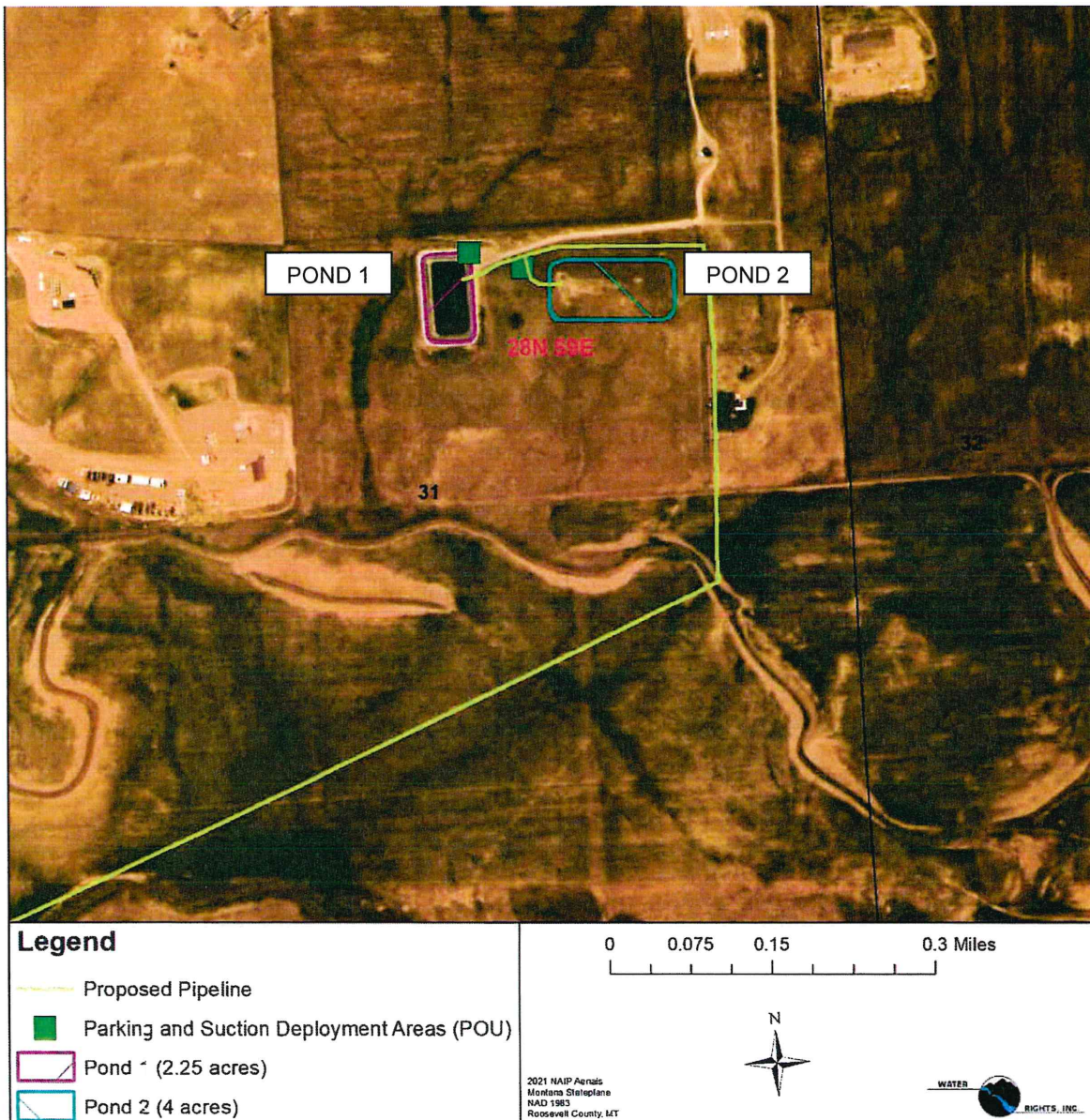


Figure 1: Map Depicting the POU and Conveyance System

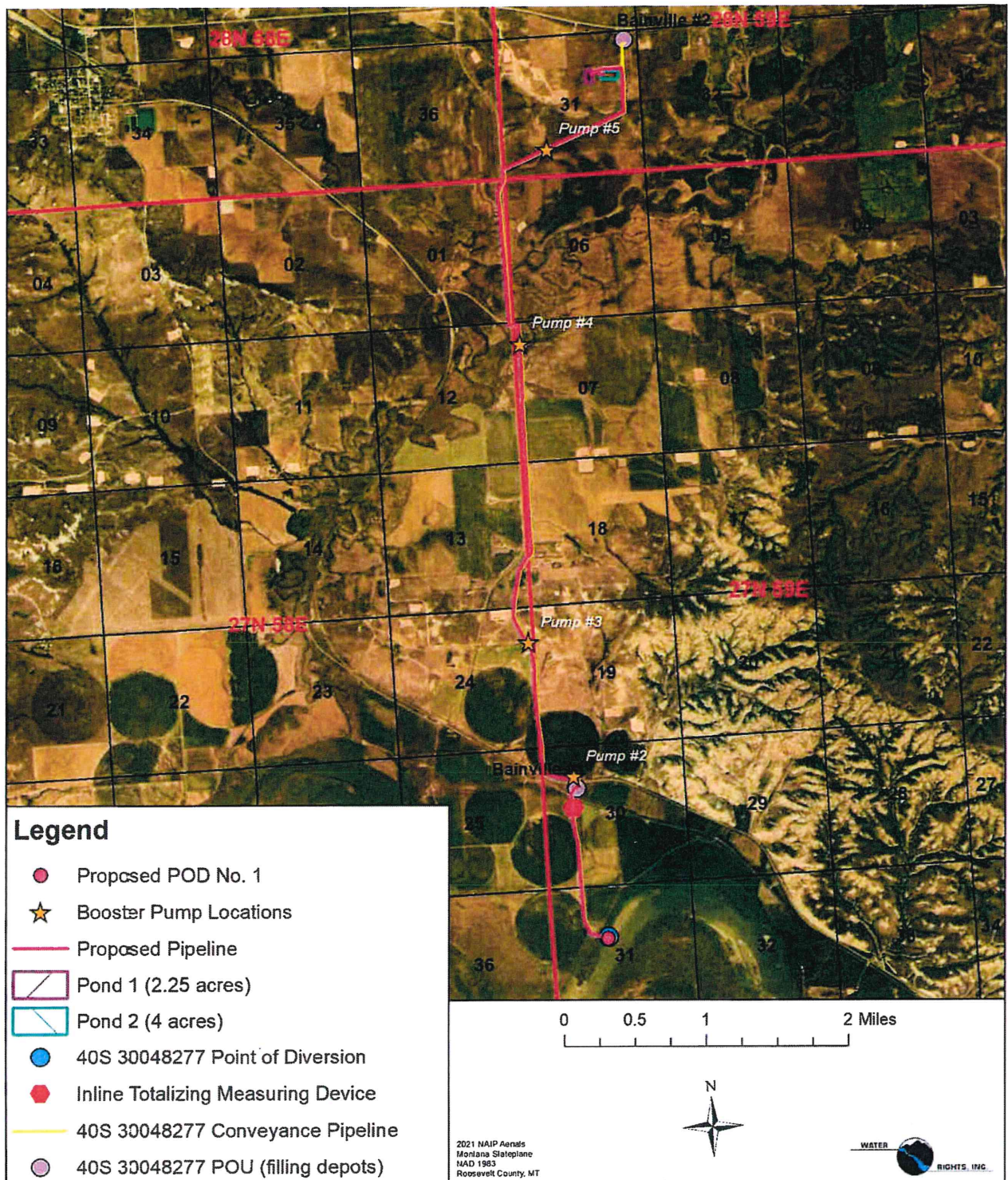


Figure 2: Map Depicting the POD, POU, and Conveyance System

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

GENERAL CONCLUSIONS OF LAW

6. 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 . . .

7. 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.” Section 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, 357 Mont. 438, 240 P.3d 628.

8. 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.

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

10. 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. Section 85-2-311(6), MCA.

11. 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

12. The Applicant proposes to divert water January 1 through December 31 for water marketing use from the Missouri River at a rate of 12 CFS up to 860.17 AF per year. Of the requested volume, 850 AF is contracted for sale and 10.17 AF accounts for net evaporation from the storage ponds.

13. Pursuant to ARM 36.12.1702, available stream gage data are used to quantify physical availability during the proposed months of diversion.

- a. USGS Gage #06185500, Missouri River near Culbertson, is approximately 21 miles upstream of the POD. The period of record for the gage was April 1958 through October 2024.
- b. The Department calculated the median of the mean monthly flow rates in cubic feet per second (CFS) for the Missouri River using USGS Gage 06185500 records for each month of the proposed period of diversion (Table 1, column B). These flows were converted to monthly volumes in AF (Table 1, column C) using the following equation found on DNRC Water Calculation Guide: median of the mean monthly flow (CFS × 1.98 AF/day/1 CFS × days per month = AF/month).

Table 1: Median of the Mean Monthly Gage Data (USGS Gage 06185500)		
A	B	C
Month	Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)
January	11,210	688,070
February	11,340	696,049
March	9,986	612,910
April	8,000	491,040
May	8,656	531,305
June	9,547	585,995
July	9,371	575,192
August	8,973	550,763
September	7,836	480,974
October	6,976	428,156
November	7,280	446,846
December	9,870	605,790

- c. The Department calculated the monthly flows appropriated by existing users between the gage and the POD on the source (Table 3, column D) by:
- Generating a list of existing water rights from the point of diversion to USGS Gage 06185500 (Table 2);
 - Designating irrigation and lawn and garden uses with no period of diversion as occurring from April 1 to October 31;
 - Designating all other water uses with no period of diversion as year-round;
 - Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
 - Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
 - Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.43 AF/Acre (Department standard for irrigation in a moderate climatic area).

- vii. The volume for the existing rights between the gage and point of diversion were calculated by dividing the annual volume by the number of months in the period of diversion.

Table 2: Water Rights Between USGS Gage 06185500 and the Proposed POD			
A	B	C	D
Water Right Number	Flow Rate (CFS)	Volume (AF)	Period of Diversion
40S 30163921	8.90	500.00	01/01 to 12/31
40S 74618 00	2.23	540.00	04/01 to 09/15
40S 77506 00	11.14	416.00	04/01 to 10/01
40S 7832 00	4.46	2,125.00	04/01 to 10/15
40S 111449 00	10.00	408.00	04/01 to 10/15
40S 30004263	3.01	330.00	04/01 to 10/15
40S 109530 00	21.40	282.00	04/01 to 10/15
40S 30043999 ²	8.91	159.60	04/01 to 10/15
40S 109529 00	10.67	2,620.06	04/01 to 10/15
40S 84851 00	21.83	1,451.00	04/01 to 11/01
40S 215560 00	1.44	102.22	04/01 to 11/04
40S 106914 00	5.10	804.00	04/15 to 10/15
40S 30072269	4.01	396.40	04/15 to 10/15
40S 7826 00	5.56	380.00	04/15 to 10/15
40S 30030363	20.05	498.15	04/15 to 10/19
40S 171255 00	15.60	2,022.88	04/15 to 10/19
40S 186742 00 ²	2.90	1,930.00	04/15 to 10/19
40S 12708 00	8.02	1,388.00	04/15 to 11/15
40S 66293 00	8.91	408.00	04/20 to 10/01
40S 66294 00	8.91	165.00	04/20 to 10/01
40S 41349 00 ²	9.00	41,349.00	05/01 to 09/19
40S 99060 00	2.23	309.70	05/01 to 09/30
40S 4010 00	13.37	1,440.00	05/01 to 10/01
40S 13498 00	2.23	324.00	05/01 to 10/01
40S 17852 00	8.91	200.00	05/01 to 10/01
40S 106990 00	4.20	636.00	04/01 to 10/31 ³
40S 106912 00	5.60	150.00	04/15 to 10/15
40S 114723 00	2.20	340.00	04/01 to 10/15
40S 7775 00	6.68	1,500.00	04/15 to 10/15
40S 172261 00 ²	41.10	2,636.55	04/01 to 11/30
40S 3227 00 ²	20.05	1,290.33	03/15 to 10/31

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40S 74095 00	8.91	130.00	04/01 to 10/31
40S 30031187	2.67	168.70	04/15 to 10/15
40S 77646 00	0.68	365.00	01/01 to 12/31
40S 186739 00 ¹	1.00	38.03	01/01 to 12/31
40S 188166 00 ¹		38.03	01/01 to 12/31
40S 188165 00 ¹		38.03	01/01 to 12/31
40S 30142666 ¹		0.07	01/01 to 12/31
40S 30142624 ¹		0.54	01/01 to 12/31
40S 30132248 ¹		17.00	01/01 to 12/31
40S 186743 00 ¹		38.03	01/01 to 12/31
40S 186744 00 ¹		38.03	01/01 to 12/31
40S 188168 00 ¹		38.03	01/01 to 12/31
40S 137592 00 ¹		0.88	01/01 to 12/31
40S 137593 00 ¹		1.29	01/01 to 12/31
40S 186738 00 ¹		38.03	01/01 to 12/31
40S 30142668 ¹		0.07	01/01 to 12/31
40S 30142629 ¹		0.34	01/01 to 12/31
40S 135791 00 ¹		10.34	01/01 to 12/31
40S 137594 00 ¹		1.90	01/01 to 12/31
40S 135792 00 ¹		7.89	01/01 to 12/31
40S 137576 00 ¹		1.29	01/01 to 12/31
40S 30142622 ¹		2.45	01/01 to 12/31
40S 172341 00 ¹		34.00	01/01 to 12/31
40S 30142670 ¹		0.48	01/01 to 12/31
40S 30142625 ¹		0.20	01/01 to 12/31
40S 135782 00 ¹		0.27	01/01 to 12/31
40S 135783 00 ¹		0.48	01/01 to 12/31
40S 135784 00 ¹		0.54	01/01 to 12/31
40S 135793 00 ¹		13.60	01/01 to 12/31
40S 30142615 ¹		0.48	01/01 to 12/31
40S 30142667 ¹		0.20	01/01 to 12/31
40S 30161904	6.68	600.00	01/01 to 12/31
40S 30113093	4.20	243.00	01/01 to 12/31
40S 30153305	1.50	210.00	01/01 to 12/31
40S 30063074	4.50	140.00	01/01 to 12/31
40S 30048277	4.50	522.10	01/01 to 12/31

¹Livestock direct from source – flow rate and volume assigned from animal units per Department standards

²Irrigation – volume assigned using Department standards for irrigation in climatic area 2

³Assigned period of diversion per Department standards

14. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the monthly flow rates and volumes of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. The Department subtracted the flow rates and volumes of the existing rights between USGS Gage 06185500 and the POD (Table 3, columns D and E) from the median of the mean monthly gage values (Table 3, columns B and C) to determine physical availability (CFS and AF) at the POD (Table 3, columns F and G).

Table 3: Physical Availability at the Point of Diversion on the Missouri River						
A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)	Existing Rights from the POD to Gage 06185500 (CFS)	Existing Rights from the POD to Gage 06185500 (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
Jan	11,210	688,070	34	245	11,176	687,825
Feb	11,340	696,049	34	245	11,306	695,804
March	9,986	612,910	54	406	9,932	612,504
April	8,000	491,040	299	3,496	7,701	487,544
May	8,656	531,305	335	12,221	8,321	519,084
June	9,547	585,995	335	12,221	9,212	573,774
July	9,371	575,192	335	12,221	9,036	562,971
Aug	8,973	550,763	335	12,221	8,638	538,542
Sep	7,836	480,974	335	12,221	7,501	468,753
Oct	6,976	428,156	286	3,337	6,690	424,819
Nov	7,280	446,846	83	748	7,197	446,098
Dec	9,870	605,790	34	245	9,836	605,545

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

LEGAL AVAILABILITY

FINDINGS OF FACT

16. The area of potential impact is 9.5 miles downstream from the proposed point of diversion to the Montana/North Dakota border. A total of 34 surface water rights exist within this reach.

17. The Missouri River is a major surface water source compared to other streams in the area. Because there are no significant tributaries or confluences between the POD and the exit of the

Missouri River into North Dakota, the Department will designate the said reach as the area of potential impact.

18. A list of senior surface water rights that divert from the Missouri River in the location between the POD (Gov't Lot 3, NWSENW, Section 31, T27N, R59E, Roosevelt County) and the Montana/North Dakota state border (Section 24, T26N, R59E, Richland County) were compiled using the DNRC GIS web application Converge. Senior surface water rights could include all active claims, exempt notices, permits, perfected CD reservations, instream flows, tribal rights, and hydropower water rights. The flow rate and volume were assigned to any unquantified water rights following Department standards per the DNRC permit manual by:

- a. Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
- b. Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
- c. Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.43 AF/Acre per Department water use standards for a moderate consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

These downstream legal demands are summarized in Table 4.

Table 4: Water Rights on Missouri River in the Area of Potential Impact			
A	B	D	E
Water Right #	Period of Diversion	Flow Rate (CFS)	Volume (AF)
40S 187284 00	01/01 to 12/31	0.01	3.00
40S 9852 00	01/01 to 12/31	1.67	60.00
40S 130567 00 ¹	01/01 to 12/31	-	172.00
40S 30017671	01/01 to 12/31	5,178.00	3,748,500.00
40S 142799 00 ³	01/01 to 12/31	0.89	225.00
40S 130516 00 ³	03/01 to 11/30	1.67	60.00
40S 30015443	04/01 to 10/15	0.33	20.00
40S 30069082	04/01 to 10/15	1.56	60.00
40S 103653 00	04/01 to 10/15	1.30	147.00
40S 30010979	04/01 to 10/15	6.70	536.00
40S 171828 00 ³	04/01 to 10/31	1.78	285.00
40S 130566 00 ⁴	04/01 to 10/31	10.53	675.54
40S 46536 00 ⁴	04/01 to 10/31	2.50	267.30

40S 104510 00	04/15 to 10/15	2.60	145.00
40S 11818 00 ⁵	04/15 to 10/15	-	184.00
40S 30003106 ⁵	04/01 to 10/15	1.67	24.00
40S 114722 00	04/15 to 10/15	3.40	203.00
40S 111301 00	04/15 to 10/15	5.10	302.00
40S 7775 00	04/15 to 10/15	6.68	1,500.00
40S 5477 00 ³	05/01 to 08/31	10.03	600.00
40S 74095 00	04/01 to 10/31 ⁶	8.91	130.00
40S 3227 00 ³	04/01 to 10/32 ⁶	20.05	1,693.00
40S 30152855	01/01 to 12/31	5.71	925.00
40S 171290 00 ⁴	04/15 to 11/04	4.46	170.10
40S 12810 00	03/01 to 11/01	13.37	540.00
40S 19231 00	05/01 to 06/30	25.06	3,340.00
40S 30 00	07/01 to 09/30	25.06	3,340.00
40S 5479 00	05/01 to 08/31	2.67	60.75
40S 4213 00	05/01 to 09/30	8.91	176.00
40S 30142626 ²	01/01 to 12/31	0.09	0.31
40S 135790 00 ²	01/01 to 12/31		0.88
40S 187283 00 ²	01/01 to 12/31		2.04
40S 137598 00 ²	01/01 to 12/31		7.75
40S 30048277	01/01 to 12/31	4.50	522.10

¹No assigned flow rate for water spreading purpose

²Livestock direct from source - flow rate and volume assigned from animal units per department standards

³Assigned volume as claimed

⁴Volume calculated using Department standard water use for irrigation in climatic area 2

⁵Combined flow rate of 1.67 CFS

⁶Assigned period of diversion per department standards

19. Table 5 shows the legally available water for appropriation during the period of diversion requested. The monthly volume of downstream water rights was calculated by dividing the appropriated volumes by the number of months in the period of use.

Table 5: Legal Availability Analysis of the Missouri River from the Proposed POD to the North Dakota Border						
A	B	C	D	E	F	G
Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands Downstream of the Proposed POD (CFS)	Existing Legal Demands Downstream of the Proposed POD (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
January	11,176	687,825	5,191	312,535	5,987	375,290
February	11,306	695,804	5,191	312,535	6,117	315,910
March	9,932	612,504	5,206	312,609	4,728	299,895
April	7,701	487,544	5,283	313,515	2,419	157,924

May	8,321	519,084	5,330	315,385	2,993	203,434
June	9,212	573,774	5,330	315,385	3,884	239,221
July	9,036	562,971	5,330	314,829	3,708	247,878
August	8,638	538,542	5,330	314,829	3,310	223,449
September	7,501	468,753	5,317	314,664	2,185	138,309
October	6,690	424,819	5,283	313,515	1,522	112,548
November	7,197	446,098	5,193	312,542	2,047	119,472
December	9,836	605,545	5,191	312,535	4,647	293,010

20. The Assiniboine and Sioux tribes of the Fort Peck Indian reservation (Tribes) possess a Tribal Water Right, as defined in Article III the Fort Peck-Montana Compact, § 85-20-201, MCA, which entitles the Tribes to divert up to 950,000 AF per year from the Missouri River or Fork Peck Reservoir. Art. III.F. Article III.E. requires any diversion of the Tribal Water Right from the Missouri River outside of the Reservation boundaries to be authorized prior to diversion. In its analysis of this Application, the Department did not include the Tribal Water Right in Tables 4 and 5 as an existing legal demand because the location(s) where the Tribal Water Right will be diverted in comparison to the proposed appropriation in this application is not discernable and the point of diversion in this application is about 155 river miles downstream of the Fort Peck Reservation boundary. Based on these factors, the Department finds the proposed appropriation will not adversely affect the Tribes' ability to exercise the Tribal Water Right as authorized in the Fort Peck – Montana Compact.

21. Table 6 compares the legally available flow rate and volume with the requested amount. Table 5 shows that water is legally available for the requested amount throughout the proposed period of diversion at the proposed source of supply. Even though the proposed water will be variable as dictated by oil drilling schedules, for comparison purpose, the monthly requested volumes are equal to the total requested volume divided by the period of use (850 AF/12 months = 71 AF/month).

Table 6: Legal Availability Comparison of Flow Rate and Volume						
A	B	C	D	E	F	G
Month	Legally Available Water (CFS)	Legally Available Water (AF)	Applicant Requested Flow Rate (CFS)	Applicant Requested Volume (AF)	Remaining Legally Available Water (CFS)	Remaining Legally Available Water (AF)
Jan.	5,987	375,290	12	71	5,975	375,219
Feb.	6,117	315,910	12	71	6,105	315,839
March	4,728	299,895	12	71	4,716	299,824

April	2,419	157,924	12	71	2,407	157,853
May	2,993	203,434	12	71	2,981	203,363
June	3,884	239,221	12	71	3,872	239,150
July	3,708	247,878	12	71	3,696	247,807
August	3,310	223,449	12	71	3,298	223,378
Sept.	2,185	138,309	12	71	2,173	138,238
Oct.	1,522	112,548	12	71	1,510	112,478
Nov.	2,047	119,472	12	71	2,035	119,401
Dec.	4,647	293,010	12	71	4,635	292,939

22. The Department finds the proposed appropriation of 12 CFS and up to 860.17 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

23. Water is both physically and legally available in the source. The water rights considered for adverse effect in the Department- designated area of potential impact (see FOF 16-17) are listed in Table 4. In the event of a water shortage, the Applicant will cease diversion if a valid call is made.

24. In order to ensure that the requested flow rate and volume are not exceeded during years of high oil field activity, the Applicant will be required to submit measurement report each year, and the application is subject to the following conditions:

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 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 GLASGOW WATER RESOURCES UNIT OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

2. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY THE LANGUAGE INCLUDED IN THE CONTRACT AND SIGNS POSTED AT THE DEPOT.

3. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.

25. The Applicant is a co-owner of the water right 40S 30048277 whose point of diversion and conveyance structure will temporarily be used by the proposed project during construction of the new pipeline. The Department found the pipeline was adequate to convey 4.5 CFS and 1000 AF in the criteria analyses for Change Authorization 40S 30063269. The Applicant stated that the existing pipeline may be used to supply water contracted for the proposed project as well as the project approved with water right 40S 30048277 but will not go over the total flow rate and volume of 4.5 CFS and 522.1 AF permitted under 40S 30048277.

26. Notice was provided to Miles Panasuk, the other owner of 40S 30048277, who electronically signed to confirm notice receipt. The Applicant also provided a lease agreement, dated May 1, 2010, between John Ames (a member of ASWS), and Miles Panasuk providing pipeline access and construction easement.

27. The Applicant has proven that enough water remains in the Missouri River to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 12 CFS and 860.17 AF.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

28. The Applicant plans to divert water at a rate of 12 CFS and 860.17 AF from the Missouri River from a diversion point in Gov't Lot 3, NWSENW, Section 31, T27N, R59E, Roosevelt County using a screened river intake pump. The pump is a single stage Cornell 101222T, with an impeller of 21.95", a discharge pressure of 425', and a lift of 15'. Pump curves were provided by the Applicant, identifying the optimum performance at 4,998 to 7,689 GPM (11 – 17 CFS). The pump is powered by an 800 HP, Caterpillar C18 diesel engine, which meets Tier 4 EPA standards. The Applicant stated the pumps will maintain the flow rate of 12 CFS, which is within the optimal performance range, to lower power costs.

29. Water will be delivered approximately 7.33 miles to two ponds via a 12" SDR 26 buried PVC pipeline. Four booster pumps, located 1-2 miles apart, will be utilized to deliver the desired flow

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rate throughout the pipeline. During the construction of the proposed pipeline, which the Applicant stated would take approximately a year, they will temporarily use the existing pipeline from Provisional Permit 40S 30048277. The Department found the pipeline was adequate to convey 4.5 CFS and 1000 AF in the criteria analyses for Change Authorization 40S 30063269 and more information regarding the pipeline infrastructure can be found in that file. The Applicant stated that the existing pipeline may be used to supply water contracted for the proposed project as well as the project approved with water right 40S 30048277 but will not go over the total flow rate and volume of 4.5 CFS and 522.1 AF permitted under 40S 30048277.

30. The POU consists of two, lined reservoirs, one with a capacity of 24 AF (2.25 surface acres) located in the NESWNE, Section 31, T28N, R59E, and the other 45 AF (3.96 surface acres) located in the NWSENE, Section 31, T28N, R59E. The parking and water extraction areas (See Fig. 1) for both reservoirs are in NESWNE, Section 31, T28N, R59E. Both reservoirs are approximately 20 FT deep, and the outlets will be from the bottom to account for freezing conditions. Both ponds will be fenced for security, public safety and livestock protection. Other than evaporation from the storage ponds, there will be no conveyance losses.

31. Clients will access pond #1 via suction. A designated area will allow clients to park pumps and install their intakes. This area will be within the security fence. This pond inlet is an open air, cascading type inlet that will thaw the suction and fill areas in the winter months through the movement of above-freezing temperature water. The fill is connected directly to the 12" pipeline and controlled with a 12" buried gate valve.

32. Clients will access pond #2 via a common inlet/outlet pipe installed into the pond floor through the pond dike. The common inlet/outlet will be connected directly to the 12" pipeline and controlled with a 12" buried gate valve. An above-grade riser will be installed as a branch to this common inlet/outlet, allowing clients to connect their pump intakes to it. Access in winter will be maintained due to the depth of the inlet/outlet within the water column.

33. The Applicant has provided easements for pipeline access and construction with the landowner at the point of diversion, as well as a lease agreement with the landowner of the point of sale. Any further easements needed by the Applicant for the pipeline will be acquired.

34. The Department finds that the proposed means of diversion and conveyance are capable of diverting the proposed appropriation.

BENEFICIAL USE

FINDINGS OF FACT

35. The Applicant proposes to divert 860.17 AF, year-round, at a rate of 12 CFS for the beneficial use of water marketing for oil field development. The general service area is located in the following townships and ranges:

- a. T29N, R56E
- b. T29N, R57E
- c. T29N, R58E
- d. T28N, R56E
- e. T28N, R57E

36. The Department does not have a standard water use calculation for water marketing. Of the requested volume of 860.17 AF, 850 AF is contracted to be sold for water marketing, and 10.17 accounts for net evaporation losses from the two storage ponds.

37. Storage pond evaporation was determined in accordance with ARM 36.12.116(1). One storage pond has a surface area of 2.25 acres and the other 3.96 acres. The annual net evaporation of 19.66 IN/YR for this area was obtained from the Gridded Net Evaporation layer in the Department ArcGIS program, Converge. Multiplying the surface area of both ponds by the evaporation in feet yields 10.17 AF ($19.66 \text{ IN/YR} \times 1/12 \text{ FT/IN} \times 6.21 \text{ AC} = 10.17 \text{ AF}$).

38. ASWS, LLC has signed a Commercial Water Purchase Agreement, dated December 20, 2024, with Phoenix Operating, LLC for up to 850 AF per year. This contract satisfied the requirements of §85-2-310(8)(c)(v), MCA. With the requested 850 AF per year, the contracted customer will develop oil and gas wells in Roosevelt County. Phoenix Operating will be drilling 3-mile and 4-mile laterals with total lateral lengths of 15,000 – 20,000 FT. The Applicant stated that modern fracking design for 4-mile laterals consists of 105-110 stages, each roughly 190 FT apart throughout the lateral. Each stage is designed to utilize approximately 0.5 AF of fresh water to ensure sufficient operation. Up to 53 AF of fresh water will be required per 4-mile lateral and up to 16 oil wells may be developed each year.

39. The Applicant described a technology that requires a high flow for efficient fracking and provided industry data showing that a flow up to 12.5 CFS has successfully serviced many modern frac sites. Fresh water must be pumped between 6.5 and 7.5 CFS to prevent frac sand from falling out of solution and “sanding off” the well.

40. Water sold under this appropriation will be used in the oil field industry. The amount of sales will vary with oil field activity during the year, not to exceed 850 AF per year.

41. The Department finds the proposed water use is beneficial, and that the requested flow rate of 12 CFS and annual volume of 850 AF is the amount needed to meet the beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

42. This application is for water marketing in which water is supplied to another. The Applicant, ASWS, LLC, has signed a Commercial Water Purchase Agreement with Phoenix Operating LLC, dated December 20, 2024. The service area for Phoenix Operating LLC is depicted in the purchase agreement Exhibit A. It is clear that the ultimate user will not accept the supply without consenting to the use of water.

43. 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

PHYSICAL AVAILABILITY

44. 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.”

45. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

46. 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).

47. Use of published upstream gauge data minus rights of record between gauge 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)

48. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 12-15)

LEGAL AVAILABILITY

49. 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).

50. 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.

51. Use of published upstream gauge data minus rights of record between gauge 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);

52. 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. Section 85-2-311(1)(a)(ii), MCA. (FOF 16-22)

ADVERSE EFFECT

53. 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.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

54. 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(5).

55. 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*, 4 (2011).

56. 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*, 249 Mont. 425, 816 P.2d 1054 (1991).

57. 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*, 7 (2011) (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). 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.

58. 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*, 8 (2011).

59. 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. Section 85-2-311(1)(b), MCA. (FOF 23-27)

ADEQUATE DIVERSION

60. 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.

61. 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.

62. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

63. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

64. 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. Section 85-2-311(1)(c), MCA (FOF 28-34).

BENEFICIAL USE

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

66. 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; 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*, 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).

67. 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*, 3 (2011) (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).

68. Applicant seeks a change authorization to market water to others for beneficial use, which is a recognized beneficial use. Section 85-2-102(5), 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. . . .” Section 85-2-310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(5), and -311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

69. 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 or change authorization 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).

70. It is the Applicant’s burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 (“issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied”); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); *see also Royston; Ciotti*.

71. Applicant proposes to use water for water marketing which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence water marketing is a beneficial use and that 860.17 AF of diverted volume and 12 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 35-41)

POSSESSORY INTEREST

72. 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.

73. 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.

74. 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. Section 85-2-311(1)(e), MCA. (FOF 42-43)

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 30164889 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from January 1 through December 31 at 12 CFS up to 860.17 AF, from a point in Gov't Lot 3, NWSENW, Section 31, T27N, R59E, Roosevelt County, for water marketing use from January 1 through December 31. The place of use is the point of sale located in the NESWNE, Section 31, T28N, R59E, Roosevelt County. The Applicant may store water in reservoirs located in the NESWNE, Section 31, T28N, R59E and NWSENE, Section 31, T28N, R59E.

Draft Preliminary Determination to Grant

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Application for Beneficial Water Use Permit No. 40S 30164889

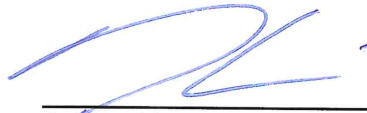
The application will be subject to the following conditions, limitations, or restrictions:

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 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 GLASGOW WATER RESOURCES UNIT OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
2. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY THE LANGUAGE INCLUDED IN THE CONTRACT AND SIGNS POSTED AT THE DEPOT.
3. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 25th day of July, 2025.



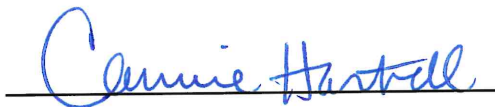
Ashley Kemmis, Acting Regional Manager
Glasgow Regional Office
Montana Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 25th day of July, 2025, by first class United States mail.

ASWS, LLC
C/O NEIL IVERSEN
PO BOX 1166
WILLISTON, ND 58802-1166

LEE YELIN (CONSULTANT)
WATER RIGHTS, INC.
(VIA EMAIL: WATERRIGHTSINC@GMAIL.COM)



GLASGOW Regional Office, (406) 228-2561