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October 16, 2026

James D. Carlisle and Evelyn D. Carlisle
PO Box 410
Culbertson, MT 59218

Subject: Preliminary Determination to Grant in Modified Form Beneficial Water Use Permit Application No. 40S 30171137

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has received and considered public comments pursuant to §85-2-307(5), MCA on the following aspects of the Department's Draft Preliminary Determination for your application:

- ❑ One public comment was considered regarding legal availability analysis, and one issue was raised by this comment. This issue generally called into question the lack of condition for real-time measurements and shut off.
- ❑ One public comment was considered regarding beneficial use, and one issue was raised by this comment. This issue generally called into question the maximization of beneficial use by the state.

The Department has reviewed the public comments. Following consideration of the public comments for our evaluation of the criteria for issuance of permit authorization found in §85-2-311, MCA, the Department has preliminarily determined that the criteria can be met only with modifications to the original application, and this application should be granted in modified form. A copy of the Preliminary Determination to Grant in Modified Form is attached.

The Department will prepare a notice of opportunity to object to the application based on issues identified in the public comment(s), pursuant to §85-2-307(8), MCA. If no valid objections are received within the objection period, the Department will issue the PD as final pursuant to §85-2-307(5)(c), MCA.

If valid objections are received, the Department will schedule a contested case hearing no more than 90 days after the objection filing deadline, per §85-2-309(1), MCA.

Please let me know if you have any questions.

Best,

Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division

CC: Magnus Consulting, LLC, c/o Jim Talbert via email

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

* * * * * * *

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30171137 BY JAMES D. CARLISLE AND EVELYN D. CARLISLE	)))	**PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM PERMIT**

* * * * * * *

On December 18, 2025, James D. Carlisle and Evelyn D. Carlisle (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30171137 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 12 CFS and 1,000 AF for water marketing. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated January 8, 2026. The Applicant responded with information dated April 20, 2026. A preapplication meeting was held between the Department and the Applicant on June 11, 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 Meeting Form on August 1, 2025. The Department delivered the Department – completed technical analyses on September 12, 2025. The application was determined to be correct and complete as of May 19, 2026. The Draft Preliminary Determination to grant in modified form was sent to the Applicant on July 17, 2026. The Department provided notice of opportunity to provide public comments to this application per § 85-2-307(4), MCA on August 20, 2026. The Department received and considered one public comment. This Preliminary Determination to grant in modified form incorporates the Department's consideration of, and response to, this public comment. An Environmental Assessment for this application was completed on July 13, 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 600/606 WMA
- Attachments:
    - Commercial Water Purchase Agreement with Phoenix Energy signed by Phoenix representative on November 11, 2025; signed by Applicants on December 17, 2025
    - Deficiency Response dated April 20, 2026, which includes:
        - Schematic Diagrams of water Source to Pad Water Transfer Operation
        - Riverscreen Intake – Specifications
        - Cornell Pump and Caterpillar Engine – Specifications and Pump Curves
        - GeoTech Flow Meter GEM 2 Series Specifications
        - Direct Contact and Coil Heating Unit Operating Information
        - TPU Lay-flat Hose Specifications
        - Victaulic Gate Valves and Pipe Fitting Specifications
        - Samples of:
            - Landowner Lay-Flat Agreements
            - Public Agency and BNSF Railroad Permits
- Maps: Undated aerial Imagery depicting the POD/POU and service area
- Department- completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated September 12, 2025
- Surface Water Permit Technical Analyses Report – Notice of Errata, dated October 16, 2025, by Ashley Kemmis, DNRC Water Conservation Specialist

Information Received after Application Filed

- Email from Jim Talbert of Magnus Services, LLC dated May 15, 2026, clarifying deficiency response

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
    - 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).

Public Comments Received

- The Department received and considered the following comment for the Preliminary Determination. The Department has considered one public comment on the legal availability and beneficial use analysis. The Department has not modified the criteria analysis or preliminary determination decision and determined that the information provided did not demonstrate that the legal availability and beneficial use criteria were inadequately addressed and the Department will not reevaluate the criteria. The preliminary determination is to grant in modified form. The comment is addressed in the respective sections. The public comment received can be found in the administrative file.
    - One public comment was considered regarding legal availability analysis, and one issue was raised by this comment. This issue generally called into question the lack of condition for real-time measurements and shut off.
    - One public comment was considered regarding beneficial use, and one issue was raised by this comment. This issue generally called into question the maximization of beneficial use by the state.

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1 to December 31 at 12 CFS up to 1,000 AF, from a point in NWNENW, Section 9, T27N, R56E, Richland County for water marketing use from January 1 to December 31. The place of use is the point of sale, which is in NWNENW, Section 9, T27N, R56E, Richland County. 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 Richland County.

Table 1: Summary of Proposed Use

Flow Rate	Volume	Purpose	Modified Period of Use	Place of Use	Point(s) of Diversion	Priority Date
12 CFS	1,000 AF	Water Marketing	01/01 to 12/31	NWNENW, Section 9, T27N, R56E, Richland County	NWNENW, Section 9, T27N, R56E, Richland County	December 18, 2025

2. This proposed use will not be supplemental to any other water rights nor share a place of use.

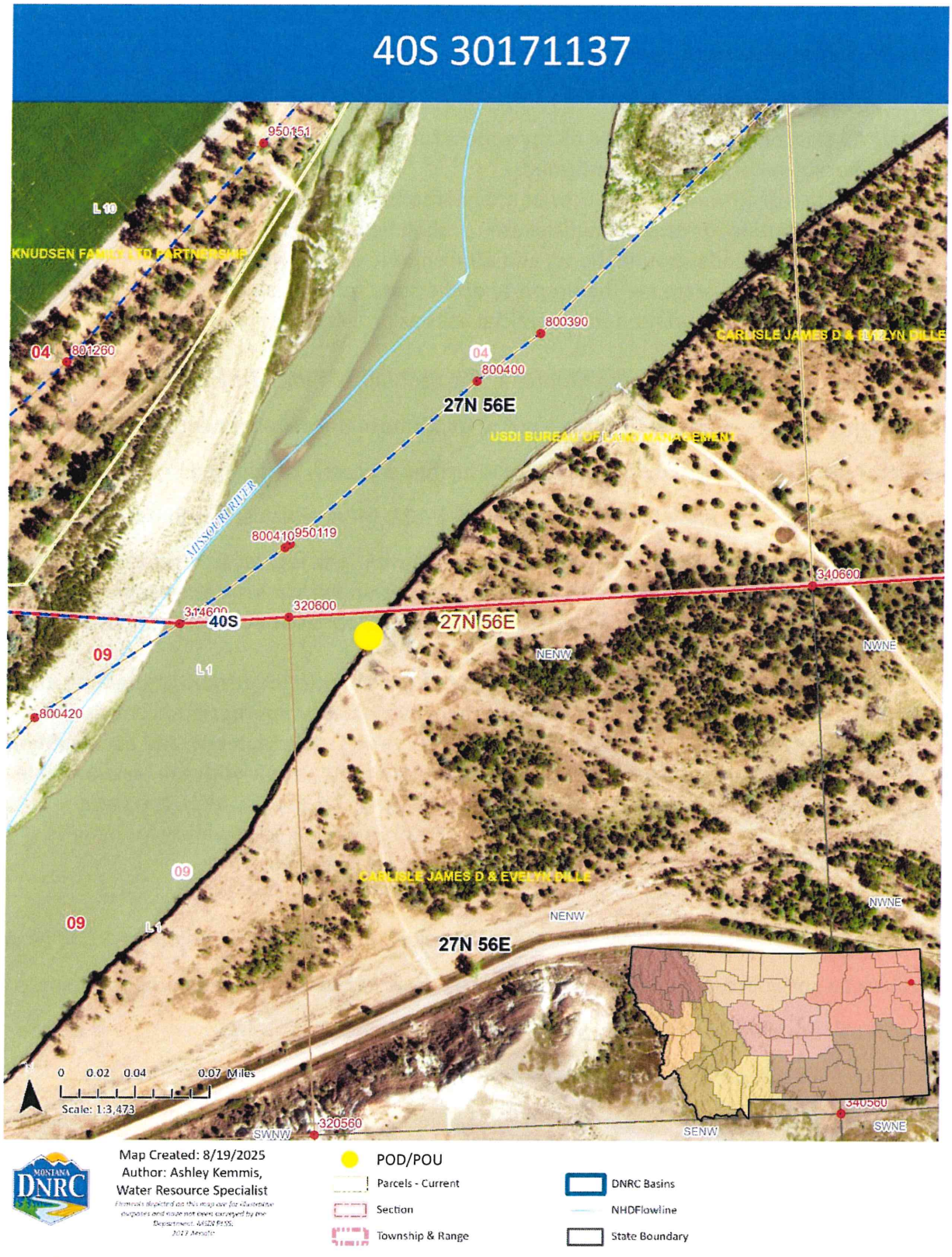


Figure 1: Map Depicting POD and POU

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

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, 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).

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 Applicant proposes to divert water from January 1 through December 31 for water marketing use from the Missouri River at a rate of 12 CFS and 1,000 AF per year.

10. According to ARM 36.12.1702, available stream gage records will be used to quantify physical availability using the median of the mean monthly flow rate and volume during the proposed months of diversion. USGS Gage 06185500, Missouri River Near Culbertson, is the nearest gage to the proposed POD and is approximately 1.5 river miles downstream of the POD. The date rage used for this gage is April 1958 – September 2024.

11. Physical availability of the Missouri River water at the POD will be quantified monthly. 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 and volumes at the gage. The DNRC used the method below to quantify physically available monthly flows and volumes at the POD during the proposed period of diversion.

a. 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 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 × 1.98 AF/day/1 CFS × days per month = AF/month).

Table 2: Median of the Mean Monthly Gage Data (USGS Gage 06185500)

A	B	C
Month	**Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)**	**Median of the Mean Monthly Volume at Gage 06185500 (AF)**
January	11,210	688,070
February	11,340	628,690
March	9,986	612,910
April	8,000	475,200
May	8,656	531,305
June	9,547	567,092
July	9,371	575,192
August	8,973	550,763
September	7,836	465,458
October	6,976	428,156
November	7,280	432,432
December	9,870	605,790

b. 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 3);

Table 3: Existing Water Rights between the USGS Gage 06185500 and the Point of Diversion				
A	B	C	D	E
Water Right Number	**Period of Diversion**	**Water Right Type**	**Flow Rate (CFS)**	**Volume (AF)**
40S 30150186	04/01 to 10/15	CONSERVATION DISTRICT RECORD	0.78	69.00
40S 1549 00	01/01 to 12/31	STATEMENT OF CLAIM	1.78	257.35
40S 77646 00	01/01 to 12/31	WATER RESERVATION	0.68	365.00
40S 184965 00[1]	01/01 to 12/31	STATEMENT OF CLAIM	0.09	7.13
40S 30142619[1]	01/01 to 12/31	STATEMENT OF CLAIM		0.48

[1] Livestock Direct – Flow rate and volume assigned per Department standards

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. 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.

12. Since the gage used is downstream of the POD, the Department added the flow rates and volumes of the existing rights between USGS Gage 06185500 and the POD (Table 4, column D and E) to the median of the mean monthly gage values (Table 4, column B and C) to determine physical availability (CFS and AF) at the POD (Table 4, column F and G).

Table 4: 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 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)	Existing Rights from Gage 06185500 to POD (CFS)	Existing Rights from Gage 06185500 to POD (AF)	Physically Available Flow at POD (CFS)	Physically Available Volume at POD (AF)
January	11,210	688,070	2.55	52.50	11,213	688,122
February	11,340	628,690	2.55	52.50	11,343	628,742
March	9,986	612,910	2.55	52.50	9,988	612,962
April	8,000	475,200	3.33	62.35	8,003	475,262
May	8,656	531,305	3.33	62.35	8,659	531,368
June	9,547	567,092	3.33	62.35	9,550	567,154
July	9,371	575,192	3.33	62.35	9,374	575,254
August	8,973	550,763	3.33	62.35	8,976	550,825
September	7,836	465,458	3.33	62.35	7,839	465,521
October	6,976	428,156	3.33	62.35	6,979	428,219
November	7,280	432,432	2.55	52.50	7,283	432,484
December	9,870	605,790	2.55	52.50	9,872	605,842

13. The Department finds, by a preponderance of evidence, that 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

14. The area of potential impact is approximately 34 miles downstream from the proposed point of diversion to the Montana/North Dakota border. 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.

15. A list of surface water rights that divert from the Missouri River in the location between the POD (NWNENW, Section 9, T27N, R56E, Richland County) and the Montana/North Dakota state border (Section 24, T26N, R59E, Richland County) were compiled using the DNRC GIS web application Converge. A total of 90 surface water rights exist within this reach (see Table 5). Additional to these water rights are the Richland County Conservation District (CD) Reservation #8450000, Roosevelt County CD Reservation #8450100 (see Table 6), the

Montana Department of Fish, Wildlife and Parks Reservation 40S 30017671 (see Table 7), and the Fort Peck-Montana Compact (see Table 8). The Fort Peck-Montana Compact was added as a legal demand in the Surface Water Permit Technical Analyses-Notice of Errata, dated October 16, 2025, because it was not included in the original Surface Water Permit Technical Analyses Report, dated September 12, 2025. The flow rate and volume were assigned to any unquantified water rights following Department standards per the DNRC permit manual by:

a. Designating irrigation and lawn and garden uses with no period of diversion as occurring from April 1 to October 31;
b. 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.
c. 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.
d. Calculating a volume for irrigation water rights without an assigned volume by multiplying the irrigation requirement for 60% efficiency of climatic area II (see DNRC Water Calculation Guide) by the number of acres.
e. The volume for the existing rights between the gage and point of diversion were calculated by dividing the annual volume by the number of months in the period of diversion.

Table 5: Water Rights Within the Area of Potential Impact

A	B	C	D	E
Water Right	**Water Right Type**	**Flow Rate (CFS)**	**Volume (AF)**	**Period of Diversion**
40S 19231 00	PROVISIONAL PERMIT	25.06	3,340.00	05/01 to 06/30
40S 30 00	PROVISIONAL PERMIT	25.06	3,340.00	07/01 to 09/30
40S 7832 00	PROVISIONAL PERMIT	4.46	2,125.00	04/01 to 10/15
40S 7775 00	PROVISIONAL PERMIT	6.68	1,500.00	04/15 to 10/15
40S 84851 00	PROVISIONAL PERMIT	21.83	1,451.00	04/01 to 11/01
40S 4010 00	PROVISIONAL PERMIT	13.37	1,440.00	05/01 to 10/01
40S 12708 00	PROVISIONAL PERMIT	8.02	1,388.00	04/15 to 11/15
40S 30161904	PROVISIONAL PERMIT	6.68	600.00	01/01 to 12/31
40S 97742 00	PROVISIONAL PERMIT	2.67	542.70	05/01 to 09/30

40S 74618 00	PROVISIONAL PERMIT	2.23	540.00	04/01 to 09/15
40S 12810 00	PROVISIONAL PERMIT	13.37	540.00	03/01 to 11/01
40S 30048277	PROVISIONAL PERMIT	4.50	522.10	01/01 to 12/31
40S 77506 00	PROVISIONAL PERMIT	11.14	416.00	04/01 to 10/01
40S 66293 00	PROVISIONAL PERMIT	8.91	408.00	04/20 to 10/01
40S 30072269	PROVISIONAL PERMIT	4.01	396.40	04/15 to 10/15
40S 7826 00	PROVISIONAL PERMIT	5.56	380.00	04/15 to 10/15
40S 13498 00	PROVISIONAL PERMIT	2.23	324.00	05/01 to 10/01
40S 99060 00	PROVISIONAL PERMIT	2.23	309.70	05/01 to 09/30
40S 30113093	PROVISIONAL PERMIT	4.20	243.00	01/01 to 12/31
40S 30153305	PROVISIONAL PERMIT	1.50	210.00	01/01 to 12/31
40S 17852 00	PROVISIONAL PERMIT	8.91	200.00	05/01 to 10/01
40S 11818 00	PROVISIONAL PERMIT	1.67	184.00	04/15 to 10/15
40S 4213 00	PROVISIONAL PERMIT	8.91	176.00	05/01 to 09/30
40S 30031187	PROVISIONAL PERMIT	2.67	168.70	04/15 to 10/15
40S 66294 00	PROVISIONAL PERMIT	8.91	165.00	04/20 to 10/01
40S 30063074	PROVISIONAL PERMIT	4.50	140.00	01/01 to 12/31
40S 74095 00	PROVISIONAL PERMIT	8.91	130.00	04/01 to 10/31[5]
40S 9852 00	PROVISIONAL PERMIT	1.67	60.00	01/01 to 12/31
40S 30071102	PROVISIONAL PERMIT	0.02	1.25	04/01 to 10/31
40S 1549 00	STATEMENT OF CLAIM	1.78	257.35	01/01 to 12/31
40S 130567 00	STATEMENT OF CLAIM	11.14	172.00	01/01 to 12/31
40S 187284 00	STATEMENT OF CLAIM	0.01	3.00	01/01 to 12/31
40S 30152855	TEMPORARY PERMIT	5.71	925.00	01/01 to 12/31
40S 77646 00	WATER RESERVATION	0.68	365.00	01/01 to 12/31
40S 186742 00[1]	STATEMENT OF CLAIM	2.90	544.00	04/15 to 10/19
40S 109529 00[2]	PROVISIONAL PERMIT	10.67	-	04/01 to 10/15
40S 3227 00[1]	STATEMENT OF CLAIM	20.05	1,693.00	04/01 to 10/31[5]
40S 172261 00[1]	STATEMENT OF CLAIM	41.10	1,296.00	04/01 to 11/30
40S 30030363[3]	STATEMENT OF CLAIM	20.05	498.15	04/15 to 10/19
40S 171255 00[3]	STATEMENT OF CLAIM	15.60	1,827.36	04/15 to 10/19
40S 130566 00[3]	STATEMENT OF CLAIM	10.53	675.54	04/01 to 10/31
40S 5477 00[1]	STATEMENT OF CLAIM	10.03	600.00	05/01 to 08/31
40S 41349 00[1]	STATEMENT OF CLAIM	9.00	491.40	05/01 to 09/19
40S 171290 00[3]	STATEMENT OF CLAIM	4.46	170.10	04/15 to 11/04
40S 5479 00[1]	STATEMENT OF CLAIM	2.67	50.00	05/01 to 08/31
40S 46536 00[3]	STATEMENT OF CLAIM	2.50	267.30	04/01 to 10/31
40S 171828 00[1]	STATEMENT OF CLAIM	1.78	285.00	04/01 to 10/31
40S 130516 00[1]	STATEMENT OF CLAIM	1.67	60.00	03/01 to 11/30
40S 215560 00[3]	STATEMENT OF CLAIM	1.44	102.22	04/01 to 11/04
40S 142799 00[1]	STATEMENT OF CLAIM	0.89	225.00	01/01 to 12/31

40S 30132248[4]	STATEMENT OF CLAIM	0.68	17.00	01/01 to 12/31
40S 135782 00[4]	STATEMENT OF CLAIM		0.27	01/01 to 12/31
40S 135783 00[4]	STATEMENT OF CLAIM		0.48	01/01 to 12/31
40S 135784 00[4]	STATEMENT OF CLAIM		0.54	01/01 to 12/31
40S 135790 00[4]	STATEMENT OF CLAIM		0.88	01/01 to 12/31
40S 135791 00[4]	STATEMENT OF CLAIM		10.34	01/01 to 12/31
40S 137594 00[4]	STATEMENT OF CLAIM		1.90	01/01 to 12/31
40S 135792 00[4]	STATEMENT OF CLAIM		7.89	01/01 to 12/31
40S 135793 00[4]	STATEMENT OF CLAIM		13.60	01/01 to 12/31
40S 186743 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 186744 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 186739 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 188166 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 188167 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 188168 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 187283 00[4]	STATEMENT OF CLAIM		2.04	01/01 to 12/31
40S 172341 00[4]	STATEMENT OF CLAIM		34.00	01/01 to 12/31
40S 137580 00[4]	STATEMENT OF CLAIM		0.54	01/01 to 12/31
40S 137592 00[4]	STATEMENT OF CLAIM		0.88	01/01 to 12/31
40S 137593 00[4]	STATEMENT OF CLAIM		1.29	01/01 to 12/31
40S 137598 00[4]	STATEMENT OF CLAIM		7.75	01/01 to 12/31
40S 137576 00[4]	STATEMENT OF CLAIM		1.29	01/01 to 12/31
40S 186738 00[4]	STATEMENT OF CLAIM		43.06	01/01 to 12/31
40S 188165 00[4]	STATEMENT OF CLAIM		37.96	01/01 to 12/31
40S 30142670[4]	STATEMENT OF CLAIM		0.48	01/01 to 12/31
40S 30142615[4]	STATEMENT OF CLAIM		0.48	01/01 to 12/31
40S 184965 00[4]	STATEMENT OF CLAIM		7.13	01/01 to 12/31
40S 30142629[4]	STATEMENT OF CLAIM		0.34	01/01 to 12/31
40S 30142624[4]	STATEMENT OF CLAIM		0.54	01/01 to 12/31
40S 30142668[4]	STATEMENT OF CLAIM		0.07	01/01 to 12/31
40S 30142625[4]	STATEMENT OF CLAIM		0.20	01/01 to 12/31
40S 30142667[4]	STATEMENT OF CLAIM		0.20	01/01 to 12/31
40S 30142622[4]	STATEMENT OF CLAIM		2.45	01/01 to 12/31
40S 30123529[4]	STATEMENT OF CLAIM		13.60	01/01 to 12/31
40S 30142666[4]	STATEMENT OF CLAIM		0.07	01/01 to 12/31
40S 30142626[4]	STATEMENT OF CLAIM		0.31	01/01 to 12/31
40S 30142623[4]	STATEMENT OF CLAIM		0.10	01/01 to 12/31
40S 30142619[4]	STATEMENT OF CLAIM		0.48	01/01 to 12/31
40S 78203 00	PROVISIONAL PERMIT	4.46	1,202.00	04/01 to 10/31
40S 101292 00[3]	STATEMENT OF CLAIM	6.24	1,869.55	05/01 to 10/19

[1]Volume assigned as claimed
[2]Additional flowrate only

[3]Irrigation – Volume assigned per Department standards for climatic area II
[4] Livestock Direct - Flow rate and volume assigned per department standards
[5]Department assigned period of diversion

Table 6: Conservation Districts Water Reservation Within the Area of Potential Impact				
Month	**Richland CD Flow rate (CFS)**	**Richland CD Volume (AF)**	**Roosevelt CD Flow rate (CFS)**	**Roosevelt CD Volume (AF)**
January	-	-	-	-
February	-	-	-	-
March	-	-	-	-
April	186.9	3,621*	558.8	10,445*
May	186.9	3,621*	558.8	10,445*
June	186.9	3,621*	558.8	10,445*
July	186.9	3,621*	558.8	10,445*
August	186.9	3,621*	558.8	10,445*
September	186.9	3,621*	558.8	10,445*
October	186.9	3,621*	558.8	10,445*
November	-	-	-	-
December	-	-	-	-

*Monthly volume was calculated by dividing the annual volume by the number of months in the period of use granted to each conservation district in accordance with the Lower Missouri Basin Final Order of the Board of Natural Resources and Conservation dated December 30, 1994.

Table 7: Montana Department of Fish, Wildlife & Parks Water Reservation 40S 30017671		
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

*Volume calculated by multiplying the monthly flowrate in CFS by 1.98 times the days in the corresponding month.
(CFS × 1.98 AF/day/1 CFS × days per month = AF/month)

Table 8: 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.
(AF/month ÷ 1.98 AF/day/1 CFS ÷ days per month = CFS)

16. For this application, the legal demand of the Richland County and Roosevelt County Conservation District water reservations is the portion of the water reservations that have been perfected or remain to be perfected within the area of potential impact. To determine this legal demand, the flow rate and volume of perfected Conservation District Records upstream of the proposed POD were subtracted from the flow and volume of the total reservation amount. Those diversions occur before the proposed point of diversion and are accounted for in the physical availability analysis. The remaining portion of the Conservation District Reservations were subtracted from the physical availability in the legal availability analyses.

Table 9: Legal Demand of the Richland County Conservation District #8450000					
A	B	C	D	E	F
Richland CD Total Flow Rate (CFS)	Richland CD Total Volume (AF)	Total Flow of CD Records Upstream of POD (CFS)	Total Volume of CD Records upstream of POD (AF)	Remaining Demand - Flow Rate (CFS)	Remaining Demand – Volume (AF)
186.90	25,349.00	91.41	8,660.80	95.49	16,688.20

Table 10: Legal Demand of the Roosevelt County Conservation District #8450100					
A	B	C	D	E	F
Roosevelt CD Total Flow Rate (CFS)	Roosevelt CD Total Volume (AF)	Total Flow of CD Records Upstream of POD (CFS)	Total Volume of CD Records Upstream of POD (AF)	Remaining Demand – Flow Rate (CFS)	Remaining Demand – Volume (AF)
558.80	73,115.00	55.39	6,561.50	503.41	66,553.50

17. To determine legal availability, the aforementioned legal demands in the area of potential impact were subtracted from the physical availability of the source at the proposed

POD. While Fort Peck Tribal Compact and MT FWP reservation 40S 30017671 have specific monthly volumes, the Department calculated the monthly volume of the private rights and Conservation District legal demands by dividing the appropriated volumes by the number of months in the period of use. The legal availability analysis is shown in Tables 11 and 12.

18. Table 11 shows that volume is legally available during the proposed period of diversion, January 1 to December 31.

Table 11: Legal Availability at the Point of Diversion on Missouri River (Volume)

A	B	C	D	E	F	G	H
Month	Physically Available Water at POD (AF)	Richland CD Volume (AF)[1]	Roosevelt CD Volume (AF)[2]	Fort Peck Compact Volume (AF)	Individual Water Rights (AF)[3]	FWP Instream Right (AF)	Legally Available Volume (AF)[4]
Jan	688,122.30	-	-	40,000	346.53	317,826	329,949.76
Feb	628,742.10	-	-	40,000	346.53	287,068	301,327.56
Mar	612,962.49	-	-	40,000	420.70	317,826	254,715.79
Apr	475,262.35	2,384.03	9,507.64	50,000	2,954.04	307,573	102,843.64
May	531,367.63	2,384.03	9,507.64	105,000	5,857.21	317,826	90,792.75
Jun	567,154.15	2,384.03	9,507.64	145,000	5,857.21	307,573	96,832.27
Jul	575,254.33	2,384.03	9,507.64	215,000	5,300.54	317,826	25,236.12
Aug	550,825.09	2,384.03	9,507.64	180,000	5,300.54	317,826	35,806.88
Sep	465,520.75	2,384.03	9,507.64	105,000	5,138.04	307,573	35,918.04
Oct	428,218.54	2,384.03	9,507.64	50,000	3,073.11	317,826	45,427.76
Nov	432,484.50	-	-	40,000	688.70	307,573	84,222.80
Dec	605,842.41	-	-	40,000	346.53	317,826	247,669.87

[1] Determined by subtracting the monthly volume of individual CD records upstream of the proposed point of diversion from the total Richland County Conservation District volume (Table 9, column F)

[2] Determined by subtracting the monthly volume of individual CD records upstream of the proposed point of diversion from the total Roosevelt County Conservation District volume (Table 10, column F)

[3] See table 5 for a list of individual water rights

[4] Determined by subtracting the legal demands of downstream water users (columns C-G) from the physically available water at the POD (column B).

19. Tables 12 shows that flow rate is not legally available in the months of July, August and September during the proposed period of diversion at the proposed source of supply.

Table 12: Legal Availability at the Point of Diversion on Missouri River (Flow Rate)

A	B	C	D	E	F	G	H
Month	Physically Available Flow Rate at POD (CFS)	Richland CD Flow Rate (CFS)[1]	Roosevelt CD Flow Rate (CFS)[2]	Fort Peck Compact Flow Rate (CFS)	Individual Water Rights Flow Rate (CFS)[3]	FWP Instream Right Flow Rate (CFS)	Legally Available Flow Rate (CFS)[4]
Jan	11,212.55	-	-	652	43.95	5,178	5,338.60
Feb	11,342.55	-	-	722	43.95	5,178	5,398.60

Mar	9,988.05	-	-	652	58.99	5,178	4,099.06
Apr	8,003.33	95.49	503.41	842	289.55	5,178	1,094.88
May	8,659.33	95.49	503.41	1,711	380.87	5,178	790.56
Jun	9,550.33	95.49	503.41	2,441	380.87	5,178	951.56
Jul	9,374.33	95.49	503.41	3,503	380.87	5,178	-286.44
Aug	8,976.33	95.49	503.41	2,933	380.87	5,178	-114.44
Sep	7,839.33	95.49	503.41	1,768	368.17	5,178	-73.74
Oct	6,978.83	95.49	503.41	815	264.60	5,178	122.34
Nov	7,282.55	-	-	673	94.74	5,178	1,336.81
Dec	9,872.05	-	-	652	43.95	5,178	3,998.10

[1] Determined by subtracting the flow of individual CD records upstream of the proposed point of diversion from the total Richland County Conservation District flow (Table 9, column E)

[2] Determined by subtracting the flow of individual CD records upstream of the proposed point of diversion from the total Roosevelt County Conservation District flow (Table 10, column E)

[3] See table 5 for a list of individual water rights

[4] Determined by subtracting the legal demands of downstream water users (columns C-G) from the physically available water at the POD (column B).

20. The Department compared the Applicant's proposed flow rate and volume to the legally available flow rate and volume from January 1 to June 30 and October 1 to December 31 because no flow rate is legally available during the months of July, August, and September (see Table 13). To evaluate the Applicant's proposed volume, the Department divided the total requested volume by the months in the modified period of diversion, yielding a proposed monthly volume of 111.11 AF (1,000 AF/9 months = 111.11 AF/month). Table 13 shows there is water legally available for the Applicant's proposed usage from January 1 to June 30 and October 1 to December 31.

Table 13: Comparison of the Proposed Appropriation to Legal Availability

A	B	C	D	H	F	G
Month	**Legally Available Flowrate (CFS)**	**Legally Available Volume (AF)**	**Applicant Requested Flow Rate (CFS)**	**Applicant Requested Volume (AF)**	**Remaining Flow Rate (CFS)**	**Remaining Volume (AF)**
Jan	5,338.60	329,838.65	12.00	111.11	5,326.60	329,727.54
Feb	5,398.60	301,216.45	12.00	111.11	5,386.60	301,105.34
Mar	4,099.06	254,604.68	12.00	111.11	4,087.06	254,493.57
Apr	1,094.88	102,732.53	12.00	111.11	1,082.88	102,621.42
May	790.56	90,681.64	12.00	111.11	778.56	90,570.53
Jun	951.56	96,721.16	12.00	111.11	939.56	96,610.05
Jul	(286.44)	25,236.12	-	-	(286.44)	25,236.12
Aug	(114.44)	35,806.88	-	-	(114.44)	35,806.88
Sep	(73.74)	35,918.04	-	-	(73.74)	35,918.04
Oct	122.34	45,316.65	12.00	111.11	110.34	45,205.54

Nov	1,336.81	84,111.69	12.00	111.11	1,324.81	84,000.58
Dec	3,998.10	247,558.76	12.00	111.11	3,986.10	247,447.65

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

21. Issue 1: The commenter states the draft PD fails to adequately address how water can be considered legally available year-round and that the Department should issues the permit for year-round use subject to real-time measurement and shutoff conditions. They refer to Table 12, which shows negative legal availability in the months of July, August, and September. They state that this methodology compares the median of the mean monthly flow against static legal demands, ignoring real-time high-flow events and that water is legally available if the DNRC utilizes its authority under § 85-2-312, MCA, to issue the permit subject to real-time measurement and shutoff conditions. The commenter states that pumping should be conditionally permitted when USGS Gage 06185500 registers flow exceeding the total calculated downstream legal demands plus the requested 12.00 CFS (July: 9,672.77 CFS; August: 9,102.77 CFS; September: 7,925.07 CFS). They state that at these thresholds, it is mathematically certain that all senior appropriators-including the MT FWP reservation and the Fort Peck Tribal Compact-are simultaneously satisfied, fully addressing the adverse effect concerns cited in Sitz Ranch. (Commenters: Neil Iversen on behalf of ASWS, LLC dba Hamlin Water).

22. Response 1: Response 1: Per MCA 85-2-311(ii) "Legal availability is determined using an analysis involving the following factors: (A) identification of physical water availability; (B) identification of existing legal demands of water rights 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 of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water."

23. In addition, ARM 36.12.1702(1) specifies that, if stream gage records are available, physical availability is quantified by median of the mean monthly flow rate and volume during the proposed month of diversion. A comparison of the legal demands in the area of potential impact to the amount of water physically available on the source of supply at the proposed

point of diversion yielded negative availability in the months of June, July and August (see Table 12). The Applicant did not submit a proposal to operate under real-time measurement and shut off conditions; therefore, a conditional flow rate was not evaluated as a component of this application.

24. The public comments regarding the legal availability criterion have been considered and addressed in FOF 21-23. The public comment did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds that water is not legally available from July 1 to September 30 in the amount requested from the proposed point of diversion. The Department finds that water is legally available in the requested amount at the proposed point of diversion from January 1 to June 30 and October 1 to December 31.

ADVERSE EFFECT

FINDINGS OF FACT

25. The Applicant proposed to divert water from January 1 to December 31. The water rights considered for adverse effect in the Department- designated area of potential impact (see FOF 15) are listed in Tables 5-8. In the event of a water shortage, the Applicant will cease diversion if a valid call is made, which can be done by shutting valves or removing pumps.

26. Water is not legally available in the months of July to September (see FOF 17-21). The Department finds the proposed year-round appropriation would present adverse effect to senior water rights within the AOPI that are appropriated to divert water from July to September.

27. Water is both physically and legally available in the source of supply from the proposed point of diversion from January 1 to June 30 and October 1 to December 31 in the amount the Applicant requested.

28. The Department finds the proposed use will not have an adverse effect if the period of diversion and period of use are modified to January 1 to June 30 and October 1 to December 31 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

29. The Applicant plans to divert water at a rate of 12 CFS up to 1,000 AF from the Missouri River from a diversion point in the NWNENW, Section 9, T27N, R56E, Richland 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.

30. 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 layflat hose operated at a maximum of 200 PSI and 65 BBLs per minute. Vitaulic gate valves and specialized fittings are used to direct or restrict water flow from the water source to the pad.

31. In winter conditions, the water will be pulled from the river and heated prior to pumping the water and reheated as needed, depending on the distance to the service area. Direct contact units are typically used at the source, while coil heating units are often used inline. Equipment parameters can be found in the application file.

32. The Applicant will obtain permission before laying hose on private property, railroad tracks, and roadways. The Applicant provided sample applications and agreements to demonstrate land access procedures.

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

BENEFICIAL USE

FINDINGS OF FACT

34. The Applicant proposes to divert 12 CFS up to 1,000 AF for the beneficial use of water marketing for oil field development. The general service area is located in multiple townships and ranges in Richland County.

35. The Applicant has a Commercial Water Purchase Agreement with Phoenix Energy signed by Phoenix representative on November 11, 2025, and signed by the Applicants on December 17, 2025. 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 C of the Commercial Water Purchase Agreement. The Department has included clarifying information on the requested flow rate in response to a review of the Draft Preliminary Determination following the receipt of public comment. The requested flow rate of 12 CFS is based on the operational plans of Phoenix Energy, LLC, for approximately 125 BBL per minute as stated by the Applicant.

36. 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.

37. The Applicant proposed to divert water from January 1 to December 31, but water is not legally available in the months of July to September. In the Application for Beneficial Water Use Permit, Form 600, the Applicant states that Phoenix drills and pumps oil wells year-round. The use can still be reasonably accomplished within the modified period of diversion and period of use of January 1 to June 30 and October 1 to December 31.

38. In order to substantiate the proposed beneficial use, the Applicant 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 DEPARMENT, 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.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

39. Issue 1: The commenter states that the draft PD fails to adequately address why the proposed full flow rate and volume may be considered beneficial for year-round use. They state that by strictly denying the 12.00 CFS diversion during the summer, the draft PD guarantees that unappropriated high flows will pass through the system unused, failing the state's mandate to maximize the beneficial use of Montana's water. (Commenters: Neil Iversen on behalf of ASWS, LLC dba Hamlin Water)

40. Response 1: Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. The Applicant proposes to use water for water marketing, which is a recognized beneficial use, and the use can be reasonably

accomplished within the modified period of diversion and period of use of January 1 to June 30 and October 1 to December 31.

41. The public comments regarding the beneficial use criterion have been considered and addressed in FOF 39-40. The public comment did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds the proposed water use is beneficial, and that the requested flow rate of 12 CFS up to 1,000 AF is the amount needed to meet the beneficial use.

POSSESSORY INTEREST

FINDINGS OF FACT

42. The Applicant owns the property where water is to be put to beneficial use, which demonstrates possessory interest. The Department finds the possessory interest criterion to be met.

43. This application is for water marketing in which water is supplied to another entity who is the ultimate end user. The Applicant supplied a Commercial Water Purchase Agreement with Phoenix Energy signed by a Phoenix representative on November 11, 2025, and the Applicants on December 17, 2025

44. The service area for Phoenix Operating LLC is depicted in the purchase agreement Exhibit C. It is clear that the ultimate user will not accept the supply without consenting to the use of water.

45. 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

46. 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."

47. 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).

48. 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).

49. 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)

50. 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 9-13)

LEGAL AVAILABILITY

51. 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).

52. 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.

53. 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);

54. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. *Id.*

55. Applicant has not 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. The Department finds by a preponderance of the evidence that water is not legally available from July 1 to September 30 in the amount requested from the proposed point of diversion. The Department finds by a preponderance of the evidence that water is legally available in the requested amount at the proposed point of diversion from January 1 to June 30 and October 1 to December 31. Section 85-2-311(1)(a)(ii), MCA. (FOF 14-24)

ADVERSE EFFECT

56. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. *See Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

57. 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).

58. 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).

59. 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).

60. 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.

61. 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).

62. 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 25-28)

ADEQUATE DIVERSION

63. 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.

64. 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.

65. 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).

66. 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).

67. 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 29-33).

BENEFICIAL USE

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

69. 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).

70. 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).

71. 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.

72. 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).

73. 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.*

74. Applicant proposes to use water for water marketing which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence water marketing is a beneficial use and that 1,000 AF of diverted volume and 12 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 34-41)

POSSESSORY INTEREST

75. 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.

76. 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.

77. In *Town of Kevin v. DNRC*, 2024 MT 210, ¶ 31, 418 Mont. 131, 557 P.3d 913, the Court held that water service agreements satisfy the "written consent" under §§ 85-2-311(1)(e) and -402(2)(d), MCA.

78. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 42-45)

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 30171137 should be GRANTED IN MODIFIED FORM.

The Department determines the Applicant may divert water from the Missouri River, by means of a Pump, from January 1 to June 30 and October 1 to December 31 at 12 CFS up to 1,000 AF, from a point in the point in NWNENW, Section 9, T27N, R56E, Richland County for water marketing use from January 1 to June 30 and October 1 to December 31. The place of use is the point of sale, which is in NWNENW, Section 9, T27N, R56E, Richland 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 DEPARMENT, 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 public notice of this application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this application as herein approved. If this application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

Dated this 16th day of October, 2026.

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 PRELIMINARY DETERMINATION TO GRANT IN MODIFIED FORM was served upon all parties listed below on this 16th day of October, 2026, by first class United States mail.

JAMES D. CARLISLE AND EVELYN D. CARLISLE

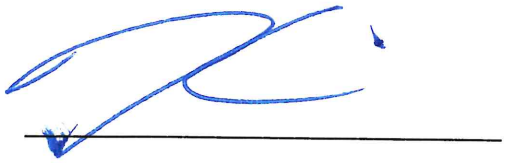
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