

# THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

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January 5, 2026

KAR, Inc.  
PO Box 1  
Culbertson, MT 59218-0001

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 40S 30165533

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 written request for an extension is received by January 27, 2026, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.

Please let me know if you have any questions.

Best,



Ashley Kemmis  
Water Resource Specialist  
Water Rights Bureau  
Water Resources Division

Cc: Jim Talbert of Magnus Services, LLC via email: [jim@magnusservices.com](mailto:jim@magnusservices.com)



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

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**APPLICATION FOR BENEFICIAL WATER  
USE PERMIT NO. 40S 30165533 BY KAR,  
INC ) DRAFT PRELIMINARY DETERMINATION  
 ) TO GRANT PERMIT  
 )**

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On July 11, 2025, KAR, Inc. (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30165533 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 11.1 CFS and 1,000 AF for water marketing use. 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 July 29, 2025. The Applicant responded with information dated October 8, 2025. A preapplication meeting was held between the Department and the Applicant on March 13, 2025, 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 March 26, 2025. The Department delivered the Department- completed Technical Analyses on May 8, 2025. The application was determined to be correct and complete as of November 7, 2025. An Environmental Assessment for this application was completed on January 2, 2026.

**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 Kar, Inc. and Phoenix Energy LLC, dated October 1, 2025
  - Service Area Map on undated aerial imagery depicting Phoenix Energy, LLC's service area

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- Cornell Pump Data Sheet
- Maps: Undated aerial imagery depicting the point of diversion and place of use
- Department- completed technical analysis based on information provided in the Preapplication Checklist, dated March 26, 2025

Information Received after Application Filed

- Deficiency Response, dated October 8, 2025
- Surface Water Permit Technical Analyses Report – Notice of Errata, by Ashley Kemmis, dated January 5, 2026

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
  - DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
  - DNRC Water Calculation Guide

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; BBLs means barrels; EPA means Environmental Protection Agency; 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 to December 31 at 11.1 CFS up to 1,000 AF, from a point in the NWSENE, Section 4, T27N, R56E, Roosevelt County, for water marketing use from January 1 to December 31. The

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place of use is the point of sale, which is NWSENE, Section 4, T27N, R56E. 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 multiple townships and ranges in Roosevelt County and Sheridan County as depicted in Exhibit B of the Commercial Water Purchase Agreement dated October 1, 2025.

2. The permit will not be supplemental to any other water rights nor share a place of use.
3. 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 1,000 AF per year. 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 reports each year. The Applicant's design plans include the use of a totalizing flow meter.
4. 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.

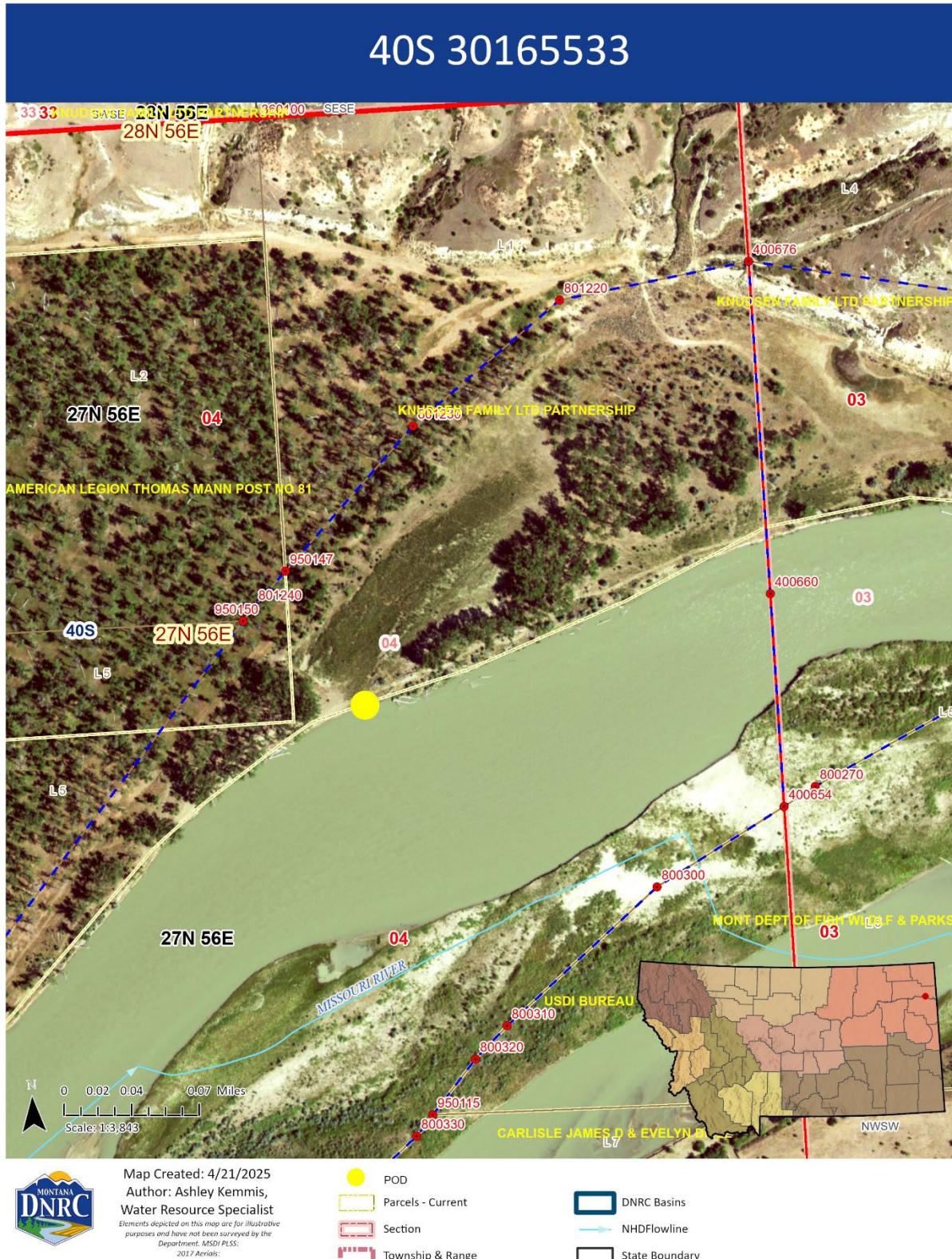


Figure 1: Map showing the POD and POU  
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Application for Beneficial Water Use Permit No. 40S 30165533

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

### **GENERAL CONCLUSIONS OF LAW**

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

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

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

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

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

- (a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
- (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

11. The Applicant proposes to divert water January 1 through December 31 for water marketing use from the Missouri River at a rate of 11.1 CFS up to 1,000 AF per year.

12. 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 0.5 miles downstream of the POD. The period of record for the gage was April 1958 through September 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).

<b>Table 1: Median of the Mean Monthly Gage Data (USGS Gage 06185500)</b>		
<b>A</b>	<b>B</b>	<b>C</b>
<b>Month</b>	<b>Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)</b>	<b>Median of the Mean Monthly Volume at Gage 06185500 (AF)</b>
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

a. The Department calculated the monthly flows appropriated by existing users between the gage and the POD on the source (Table 3, column D) by:

- i. Generating a list of existing water rights from the point of diversion to USGS Gage 06185500 (Table 2);
- ii. Designating irrigation and lawn and garden uses with no period of diversion as occurring from April 1 to October 31;
- iii. Designating all other water uses with no period of diversion as year-round;
- iv. 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.
- v. 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.
- vi. Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.69 AF/Acre (Department standard for irrigation in a moderately high 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.

<b>Table 2: Water Rights Between USGS Gage 06185500 and the Proposed POD</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 1549 00	1.78	257.35	01/01 to 12/31
40S 77646 00	0.68	365.00	01/01 to 12/31
40S 184965 00 <sup>1</sup>	0.09	7.13	01/01 to 12/31

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

13. 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. The Department added the flow rates and volumes of the existing rights between USGS Gage 06185500 and the POD (Table 3, columns D and E) to 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).

<b>Table 3: Physical Availability at the Point of Diversion on the Missouri River</b>						
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>
Month	Median of the Mean Monthly Flow at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)	Existing Rights from Gage 06185500 to the POD (CFS)	Existing Rights from Gage 06185500 to the POD (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
January	11,210	688,070	3	52	11,213	688,122
February	11,340	628,690	3	52	11,343	628,742
March	9,986	612,910	3	52	9,989	612,962
April	8,000	475,200	3	52	8,003	475,252
May	8,656	531,305	3	52	8,659	531,357
June	9,547	567,092	3	52	9,550	567,144
July	9,371	575,192	3	52	9,374	575,244
August	8,973	550,763	3	52	8,976	550,815
September	7,836	465,458	3	52	7,839	465,510
October	6,976	428,156	3	52	6,979	428,208
November	7,280	432,432	3	52	7,283	432,484
December	9,870	605,790	3	52	9,873	605,842

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 Applicant seeks to appropriate.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

15. The area of potential impact is approximately 29.5 river miles downstream from the proposed point of diversion to the Montana/North Dakota border. A total of 107 surface water rights exist within this reach. This includes private water rights (Table 4), the Fort Peck-Montana Compact (Table 5), and the Montana Department of Fish, Wildlife and Parks Reservation 40S 30017671 (Table 6).

16. 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.

17. A list of senior surface water rights that divert from the Missouri River in the location between the POD (NWSENE, Section 4, T27N, R56E, 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 area of potential impact is downstream of the Fort Peck Indian Reservation, so the Fort Peck-Montana Compact was not listed in Appendix A: Water Rights within the Area of Potential Impact in the Technical Analysis, dated May 8, 2025. A recent review by DNRC determined that tribal rights should be considered a legal demand on this portion of the Missouri River. Therefore, the maximum diversion appropriation specified in MCA 85-20-201, Article III(F)(1) was added as a legal demand via the Surface Water Permit Technical Analyses Report – Notice of Errata dated January 5, 2026 (see Table 5). 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.

<b>Table 4: Water Rights Within the Area of Potential Impact</b>				
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
<b>Water Right Number</b>	<b>Period of Diversion</b>	<b>Water Right Type</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>
40S 19231 00	05/01 to 06/30	PROVISIONAL PERMIT	25.06	3,340.00
40S 30 00	07/01 to 09/30	PROVISIONAL PERMIT	25.06	3,340.00
40S 7832 00	04/01 to 10/15	PROVISIONAL PERMIT	4.46	2,125.00
40S 7775 00	04/15 to 10/15	PROVISIONAL PERMIT	6.68	1,500.00
40S 84851 00	04/01 to 11/01	PROVISIONAL PERMIT	21.83	1,451.00
40S 4010 00	05/01 to 10/01	PROVISIONAL PERMIT	13.37	1,440.00
40S 12708 00	04/15 to 11/15	PROVISIONAL PERMIT	8.02	1,388.00
40S 30152855	01/01 to 12/31	TEMPORARY PERMIT	5.71	925.00
40S 106914 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	5.10	804.00
40S 106990 00	04/01 to 10/31 <sup>5</sup>	CONSERVATION DISTRICT RECORD	4.20	636.00
40S 30161904	01/01 to 12/31	PROVISIONAL PERMIT	6.68	600.00
40S 97742 00	05/01 to 09/30	PROVISIONAL PERMIT	2.67	542.70
40S 74618 00	04/01 to 09/15	PROVISIONAL PERMIT	2.23	540.00
40S 12810 00	03/01 to 11/01	PROVISIONAL PERMIT	13.37	540.00
40S 30010979	04/01 to 10/15	CONSERVATION DISTRICT RECORD	6.70	536.00
40S 30048277	01/01 to 12/31	PROVISIONAL PERMIT	4.50	522.10
40S 106915 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	3.90	520.00
40S 114654 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	2.70	451.00
40S 77506 00	04/01 to 10/01	PROVISIONAL PERMIT	11.14	416.00
40S 66293 00	04/20 to 10/01	PROVISIONAL PERMIT	8.91	408.00
40S 111449 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	10.00	408.00
40S 30072269	04/15 to 10/15	PROVISIONAL PERMIT	4.01	396.40
40S 7826 00	04/15 to 10/15	PROVISIONAL PERMIT	5.56	380.00
40S 77646 00	01/01 to 12/31	WATER RESERVATION	0.68	365.00
40S 114723 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	2.20	340.00

40S 30004263	04/01 to 10/15	CONSERVATION DISTRICT RECORD	3.01	330.00
40S 13498 00	05/01 to 10/01	PROVISIONAL PERMIT	2.23	324.00
40S 99060 00	05/01 to 09/30	PROVISIONAL PERMIT	2.23	309.70
40S 111301 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	5.10	302.00
40S 109530 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	21.40	282.00
40S 1549 00	01/01 to 12/31	STATEMENT OF CLAIM	1.78	257.35
40S 30113093	01/01 to 12/31	PROVISIONAL PERMIT	4.20	243.00
40S 30153305	01/01 to 12/31	PROVISIONAL PERMIT	1.50	210.00
40S 114722 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	3.40	203.00
40S 17852 00	05/01 to 10/01	PROVISIONAL PERMIT	8.91	200.00
40S 11818 00	04/15 to 10/15	PROVISIONAL PERMIT	1.67	184.00
40S 4213 00	05/01 to 09/30	PROVISIONAL PERMIT	8.91	176.00
40S 130567 00 <sup>3</sup>	01/01 to 12/31	STATEMENT OF CLAIM	11.14	172.00
40S 30031187	04/15 to 10/15	PROVISIONAL PERMIT	2.67	168.70
40S 66294 00	04/20 to 10/01	PROVISIONAL PERMIT	8.91	165.00
40S 30043999	04/01 to 10/15	CONSERVATION DISTRICT RECORD	8.91	159.60
40S 106912 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	5.60	150.00
40S 103653 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	1.30	147.00
40S 104510 00	04/15 to 10/15	CONSERVATION DISTRICT RECORD	2.60	145.00
40S 30063074	01/01 to 12/31	PROVISIONAL PERMIT	4.50	140.00
40S 74095 00		PROVISIONAL PERMIT	8.91	130.00
40S 9852 00	01/01 to 12/31	PROVISIONAL PERMIT	1.67	60.00
40S 30069082	04/01 to 10/15	CONSERVATION DISTRICT RECORD	1.56	60.00
40S 30003106 <sup>6</sup>	04/01 to 10/15	CONSERVATION DISTRICT RECORD	-	24.00
40S 30015443	04/01 to 10/15	CONSERVATION DISTRICT RECORD	0.33	20.00
40S 187284 00	01/01 to 12/31	STATEMENT OF CLAIM	0.01	3.00
40S 30071102	04/01 to 10/31	PROVISIONAL PERMIT	0.02	1.25
40S 186742 00 <sup>3</sup>	04/15 to 10/19	STATEMENT OF CLAIM	2.90	544*
40S 109529 00 <sup>4</sup>	04/01 to 10/15	PROVISIONAL PERMIT	10.67	0**
40S 3227 00 <sup>3</sup>	04/01 to 10/31 <sup>5</sup>	STATEMENT OF CLAIM	20.05	1693*
40S 172261 00 <sup>3</sup>	04/01 to 11/30	STATEMENT OF CLAIM	41.10	1296*
40S 30030363 <sup>1</sup>	04/15 to 10/19	STATEMENT OF CLAIM	20.05	498.15
40S 171255 00 <sup>1</sup>	04/15 to 10/19	STATEMENT OF CLAIM	15.60	1,827.36
40S 130566 00 <sup>1</sup>	04/01 to 10/31	STATEMENT OF CLAIM	10.53	675.54
40S 5477 00 <sup>3</sup>	05/01 to 08/31	STATEMENT OF CLAIM	10.03	600.00

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40S 41349 00 <sup>3</sup>	05/01 to 09/19	STATEMENT OF CLAIM	9.00	491.40
40S 171290 00 <sup>1</sup>	04/15 to 11/04	STATEMENT OF CLAIM	4.46	170.10
40S 5479 00 <sup>3</sup>	05/01 to 08/31	STATEMENT OF CLAIM	2.67	50.00
40S 46536 00 <sup>1</sup>	04/01 to 10/31	STATEMENT OF CLAIM	2.50	267.30
40S 171828 00 <sup>3</sup>	04/01 to 10/31	STATEMENT OF CLAIM	1.78	285.00
40S 130516 00 <sup>3</sup>	03/01 to 11/30	STATEMENT OF CLAIM	1.67	60.00
40S 215560 00 <sup>1</sup>	04/01 to 11/04	STATEMENT OF CLAIM	1.44	102.22
40S 142799 00 <sup>3</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.89	225.00
40S 30132248 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		17.00
40S 135782 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.27
40S 135783 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.48
40S 135784 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.54
40S 135790 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.88
40S 135791 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		10.34
40S 137594 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		1.90
40S 135792 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		7.89
40S 135793 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		13.60
40S 186743 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 186744 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 186739 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 188166 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 188167 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 188168 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 187283 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		2.04
40S 172341 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		34.00
40S 137580 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.54
40S 137592 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.88
40S 137593 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		1.29
40S 137598 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		7.75
40S 137576 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		1.29
40S 186738 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		43.06
40S 188165 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		37.96
40S 30142670 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.48
40S 30142615 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.48
40S 184965 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		7.13
40S 30142629 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.34
40S 30142624 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.54
40S 30142668 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.07
40S 30142625 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.20
40S 30142667 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.20
40S 30142622 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		2.45

40S 30123529 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		13.60
40S 30142666 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.07
40S 30142626 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.31
40S 30142623 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM		0.10

<sup>1</sup>Volume assigned per Department standards for climatic area irrigation use

<sup>2</sup>Livestock direct from source - flow rate and volume assigned from animal units per Department standards

<sup>3</sup>Volume as claimed

<sup>4</sup>No additional Volume

<sup>5</sup>Department assigned period of diversion

<sup>6</sup>Additional Volume only

**Table 5: Fort Peck Tribal Compact**

Month	Flowrate (CFS)	Volume (AF)
January	652	40,000
February	722	40,000
March	652	40,000
April	842	50,000
May	1,711	105,000
June	2,441	145,000
July	3,503	215,000
August	2,933	180,000
September	1,768	105,000
October	815	50,000
November	673	40,000
December	652	40,000

\*Flow rate in CFS calculated by dividing the monthly volume in AF by the numbers of days in the month by 1.98

**Table 6: Montana Department of Fish, Wildlife & Parks Water Reservation**

Month	Flowrate (CFS)	Volume (AF)
January	5,178	317,826
February	5,178	287,068
March	5,178	317,826
April	5,178	307,573
May	5,178	317,826
June	5,178	307,573
July	5,178	317,826
August	5,178	317,826
September	5,178	307,573
October	5,178	317,826
November	5,178	307,573
December	5,178	317,826

18. The comparison between physically and legally available water in the Missouri River is shown in Table 7 below, indicating that water is legally available for the proposed appropriation.

Table 7: Legal Availability at the Point of Diversion on Missouri River						
A	B	C	D	E	F	G
Month	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)	Existing Legal Demands between Surface Water Depletion and MT Border (CFS)	Existing Legal Demands between Depletion and MT Border (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
January	11,215	688,182	5,873	352,721	5,342	335,460
February	11,345	628,802	5,943	352,721	5,402	276,080
March	10,002	613,145	5,888	352,796	4,114	260,350
April	8,089	476,728	6,393	365,946	1,697	110,783
May	8,754	533,207	7,347	423,475	1,407	109,733
June	9,651	569,340	8,077	463,475	1,574	105,865
July	9,475	577,440	9,139	533,475	336	43,965
August	9,077	553,011	8,569	498,475	508	54,536
September	7,934	467,361	7,366	421,642	568	45,718
October	7,066	429,810	6,334	365,691	732	64,119
November	7,296	432,667	5,945	353,064	1,351	79,604
December	9,875	605,902	5,873	352,721	4,001	253,180

19. Table 8 compares the legally available flow rate and volume with the requested amount. Table 7 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 (1,000 AF/12 months = 83.3 AF/month).

Table 8: 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.	5,342	335,460	11.1	83.3	5,331	335,377
Feb.	5,402	276,080	11.1	83.3	5,391	275,997
March	4,114	260,350	11.1	83.3	4,103	260,267

April	1,697	110,783	11.1	83.3	1,686	110,700
May	1,407	109,733	11.1	83.3	1,396	109,650
June	1,574	105,865	11.1	83.3	1,563	105,782
July	336	43,965	11.1	83.3	325	43,882
August	508	54,536	11.1	83.3	497	54,453
Sept.	568	45,718	11.1	83.3	557	45,635
Oct.	732	64,119	11.1	83.3	721	64,036
Nov.	1,351	79,604	11.1	83.3	1,340	79,521
Dec.	4,001	253,180	11.1	83.3	3,990	253,097

20. The Department finds the proposed appropriation of 11.1 CFS and up to 1,000 AF to be legally available during the proposed period of use.

#### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

21. 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 15-17) are listed in Table 4. In the event of a water shortage, the Applicant will cease diversion if a valid call is made.

22. 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.

23. The Department finds the proposed use will not have an adverse effect because the amount of water requested is legally available and the Applicant's plan to curtail appropriation during times of water shortage is adequate.

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

24. The Applicant plans to divert water at a rate of 11.1 CFS and 1,000 AF from the Missouri River from a diversion point in the NWSENE, Section 4, T27N, R56E, Roosevelt County using a screened intake pump. The Applicant provided a data sheet and pump curves for the 8NHG19 Cornell which identifies the operating level of 1,200 GPM to 7,000 GPM and a shut off head of 625 FT. The pump is powered by a 765 HP, Caterpillar C18 ACERT diesel engine, which meets Tier 3 U.S. EPA standards. The Applicant stated this combination can pump 65 barrels (2,730 gallons) of water 7.2 miles before a booster pump is needed.

25. A floating "Riverscreen" system will be used at the intake to prevent wildlife and debris from entering the conveyance system. Water will be measured via a GloTech flow meter model GEM2, which is an electromagnetic flow meter. Measurements will be taken at the river diversion and at the service area and are monitored by staff on location. Water will be conveyed directly to the individual oil wells in the service area via 12" layflat hose operated at a maximum of 200 PSI and 65 BBLs per minute.

26. The Applicant will obtain permission before laying hose on private property, railroad tracks, and roadways. In winter conditions, the water will be pumped from the river and heated prior to pumping the water. Water may be reheated, depending on the distance to the service area. The heaters are fueled by propane with a capacity of 1,000,000 BTUs.

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

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

28. The Applicant proposes to divert 1,000 AF, year round, at a rate of 11.1 CFS for the beneficial use of water marketing for oil field development. The general service area is located in multiple townships and ranges in Roosevelt County and Sheridan County.

29. The Department does not have a standard water use calculation for water marketing. The Applicant has a signed Commercial Water Purchase Agreement with Phoenix Energy, dated October 1, 2025, for up to 1,000 AF per year. This contract satisfied the requirements of §85-2-310(8)(c)(v), MCA. With the requested 1,000 AF, the contracted customer will develop oil and gas wells in the service area as shown in Exhibit B of the Commercial Water Purchase Agreement.

30. Phoenix Energy engineers calculated the required flow rate and volume based on historic records and a variety of conditions including: the vertical depth, the horizontal length, the friction pressure created by the length of the well and the perforation holes, and the fracturing pressure needed to fracture the shale. Phoenix Energy wells have required 12-15 million gallons of water per well. Phoenix has contracted to purchase 1,000 AF per year, which will provide enough water to frack 20-27 wells per year. Phoenix Energy holds leases for over 100 wells in the service area covered by this permit application. Phoenix drills and pumps oil wells year-round.

31. The Department finds the proposed water use is beneficial, and that the requested flow rate of 11.1 CFS and 1,000 AF is the amount needed to meet the beneficial use.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

32. The Applicant signed the application form affirming that the Applicant has possessory interest or the written consent of the person with possessory interest, in the property where the water is to be put to beneficial use. This application is for water marketing in which water is supplied to another entity who is the ultimate end user. The Applicant, KAR, Inc., has signed a Commercial Water Purchase Agreement with Phoenix Operating LLC, dated October 1, 2025. The service area for Phoenix Operating LLC is depicted in the purchase agreement Exhibit B. It is clear that the ultimate user will not accept the supply without consenting to the use of water.

33. 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**

34. 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.”

35. 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).

36. 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).

37. 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)

38. 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 11-14)

### **LEGAL AVAILABILITY**

39. 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).

40. 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.

41. 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);

42. 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 15-20.)

#### ADVERSE EFFECT

43. 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

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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.

44. 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).

45. 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).

46. 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).

47. 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.

48. 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).

49. 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 21-23)

#### ADEQUATE DIVERSION

50. 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.

51. 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.
52. 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).
53. 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).
54. 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 24-27).

#### BENEFICIAL USE

55. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.
56. 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).

57. 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

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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).

58. 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.

59. 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).

60. 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*.

61. 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 use is a beneficial use and that 1,000 AF of diverted volume and 11.1 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 28-31)

#### POSSESSORY INTEREST

62. 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.

63. 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.

64. 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 32-33)

### **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 30165533 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from January 1 to December 31 at 11.1 CFS up to 1,000 AF, from a point in the NWSENE, Section 4, T27N, R56E, Roosevelt County, for water marketing use from January 1 to December 31. The place of use is the point of sale, which is NWSENE, Section 4, T27N, R56E, Roosevelt County.

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 5<sup>th</sup> day of January, 2026.



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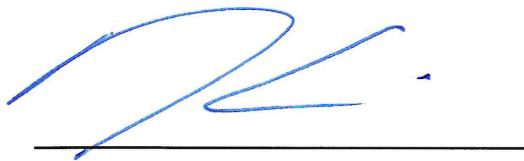
Lih-An Yang, Regional Manager  
Glasgow Regional Office  
Montana Department of Natural Resources  
and Conservation

**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 5th day of January, 2026, by first class United States mail.

KAR, INC.  
PO BOX 1  
CULBERTSON, MT 59218-0001

JIM TALBERT (CONSULTANT)  
MAGNUS SERVICES LLC  
(VIA EMAIL: [JIM@MAGNUSSERVICES.COM](mailto:JIM@MAGNUSSERVICES.COM))

A handwritten signature in blue ink, appearing to read "JIM TALBERT", is placed above a horizontal line.

GLASGOW Regional Office, (406) 228-2561