

# THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

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

June 18, 2025

ROBERT P AND LISA J HAUGO  
PO BOX 793  
SCOBEY, MT 59263

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 40S 30165154

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 July 10, 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 "Ashley Kemmis", with a stylized flourish at the end.

Ashley Kemmis  
Water Resource Specialist  
Water Rights Bureau  
Water Resources Division



DNRC.MT.GOV

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

\*\*\*\*\*

**APPLICATION FOR BENEFICIAL WATER)  
USE PERMIT NO. 40S 30165154 BY LISA J) DRAFT PRELIMINARY DETERMINATION  
HAUGO AND ROBERT P HAUGO ) TO GRANT PERMIT**

\*\*\*\*\*

On March 26, 2025, Lisa J. Haugo and Robert P. Haugo (Applicants) submitted Application for Beneficial Water Use Permit No. 40S 30165154 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 20 GPM and 2.78 AF. The Department published receipt of the application on its website. The Department sent the Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated April 16, 2025. The Applicants responded with information dated April 21, 2025. A preapplication meeting was held between the Department and the Applicants on January 8, 2025, in which the Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Checklist on January 16, 2025. The Department delivered the Department- Completed Technical Analyses on March 7, 2025. The application was determined to be correct and complete as of May 2, 2025. An Environmental Assessment for this application was completed on June 16, 2025.

**INFORMATION**

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

**Application as filed:**

- Application for Beneficial Water Use Permit, Form 600
- Attachments:
  - Pump Curves
  - Diagram of Sprinkler System
  - Proposal for Sprinkler System, by Frost Contracting
- Maps: Undated aerial imagery of the property showing the location of point of diversion (POD), conveyance and place of use (POU)
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated March 7, 2025

Draft Preliminary Determination to GRANT

Page 1 of 21

Application for Beneficial Water Use Permit No. 40S 30165154

### 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.
  - Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
- USGS gaging station records (Station #06132000, Missouri River below Fort Peck Dam, MT) from April 1934 to September 2021
- Department record of existing water rights
- Surface Water Permit Technical Analyses Report – Notice of Errata, by Ashley Kemmis, dated May 15, 2025

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; AU means animal unit; AC means acres; and AF/YR means acre-feet per year.

### **PROPOSED APPROPRIATION**

#### **FINDINGS OF FACT**

1. The Applicants propose to divert water from the Missouri River, by means of a pump, from April 1 to October 31 at 20 GPM up to 2.78 AF, from a point in the SENWSW, Sec. 34, T27N, R41E, for lawn and garden use from April 1 to October 31. The Applicants propose to irrigate lawn and garden on 1.11 acres. The place of use is located in the Idlewild Park Subdivision, Lot 64, S2NWSW, Sec. 34, T27N, R41E, Valley County.
2. Authorization from the U.S. Army Corps of Engineers may be required to place a pump on the shoreline of the Missouri River, and the Applicant is responsible for obtaining those permits.



Figure 1: The Proposed POD and POU on the Missouri River



## **§ 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." 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.

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, Starnes*, 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.

Draft Preliminary Determination to GRANT

Page 6 of 21

Application for Beneficial Water Use Permit No. 40S 30165154

*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. Section 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 Applicants are requesting to divert water from April 1 to October 31 for lawn and garden use from the Missouri River at a maximum flow rate of 20 GPM up to 2.78 AF annually.

10. Pursuant to ARM 36.12.1702, available stream gage data is used to quantify physical availability at the POD during the proposed months of diversion. The proposed point of diversion is located approximately 4.5 miles upstream from the USGS gaging station below Fort Peck Dam (USGS station #06132000). The period of record for the gage is April 1934 to September 2021. Department practice for physical availability analyses where the gage used is downstream of the POD is to add the monthly flow rates and volumes of existing water rights between the gage and the POD to the median of the mean monthly flows at the gage.

11. Table 1 lists the existing water rights between the requested point of diversion and USGS gaging station #06132000. The Department calculated the monthly flows (Table 2, column B) and volumes (Table 2, column C) following procedure outlines in the Department permit manual:

- 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 2.69 AF/Acre per Department water use standards for a moderately high consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

<b>Table 1: Existing Water Rights Between the Proposed POD and the Gaging Station</b>			
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Water Right Number</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>
40S 171767 00	4.46	2,286.00	01/01 to 12/31
40S 30106536 <sup>2</sup>	0.08	1.01	01/01 to 12/31
40S 30133976 <sup>2</sup>	0.10	16.80	01/01 to 12/31
40S 31725 00	4.68	868.53	01/01 to 12/31
40S 32086 00	0.07	1.00	01/01 to 12/31
40S 42279 00 <sup>2</sup>	0.09	10.33	01/01 to 12/31
40S 46419 00	0.04	2.50	01/01 to 12/31
40S 46416 00 <sup>1</sup>	9.13	1,445.34	03/15 to 11/19
40S 30007495	0.06	1.25	04/01 to 10/31
40S 30013570	0.07	2.50	04/01 to 10/31
40S 30016330	0.06	1.15	04/01 to 10/31
40S 37645 00 <sup>1</sup>	7.58	844.66	04/01 to 10/31
40S 46363 00 <sup>1</sup>	5.35	497.65	04/01 to 11/19
40S 46390 00 <sup>1</sup>	0.30	21.52	04/15 to 09/19
40S 35719 00	5.30	300.00	04/15 to 10/15
40S 7336 00	6.68	450.00	04/15 to 10/15
40S 30023173	-	1.25	4/1 to 12/31
40S 30030763	0.07	4.08	4/1 to 12/31
40S 30041880	0.06	2.35	04/01 to 10/31
40S 30067051	0.08	1.88	04/01 to 10/31
40S 30118355	0.10	1.73	04/01 to 10/31
40S 30163563	0.25	7.58	04/01 to 10/31
40S 43872 00 <sup>1</sup>	4.77	338.94	04/01 to 11/19
40S 30124204	0.03	1.25	04/15 to 10/15
40S 30066327	0.08	1.25	04/15 to 10/31
40S 30161677	0.04	1.61	05/01 to 10/31
40S 30012463	0.07	2.52	04/01 to 10/31
40S 30116186	0.04	1.88	04/01 to 10/31

<sup>1</sup>Irrigation volume is calculated as the number of acres multiplied by 2.69 AF per acre, in accordance with DNRC permit manual.

<sup>2</sup> Livestock use volume is calculated as number of claimed animal units at 30 gallons per day multiplied by number of days in the period of use

12. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Missouri River using USGS gage #06132000 records for each month of the proposed period of diversion (Table 2, column B). Those flows were converted to monthly volumes in AF (Table 2, column C) using the following equation found on DNRC Water Calculation Guide: median of the mean monthly flow (CFS x 1.98 AF/day/1 CFS x days per month = AF/month).

13. Because the gage is downstream of the POD, the Department added the flow rates and volumes of the existing rights between USGS gage #06132000 and the POD (Table 2, columns D and E) to the median of the mean monthly gage values (Table 2, columns B and C) to determine physical availability at the POD (Table 2, columns F and G).

Table 2 below displays the amount of water physically available at the proposed point of diversion:

Table 2: 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 at Gage 06132000 (CFS)	Median of the Mean Monthly Volume at Gage 06132000 (AF)	Existing Rights from the POD to Gage 06132000 (CFS)	Existing Rights from the POD to Gage 06132000 (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
April	6,768	402,019	49	767 <sup>1</sup>	6,817	402,786 <sup>1</sup>
May	7,729	474,406	50	767 <sup>1</sup>	7,779	475,173 <sup>1</sup>
June	8,643	513,394	50	767 <sup>1</sup>	8,693	514,161 <sup>1</sup>
July	8,629	529,648	50	767 <sup>1</sup>	8,679	530,415 <sup>1</sup>
August	9,390	576,358	50	767 <sup>1</sup>	9,440	577,125 <sup>1</sup>
September	7,808	463,766	50	767 <sup>1</sup>	7,857	464,532 <sup>1</sup>
October	7,175	440,371	49	763 <sup>1</sup>	7,224	441,134 <sup>1</sup>

<sup>1</sup>Varies from the March 7, 2025, Technical Analysis, See May 15, 2025, Surface Water Permit Technical Analyses Report – Notice of Errata

14. The Department finds surface water is physically available during the proposed period of diversion at the proposed point of diversion in the amount the Applicants seek to appropriate.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

15. The Department determined that the area of potential impact is the portion of the Missouri River between the POD and the confluence of the Missouri and Milk River, which is approximately 6.5 miles downstream. The Milk River is a substantial tributary to the Missouri River, so the Department finds the confluence to be an appropriate hydrologic boundary for the area of potential impact. The analysis of legal availability takes into consideration the existing legal demands from

individual water rights, the Montana Department of Fish Wildlife & Park's instream flow reservation (40S 30017670), and full development of the Fort Peck Tribes reserved water right. The monthly volume of water rights downstream of the proposed POD is calculated by dividing the volumes of the downstream rights by the number of months in the period of diversion.

a. These downstream legal demands are summarized in Table 3.

<b>Table 3: Water Rights on the Missouri River in the Area of Potential Impact</b>			
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Water Right Number</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>
40S 32086 00	0.07	1.00	01/01 to 12/31
40S 46419 00	0.04	2.50	01/01 to 12/31
40S 30017670	4,508.00	3,263,500.00	01/01 to 12/31
40S 35719 00	5.30	300.00	04/15 to 10/15
40S 7336 00	6.68	450.00	04/15 to 10/15
40S 33997 00	10.03	597.90	04/01 to 10/31
40S 37645 00 <sup>3</sup>	7.58	844.66	04/01 to 10/31
40S 28935 00 <sup>3</sup>	6.68	954.95	04/01 to 11/04
40S 46363 00 <sup>3</sup>	5.35	497.65	04/01 to 11/19
40S 46364 00 <sup>3</sup>	5.35	646.14	04/01 to 11/19
40S 46416 00 <sup>3</sup>	9.13	1,445.34	03/15 to 11/19
40S 46390 00 <sup>3</sup>	0.30	21.52	04/15 to 09/19
40S 30016330	0.06	1.15	04/01 to 10/31
40S 30007495	0.06	1.25	04/01 to 10/31
40S 30023173 <sup>1</sup>	0.00	1.25	04/01 to 10/31
40S 30013570	0.07	2.50	04/01 to 10/31
40S 30030763	0.07	4.08	04/01 to 10/31
40S 31725 00	4.68	868.53	01/01 to 12/31
40S 171767 00	4.46	2,286.00	01/01 to 12/31
40S 30106536 <sup>2</sup>	0.08	1.01	01/01 to 12/31
40S 42279 00 <sup>2</sup>	0.09	10.36	01/01 to 12/31
40S 30133976 <sup>2</sup>	0.10	16.85	01/01 to 12/31
40S 168953 00 <sup>2</sup>	0.11	23.59	04/01 to 11/30
40S 30066327	0.08	1.25	04/15 to 10/31
40S 43872 00 <sup>2</sup>	4.77	338.94	04/01 to 11/19
40S 30041880	0.06	2.35	04/01 to 10/31
40S 30067051	0.08	1.88	04/01 to 10/31
40S 30124204	0.03	1.25	04/15 to 10/15
40S 30118355	0.10	1.73	04/01 to 10/31
40S 30161677	0.04	1.61	05/01 to 10/31
40S 30163563	0.25	7.58	04/01 to 10/31
40S 30012463 <sup>4</sup>	0.07	2.52	04/01 to 10/31
40S 30116186 <sup>4</sup>	0.04	1.88	04/01 to 10/31

<sup>1</sup>40S 30023173 is for additional volume. No flow rate is assigned. Period of Diversion assigned by the Department.

<sup>2</sup>Livestock Direct from Source – flow rate and volume calculated per Department standards.

<sup>3</sup>Irrigation Statement of Claim – volume calculated via Department Standards.

<sup>4</sup>Varies from the March 7, 2025, Technical Analysis, See May 15, 2025, Surface Water Permit Technical Analyses Report – Notice of Errata

16. Tables 4 and 5 below show legal availability of flow rate and volume for the proposed appropriation during the proposed period of diversion.

<b>Table 4: Missouri River Legal Availability – Flow Rate (CFS)</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Flow Rate Physically Available</b>	<b>FWP Instream Right</b>	<b>Fort Peck Tribal Right</b>	<b>Downstream Users Water Rights</b>	<b>Flow Rate Legally Available</b>
April	6,817	4,508	842	72	1,396
May	7,779	4,508	1,711	72	1,488
June	8,693	4,508	2,441	72	1,672
July	8,679	4,508	3,503	72	1,166
August	9,440	4,508	2,933	72	1,927
September	7,857	4,508	1,768	72	1,509
October	7,224	4,508	815	72	1,829

<b>Table 5: Missouri River Legal Availability – Volume</b>					
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>
<b>Month</b>	<b>Volume Physically Available</b>	<b>FWP Instream Right</b>	<b>Fort Peck Tribal Right</b>	<b>Downstream Users Water Rights</b>	<b>Volume Legally Available</b>
April	402,786	267,775	50,000	1,072	83,939
May	475,173	276,701	105,000	1,072	92,400
June	514,161	267,775	145,000	1,072	100,314
July	530,415	267,775	215,000	1,072	46,568
August	577,125	276,701	180,000	1,072	119,352
September	464,532	267,775	105,000	1,072	90,685
October	441,134	276,701	50,000	1,069	113,364

17. The Applicants are requesting a flow rate of 20 GPM (0.04 CFS) up to 2.78 AF per year. The comparison in Table 6 shows water is legally available throughout the proposed period of diversion. The monthly requested volumes for comparison are equal to the total requested volume divided by the period of use (2.78 AF divided by 7 months = 0.40 AF/month).

Table 6: Comparison of Flow Rate and Volume						
A	B	C	D	E	F	G
Month	Flow Rate Legally Available at POD (CFS)	Volume Legally Available at POD (AF)	Flow Rate Requested (CFS)	Volume Requested (AF)	Flow Rate Remaining (CFS)	Volume Remaining (AF)
April	1,396	83,939	0.04	0.40	1,396	83,939
May	1,488	92,400	0.04	0.40	1,488	92,399
June	1,672	100,314	0.04	0.40	1,672	100,314
July	1,166	46,568	0.04	0.40	1,166	46,567
August	1,927	119,352	0.04	0.40	1,927	119,352
September	1,509	90,685	0.04	0.40	1,509	90,685
October	1,829	113,364	0.04	0.40	1,829	113,364

18. The Department finds the proposed appropriation of 20 GPM and 2.78 AF to be legally available during the proposed period of use.

### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

19. Water is both physically and legally available in the source. In the event of a water shortage, the Applicants will cease pumping if a valid call is made.

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

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

21. The Applicants plan to divert water from the Missouri River using a 2-HP, Franklin Electric FTB2CI pump from the SENWSW, Sec. 34, T27N, R41E, Valley County. Pump curves were provided by the Applicants, showing the pumps are capable of diverting the requested flow rate of 20 GPM. From the pump, water is filtered via a Lakos Centrifugal Sand Separator and then transferred to a 2-gallon pressure tank with a 30/40 pressure switch. Water is then distributed via 1.5" to 1" PVC pipe to an underground irrigation system consisting of 64 individual sprinklers in 11 zones.

22. The system is controlled by a Rainbird ESP-ME3 controller/clock. Power lines will be buried from power source to the housing/garage, where the controller is kept, and to the pump. Wiring

is in accordance with the National Electric Code. The amount of water delivered can be controlled by interchangeable nozzles on each individual sprinkler head. The irrigation time on each zone is set from the controller/clock.

23. The system will be shut down on or before October 31. The suction line and foot valve will be removed from the river, electricity to the pump turned off, and the entire system will be blown out with compressed air to force all water out and prevent any water from freezing in the system.

24. The Department finds that the proposed means of diversion and conveyance are capable of diverting the proposed volume and flow rate.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

25. The Applicants propose to use water for the purpose of lawn and garden irrigation from April 1 to October 31. Lawn and garden purpose is recognized by the Department as a beneficial use of water. The Applicants plan to irrigate 1.11 acres with a pump capable of diverting water at the requested rate of 20 GPM up to 2.78 AF annually.

26. The requested flow rate is sufficient to supply lawn and garden irrigation for 1.1 acres and is supported by the pump curve supplied by the Applicants. The flow rate requested is similar to the flow rates of other surface water lawn and garden irrigation permits in the area. The Applicants' proposed volume is within the Department's water calculation guide for lawn and garden, 2.5 AF per acre ( $2.5 \text{ AF/acre} \times 1.11 \text{ acres} = 2.78 \text{ AF}$ ).

27. The Department finds the proposed water use is beneficial, and that the requested flow rate of 20 GPM and annual volume of 2.78 AF are reasonably justified per ARM 36.12.1801(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

28. The Applicants signed the application form affirming that the Applicants have 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.



## **CONCLUSIONS OF LAW**

### **PHYSICAL AVAILABILITY**

29. 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.”

30. 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).

31. 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).

32. 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)

33. 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 9-14)

### **LEGAL AVAILABILITY**

34. 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).

35. 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.

36. 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);

37. 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 15-18)

#### ADVERSE EFFECT

38. 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

Draft Preliminary Determination to GRANT

Page 15 of 21

Application for Beneficial Water Use Permit No. 40S 30165154

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.

39. 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).

40. 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).

41. 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).

42. 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.

43. 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).

44. 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 19-20)

#### ADEQUATE DIVERSION

45. 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.

46. 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.

47. 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).

48. Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 21-24).

#### BENEFICIAL USE

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

50. 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).

51. 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).

52. 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*.

53. Applicant proposes to use water for lawn and garden which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence lawn and garden use is a beneficial use and that 2.78 AF of diverted volume and 20 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 25-27)

#### POSSESSORY INTEREST

54. 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.

55. 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.

56. 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 28)

### **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 30165154 should be GRANTED.

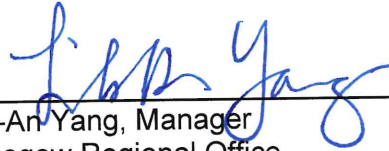
The Department determines the Applicants may divert water from the Missouri River, by means of a pump, from April 1 to October 31 at 20 GPM up to 2.78 AF, from a point in the SENWSW, Sec. 34, T27N, R41E, Valley County, for lawn and garden use from April 1 to October 31. The Applicants may irrigate lawn and garden on 1.11 Acres. The place of use is located Idlewild Park Subdivision, Lot 64, S2NWSW, Sec. 34, T27N, R41E, Valley County.



## **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

Dated this 18th day of June, 2025



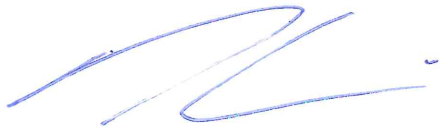
---

Lih-An Yang, 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 18<sup>th</sup> day of June, 2025, by first class United States mail.

ROBERT P AND LISA J HAUGO  
PO BOX 793  
SCOBEEY, MT 59263



---

GLASGOW Regional Office, (406) 228-2561