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May 5, 2026

Yellowstone Land & Livestock, LLC
PO Box 1588
Sidney, MT 59270

Subject: Preliminary Determination to Grant Beneficial Water Use Permit Application No. 42M 30164947

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 received regarding the physical availability analyses, and two issues were raised among these comments. These issues generally called into question the Department's use of USGS gage data.
- One public comment was received regarding the legal availability analyses, and five issues were raised among these comments. These issues generally called into question the area of potential impact, identification of legal demands, and the consideration of aquatic ecosystems.
- Two public comments were received regarding adverse effect, and six issues were raised among these comments. These issues generally called into question the Applicant's compliance plan, cumulative effects of other industrial permits, traffic, the lack of evaluation for groundwater-dependent users, past water usage complaints, and the level of consideration for aquatic ecosystems.



- One public comment was received regarding adequacy of diversion, and two issues were raised among these comments. These issues generally called into question the mobile nature of the proposed infrastructure and the self-reported flow meter.
- One public comment was received regarding beneficial use which raised one issue. This issue generally calls into question the volume requested by the Applicant for water marketing purpose.
- One public comment was received regarding possessory interest which raised one issue. This issue generally calls into question the Department's finding of possessory interest.
- One public comment was received regarding water quality.


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



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

APPLICATION FOR BENEFICIAL WATER) USE PERMIT NO. 42M 30164947 BY) YELLOWSTONE LAND & LIVESTOCK, LLC)	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On August 29, 2025, Yellowstone Land & Livestock, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30164947 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 8.91 CFS and 500 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 September 19, 2025. The Applicant responded with information dated November 10, 2025. A preapplication meeting was held between the Department and the Applicant on December 2, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Department delivered the Department- completed Technical Analyses on April 3, 2025. The Applicant returned the completed Preapplication Checklist on February 20, 2025. The application was determined to be correct and complete as of December 10, 2025. The Draft Preliminary Determination to GRANT was sent to the Applicant on February 6, 2026. The Department provided notice of opportunity to provide public comments to this application per § 85-2-307(4), MCA on March 7, 2026. The Department received two public comments, and this updated Preliminary Determination addresses those public comments. An Environmental Assessment for this application was completed on February 6, 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 Yellowstone Land and Livestock, LLC and Morning Star Operating, LLC, dated December 31, 2024
 - Service Area Map on undated aerial imagery depicting Morning Star Operating, LLC's service area
 - Exhibit D – Oil Well List
- Pump Curves and Data Sheet for the Redi Prime 325 HP Water Transfer Pump
- Maps: Undated aerial imagery depicting the point of diversion and place of use
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated April 3, 2025

Information Received after Application Filed

- Deficiency Response, dated November 10, 2025
- Email correspondence between Cherise Partin of Yellowstone Land and Livestock, and Ashley Kemmis, Water Resource Specialist, DNRC, dated November 21, 2025

Information within the Department's Possession/Knowledge

- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents.
 - Flow records for USGS Gage #06329500, Yellowstone River near Sidney, 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
 - Order of Board of Natural Resources Establishing Water Reservations, dated December 15, 1978

Public Comments Received

- The Department received two comments on this application and considered both in this document. The Department responds to issues raised by comments in the relevant criteria sections. The Department determined that no modifications were required to the analyses determining that the physical availability, legal availability, adverse effect, adequacy of diversion, beneficial use, and possessory interest criterion were met. The preliminary determination is to Grant. The Public Comment forms received can be found in the administrative file.

- One public comment was received regarding the physical availability analyses, and two issues were raised among these comments. These issues generally called into question the Department's use of USGS gage data.
- One public comment was received regarding the legal availability analyses, and five issues were raised among these comments. These issues generally called into question the area of potential impact, identification of legal demands, and the consideration of aquatic ecosystems.
- Two public comments were received regarding adverse effect, and six issues were raised among these comments. These issues generally called into question the Applicant's compliance plan, cumulative effects of other industrial permits, traffic, the lack of evaluation for groundwater-dependent users, past water usage complaints, and the level of consideration for aquatic ecosystems.
- One public comment was received regarding adequacy of diversion, and two issues were raised among these comments. These issues generally called into question the mobile nature of the proposed infrastructure and the self-reported flow meter.
- One public comment was received regarding beneficial use which raised one issue. This issue generally calls into question the volume requested by the Applicant for water marketing purpose.
- One public comment was received regarding possessory interest which raised one issue. This issue generally calls into question the Department's finding of possessory interest.
- Water quality comments are accepted during the public comment period. One public comment was submitted regarding water quality. The Department did not make changes to the draft preliminary determination regarding the water quality criterion. Pursuant to § 85-2-311(2), MCA, "the applicant is required to prove that the [water quality criterion has] been met only if a valid objection has been filed." Objections may be filed pursuant to § 85-2-308, MCA. (Commenter: Montana Clean Water)

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 Yellowstone River, by means of a pump, from January 1 to December 31 at 4,000 GPM 8.91 CFS up to 500 AF, from a point in Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County, for water marketing use from January 1 to December 31. The place of use is the point of sale, which is in Gov't Lot 3, NESWNW, Section 11, T22N, R59E, 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 as depicted in the Commercial Water Purchase Agreement dated December 31, 2024.
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 500 AF per year. 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 an inline flowmeter.
4. The Applicant provided a water purchase contract with MorningStar 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.

40S 30164947



Map Created: 2/28/2025
 Author: Ashley Kemmis,
 Water Resource Specialist
Elements depicted on this map are for illustrative purposes and have not been surveyed by the Department. NISDI PLS5
 2017 Aerials.

- POD /POU
- Parcels - Current
- Section
- Township & Range
- DNRC Basins
- NHDFlowline
- State Boundary

Figure 1: Map depicting the POD and POU

§ 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 Yellowstone River at a rate of 8.91 CFS and 500 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 #06329500, Yellowstone River near Sidney, MT, is approximately 2 miles upstream of the POD. The period of record for the gage was October 1910 through October 2024.
- b. The Department calculated the median of the mean monthly flow rates in (CFS) for the Yellowstone River using USGS Gage #06329500 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 x 1.98 AF/day/1CFS x days per month = AF/month).

A	B	C
Month	Median of the Mean Monthly Flow Rate at Gage 06329500 (CFS)	Median of the Mean Monthly Volume at Gage 06329500 (AF)
January	5,657	347,196
February	6,023	333,887
March	9,323	572,246
April	9,149	543,451
May	17,560	1,077,833
June	40,270	2,392,038

July	21,490	1,319,056
August	7,507	460,780
September	6,709	398,515
October	7,794	478,396
November	7,297	433,442
December	5,926	363,707

- c. The Department calculated the monthly flows appropriated by existing users between the gage and the POD on the source (Table 3, column D) by:
- i. Generating a list of existing water rights between the point of diversion and USGS Gage 06329500 (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. The volume for the existing rights between the gage and point of diversion was calculated by dividing the annual volume by the number of months in the period of diversion.

A	B	C	D	E
Water Right Number	Period of Diversion	Water Right Type	Flow Rate (CFS)	Volume (AF)
42M 165230 00	01/01 to 12/31	STATEMENT OF CLAIM	66	47422
42M 119268 00*	04/01 to 10/31	IRRIGATION DISTRICT	0	0
42M 119269 00	04/01 to 10/31	STATEMENT OF CLAIM	133	37,845
42M 119271 00**	04/01 to 10/31	IRRIGATION DISTRICT	0	0
42M 119272 00	04/01 to 10/31	STATEMENT OF CLAIM	43	33.3
42M 31493 00	01/01 to 12/31	STATEMENT OF CLAIM	9	2163
42M 3656 00	05/01 to 09/01	PROVISIONAL PERMIT	3	118.3

*Duplicate right of 42M 119269 00 – no additional flow rate and volume

**Duplicate right of 42M 119272 00 – no additional flow rate and volume

13. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the monthly flow rates and volumes of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. The Department subtracted the flow rates and volumes of existing rights between USGS Gage 06329500 and the POD (Table 3, columns D and E) from the median of the mean monthly gage values (Table 3, columns B and C) to determine physical availability (CFS and AF) at the POD (Table 3, columns F and G).

A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow at Gage 06329500 (CFS)	Median of the Mean Monthly Volume at Gage 06329500 (AF)	Existing Rights from Gage 06329500 to POD (CFS)	Existing Rights from Gage 06329500 to POD (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
January	5,657	347,196	74	4,132	5,582	343,064
February	6,023	333,887	74	4,132	5,948	329,755
March	9,323	572,246	74	4,132	9,249	568,114
April	9,149	543,451	251	9,543	8,898	533,907
May	17,560	1,077,833	1,598	9,573	15,962	1,068,260
June	40,270	2,392,038	1,598	9,573	38,672	2,382,465
July	21,490	1,319,056	1,598	9,573	19,892	1,309,483
August	7,507	460,780	1,598	9,573	5,909	451,207
September	6,709	398,515	251	9,543	6,458	388,971
October	7,794	478,396	251	9,543	7,543	468,852
November	7,297	433,442	74	4,132	7,223	429,310
December	5,926	363,707	74	4,132	5,851	359,575

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT’S RESPONSES

14. The public submitted one comment on physical availability, and this comment raised two issues.

15. Issue 1: The commenter finds issue with the usage of the median historical flow data from USGS Gage #06329500 rather than minimum or low-flow data. (Commenter: Montana Clean Water)

16. Response 1: The Department completed the physical availability analysis using the median of the means historical flow data in accordance with ARM 36.12.1702(1)(a), which states, “if stream gage records are available, or the source has been otherwise measured, or quantified, those measurement 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.”

17. Issue 2: The commenter finds issue with the DNRC's usage of the entire period of record from 1910 to 2024. They state that the period of record chosen does not account for the dramatically increased industrial water demand from existing and pending water marketing permits drawing from the same reach. (Commenter: Montana Clean Water)

18. Response 2: DNRC utilizes USGS stream gage records to demonstrate physical availability. USGS stream gages measure real-time stream flow and reflect the outcome of natural or anthropogenic events. The selected period of record represents wet and dry years and maintains a stable pattern of high and low flows. The Department did not identify any discontinuities or trends in the flow regime that would suggest a shorter period of record should be used for the analysis. The Technical Analysis was conducted on April 3, 2025, and used the entire period of stream flow records available.

19. The public comments regarding the physical availability criterion have been considered and addressed in FOF 14-18. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a preponderance of the 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

20. The area of potential impact is approximately 7.5 miles downstream from the proposed point of diversion to the Montana/North Dakota border. A total of 12 surface water rights exist within this reach. This includes private water rights, and the Montana Department of Fish, Wildlife and Parks Reservation 42M 30017772 (Table 4).

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

22. A list of senior surface water rights that divert from the Yellowstone River in the location between the POD (Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County) and the Montana/North Dakota state border (Section 8, T23N, R60E, Richland County) were compiled using the DNRC GIS web application Converge. Consistent with Department procedure in effect at the time of the technical analysis, senior surface water rights could include all active claims, exempt notices, permits, perfected conservation district reservations, instream flows, tribal rights,

and hydropower water rights. The flow rate and volume were assigned to any unquantified water rights following Department standards per the DNRC permit manual by:

- a. Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
- b. Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
- c. Evenly distributing each water right's volume by months within the period of diversion.

These downstream legal demands are summarized in Table 4.

A	B	C	D	E
Water Right Number	Period of Diversion	Water Right Type	Flow Rate (CFS)	Volume (AF)
42M 137600 00*	01/01 to 12/31	STATEMENT OF CLAIM	0.09	0.48
42M 137617 00*	01/01 to 12/31	STATEMENT OF CLAIM		0.68
42M 137604 00*	01/01 to 12/31	STATEMENT OF CLAIM		0.68
42M 137605 00*	01/01 to 12/31	STATEMENT OF CLAIM		0.20
42M 137597 00*	01/01 to 12/31	STATEMENT OF CLAIM		6.87
42M 104509 00	04/01 to 10/01	CONSERVATION DISTRICT RECORD	2.1	412.00
42M 30051296	04/01 to 10/15	CONSERVATION DISTRICT RECORD	1.1	136.00
42M 104422 00	04/01 to 10/15	CONSERVATION DISTRICT RECORD	4.7	913.00
42M 114728 00	04/01 to 11/01	CONSERVATION DISTRICT RECORD	1.7	271.00
42M 80579 00	04/01 to 11/01	CONSERVATION DISTRICT RECORD	8.7	870.00
42M 6815 00	05/01 to 09/15	PROVISIONAL PERMIT	12	2,200.00
42M 30017772	01/01 to 12/31	WATER RESERVATION	25,140	5,492,310.00

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

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

A	B	C	D	E	F	G
Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands Downstream of the Proposed POD (CFS)	Existing Legal Demands Downstream of the Proposed POD (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
January	5,582	343,064	3,738.40	229,438.84	1,843.69	113,625.04

February	5,948	329,755	4,327.40	239,889.28	1,620.69	89,866.03
March	9,249	568,114	6,778.40	416,034.04	2,470.19	152,079.61
April	8,898	533,907	6,826.70	404,413.90	2,071.67	129,493.43
May	15,962	1,068,260	11,994.70	734,381.02	3,967.67	333,878.93
June	38,672	2,382,465	25,170.70	1,493,346.70	13,501.67	889,118.45
July	19,892	1,309,483	10,556.70	646,116.58	9,335.67	663,366.77
August	5,909	451,207	2,700.70	163,915.30	3,208.67	287,291.51
September	6,458	388,971	3,306.70	194,625.10	3,151.67	194,346.23
October	7,543	468,852	6,024.60	368,787.64	1,518.77	100,064.81
November	7,223	429,310	5,848.40	347,371.60	1,374.19	81,938.11
December	5,851	359,575	3,998.40	245,397.64	1,852.69	114,177.46

24. Table 6 compares the legally available flow rate and volume with the requested amount. Table 6 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 (500 AF/12 months = 41.67).

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.	1,843.69	113,625.04	8.91	41.67	1,834.78	113,583.37
Feb.	1,620.69	89,866.03	8.91	41.67	1,611.78	89,824.36
March	2,470.19	152,079.61	8.91	41.67	2,461.28	152,037.94
April	2,071.67	129,493.43	8.91	41.67	2,062.76	129,451.76
May	3,967.67	333,878.93	8.91	41.67	3,958.76	333,837.26
June	13,501.67	889,118.45	8.91	41.67	13,492.76	889,076.78
July	9,335.67	663,366.77	8.91	41.67	9,326.76	663,325.10
Aug.	3,208.67	287,291.51	8.91	41.67	3,199.76	287,249.84
Sept.	3,151.67	194,346.23	8.91	41.67	3,142.76	194,304.56
Oct.	1,518.77	100,064.81	8.91	41.67	1,509.86	100,023.14
Nov.	1,374.19	81,938.11	8.91	41.67	1,365.28	81,896.44
Dec.	1,852.69	114,177.46	8.91	41.67	1,843.78	114,135.79

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

25. The public submitted one comment on legal availability, and this comment raised five issues.

26. Issue 1: The commenter finds issue with the designated area of potential impact (from the proposed point of diversion down to MT/ND border) and states that water users upstream of the point of diversion and throughout the broader Richland County basin are ignored. (Commenter: Montana Clean Water)

27. Response 1: Per section 85-2-102(32)(a), MCA, "Water right" means the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact. Existing rights were accounted for in the physical and legal availability analyses. Water rights upstream of the proposed POD were not considered to be in the area of potential impact because those water diversions occur before the Applicant's proposed use and were accounted for in the physical availability analysis. The Department subtracted the flow rates and volumes of existing rights between USGS Gage 06329500 and the POD from the median of the mean monthly gage values to determine physical availability at the POD. Legal availability is determined by analyzing the physical water availability at the proposed point of diversion and the legal demands of water rights on the source of supply throughout the area of potential impact by the proposed use per Section 85-2-311(1)(a), MCA; ARM 36.12.1704(1) and (2).

28. Issue 2: The commenter finds issue with the exclusion of cumulative legal demands of multiple concurrent and pending water marketing permits drawing from the same reach of the Yellowstone River. (Commenter: Montana Clean Water)

29. Response 2: Per ARM 36.12.1704(1) and (2), existing legal demands of water rights are compared with the physical water supply. The Department must identify "*existing legal demands of water rights* on the source of supply throughout the area of potential impact by the proposed use." Section 85-2-311(1)(a)(ii)(B), MCA (emphasis added). A "water right" is "the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact." Section 85-2-102(32), MCA. Pending permit applications are not water rights and therefore are not considered in a legal demand analysis.

30. Issue 3: The commenter states that the place of use is not defined and the service area map covering multiple townships does not satisfy the statutory requirement. The commenter states that legal availability cannot be fully evaluated without a defined place of use. (Commenter: Montana Clean Water)

31. Response 3: Legal availability is determined by analyzing the physical water availability at the proposed point of diversion and the legal demands of water rights on the source of supply throughout the area of potential impact by the proposed use. Section 85-2-311(1)(a), MCA; ARM 36.12.1704(1) and (2). It is not determined based on the proposed place of use.

32. Issue 4: The commenter finds issue with the lack of consideration for cumulative effect of this application and other industrial appropriations to the degradation of natural aquatic ecosystems. (Commenter: Montana Clean Water)

33. Response 4: The potential degradation in fisheries habitat caused by the proposed appropriation is outside of the scope of the § 85-2-311, MCA, criteria assessment for new appropriations. Montana Department of Fish, Wildlife and Parks holds an instream flow reservation, 42M 30017772, for fishery purposes. In the Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978, the Montana Department of Fish, Wildlife, and Parks (MT FWP) received a state water reservation water right to ensure waters are available for existing uses and to maintain a minimum flow, level, and quality of water. The purpose sought by the DFWP is to maintain the abundant and viable fishery and aquatic ecosystem existent in the Yellowstone River Basin. The DFWP water reservation 42M 30017772 was identified and considered as a legal demand in accordance with ARM 36.12.1704 and § 85-2-311(1)(a)(ii)(B), MCA.

34. Issue 5: The commenter alleges that DNRC is depleting aquifers in rural areas through industrial permits, while simultaneously funding the Dry Redwater regional water system to sell water to residents, thus creating a financial conflict of interest that compromises the objectivity of the DNRC's legal availability analysis. (Commenter: Montana Clean Water)

35. Response 5: Pursuant to its statutory authority under the Water Use Act (Title 85, ch. 2, MCA), DNRC's Water Resources Division evaluates new appropriations against the statutory criteria in § 85-2-311, MCA. This is separate from DNRC's statutory duties under § 90-6-715, MCA, which is administered by DNRC's Conservation and Resource Development Division.

36. The public comments regarding the legal availability criterion have been considered and addressed in FOF 25-35. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a preponderance of the evidence, the proposed appropriation of 8.91 CFS and up to 500 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

37. 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 20-22) are listed in Table 4. In the event of a water shortage, the Applicant will cease diversion if a valid call is made.

38. 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.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

39. The public submitted two comments on adverse effect, and this comment raised six issues.

40. Issue 1: The commenter states that making call places the burden of protection on downstream senior appropriators to police compliance. The commenter questions the personal ability of the Applicant to comply with the permit's measurement condition. (Commenter: Montana Clean Water)

41. Response 1: Section 85-2-311(1)(b), MCA, states that "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." In accordance with ARM 36.12.1706, the permit application includes a plan which addresses adverse effect as follows: 1) In the event of water shortage, the Applicant will cease diversion if a valid call is made; 2) the Applicant has the ability to shut pump off during times of

water shortage; 3) per Department conditions, the Applicant is required to measure, record, and submit report of the flow rate and volume of all water diverted annually. Applicant measurements are required to demonstrate permit completion.

42. Issue 2: The commenter states that application does not consider cumulative adverse effects of multiple concurrent industrial water marketing permits and applications in the same Yellowstone River reach. (Commenter: Montana Clean Water)

43. Response 2: Per ARM 36.12.1704(1) and (2), existing legal demands of water rights are compared with the physical water supply. The Department must identify “*existing legal demands of water rights*” on the source of supply throughout the area of potential impact by the proposed use.” Section 85-2-311(1)(a)(ii)(B), MCA (emphasis added). A “water right” is “the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact.” Section 85-2-102(32), MCA. Pending permit applications are not water rights considered in a legal demand analysis. The permit criteria analysis identifies and considers 19 senior water rights (see Table 2 and Table 4) sourced from the Yellowstone River in between the USGS Gage 06329500 and the Montana/North Dakota state border (Section 8, T23N, R60E, Richland County). These 19 water rights are purposed for industrial, irrigation, livestock, and fishery.

44. Issue 3: The commenter states that the Draft PD does not address the adverse effects of repeated heavy truck traffic on county roads, water infrastructure and agricultural operations in the area. (Commenter: Montana Clean Water)

45. Response 3: The adverse effect criterion in § 85-2-311, MCA, refers to the Department’s consideration of the Applicant’s plan to control the use of water to satisfy the rights of senior appropriators. The potential traffic caused by the proposed appropriation is outside of the scope of the § 85-2-311, MCA, criteria assessment for new appropriations. Furthermore, the method of conveyance to customers is proposed to be lay-flat hose, not trucks.

46. Issue 4: The commenter finds issue with the lack of assessment between the proposed surface water appropriation and the groundwater-dependent users in the immediate vicinity. (Commenter: Montana Clean Water)

47. Response 4: Per ARM 36.12.1704(1) and (2), existing legal demands of water rights are compared with the physical water supply. The Department must identify “existing legal demands of water rights on the source of supply throughout the area of potential impact by the proposed use.” Section 85-2-311(1)(a)(ii)(B), MCA (emphasis added). The permit criteria assessment analyzed 12 senior water rights in the area of potential impact sourced from Yellowstone River,

which is the source of water for the proposed permit. No groundwater rights were identified within the area of potential impact for this proposed appropriation.

48. Issue 5: The commenter finds issue with the Department's assessment of the effect of this appropriation on instream flows, riparian habitat or aquatic ecosystems downstream of the POD. (Commenter: Montana Clean Water)

49. Response 5: The Department considered MT FWP reservation 42M 30017772 in its analysis. The potential effect on aquatic environment caused by the proposed appropriation is outside of the scope of criteria for issuance of a permit per § 85-2-311, MCA.

50. Issue: The commenter has concern regarding the Applicant's moral, ethical, and historical conduct. The commenter references past complaints and requests that the DNRC take character integrity into consideration and require extra permit stipulations in order to protect water users and public resources. (Commenter: William Van Hook Jr)

51. Response: Judgement of personal character is outside the Department's scope of criteria analysis per § 85-2-311, MCA. The Department sets permit condition(s) as necessary to meet the criteria of issuance.

52. The public comments regarding the adverse effect criterion have been considered and addressed in FOF 39-51. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a preponderance of the evidence, 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

53. The Applicant plans to divert water at a rate of 8.91 CFS and up to 500 AF from the Yellowstone River from a diversion point in Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County. The water will be removed by the contracted buyer using an aluminum pipe with an inlet screen. From there a portable Redi-Prime, 8NHTA-EM18DB-1, 325 HP, 10' x 8' diesel fueled pump will discharge water into a portable filter trailer. The Applicant provided a data sheet and pump curves showing the pump is capable of diverting at a rate of 4,000 GPM and the engine meets tier III Environmental Protection Agency standards.

54. The water will pass through an in-line Field Mag 3000 flow meter capable of taking continuous measurements before water is discharged into a 10" high pressure, lay-flat pipeline which will be the conveyance method to transport water to the customers service area. Dependent on elevation

changes and distance from the POD to the service area, more inline pump trailers may be added to maintain the required flow rate. In freezing conditions, an inline hot-oil trailer can be added to keep the water temps above freezing as it travels through the conveyance system.

55. Any landowner permission needed for the conveyance system will be the responsibility of the contracted buyer. The Applicant is providing access and the sale of fresh water to the contracted buyer and is not conveying water for the buyer.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

56. The public submitted one comment on adequacy of diversion, and this comment raised two issues.

57. Issue 1: The commenter finds issue with the temporary and mobile nature of the proposed infrastructure, and states the diversion works are not a defined, fixed system. (Commenters: Montana Clean Water)

58. Response 1: Criteria for issuance of permit, § 85-2-311(1)(c), MCA, calls for adequate appropriation works and does not require infrastructure to be fixed or permanent. No information was provided by the commenter to disprove the adequacy of diversion assessment.

59. Issue 2: The commenter finds issue with the self-reported flow meter proposed by the Applicant. The commenter points out that there is no provision for independent third-party verification of metering accuracy or volume compliance. (Commenter: Montana Clean Water)

60. Response 2: The Applicant is required to submit measurement report each year of the flow rate and volume of all water diverted, including the period of time. The Applicant is also required to maintain the measuring device, so it is always operational and measures flow rate and volume accurately (see FOF 38. The Department reviews the reports to assess permit compliance and completion.

61. The public comments regarding the adequacy of diversion criterion have been considered and addressed in FOF 56-60. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a preponderance of the evidence, the proposed means of diversion and conveyance are capable of diverting the proposed appropriation.

BENEFICIAL USE

FINDINGS OF FACT

62. The Applicant proposes to divert 500 AF, at a rate of 8.91 CFS 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.

63. The Department does not have a standard water use calculation for water marketing. The Applicant has a signed Commercial Water Purchase Agreement with Morning Star Operating, LLC, dated December 31, 2024, for up to 500 AF per year. The contract satisfied the requirements of §85-2-310(8)(c)(v), MCA. With the requested 500 AF, the contracted customer will develop oil and gas wells in the service area as shown in Exhibit A and B of the Commercial Water Purchase Agreement.

64. The amount of water needed by the contracted buyer for each hydraulic fracturing job varies dependent on the lithology, geology, depth, formation characteristics, etc., so can range from 3-10 million gallons. The contracted buyer plans to refracture 12-14 wells per year and provided a well schedule list in Exhibit D of the Commercial Water Purchase Agreement.

65. The Department finds the proposed water use is beneficial, and that the requested flow rate of 8.91 CFS and 500 AF is the amount needed to meet the beneficial use.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

66. The public submitted one comment on beneficial use, and this comment raised one issue.

67. Issue 1: The commenter finds issue with the amount of water requested (500 AF). The commenter states that the Draft PD does not explain the expansion of volume as the Applicant and her father already own other water marketing rights. The commenter states that the variability of water needed for hydraulic fracturing combined with the absence of defined place of use and speculative nature of future fracking schedule raises questions about the beneficial use of the requested volume. (Commenter: Montana Clean Water)

68. Response 1: The beneficial use applied for is "water marketing." Statute recognizes this as a beneficial use and requires that the Department obtain information detailing each person that will use the marketed water and the amount that person will use, where the water will be used, the relationship between the Applicant and end-user of the water, and a firm contractual agreement for the specified amount of water for each person using the water (§ 85-2-310(8)(c)(v), MCA). The Applicant supplied this information within the Commercial Water Purchase Agreement, which cites Yellowstone Land and Livestock LLC as the seller and Morning Star Operating LLC as the buyer. The agreement states up to 500 AF per year will be purchased by the buyer from Lot 3, NESWNW, Section 11, T22N, R59E, Richland County pending the application for the Beneficial Water Use Permit 42M 30164947. The service area is depicted in the purchase agreement as all of Richland County. The contract was signed by both parties on December 31, 2024.

69. The public comments regarding the beneficial use criterion have been considered and addressed in FOF 66-68. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a

preponderance of the evidence, the Applicant met the beneficial use criterion by a preponderance of the evidence and that the Applicant provided the necessary information for marketed water.

POSSESSORY INTEREST

FINDINGS OF FACT

70. 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, Yellowstone Land & Livestock, LLC has signed a Commercial Water Purchase Agreement with Morning Star Operating LLC, dated December 31st, 2024. The service area for Morning Star Operating LLC is depicted in the purchase agreement Exhibits A and B. It is clear that the ultimate user will not accept the supply without consenting to the use of water.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

71. The public submitted one comment on possessory interest, and this comment raised one issue.

72. Issue 1: The commenter finds issue with the lack of demonstration of possessory interest or written consent of the persons with possessory interest for all properties within the service area. The commenter states that the Draft PD's conclusion that the applicant's signed affirmation is sufficient does not adequately address possessory interest across a multi-township industrial service area with undefined and shifting end-use locations. (Commenter: Montana Clean Water)

73. Response 1: The Applicant has possessory interest of the place of use identified in the proposed appropriation, which is the point of sale located in the Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County. The Applicant further demonstrated that it has a water service agreement with Morning Star Operating LLC to provide water to the proposed service area.

74. The public comments regarding the possessory interest criterion have been considered and addressed in FOF 71-73. The public comments did not demonstrate that the criterion was inadequately addressed in the draft preliminary determination. The Department finds, by a preponderance of the evidence, 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

75. 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.”

76. 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).

77. 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).

78. 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)

79. 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 11-19)

LEGAL AVAILABILITY

80. 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

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season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

81. 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.

82. In analyzing legal availability for surface water, Applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under § 85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

83. 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);

84. 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 20-36)

ADVERSE EFFECT

85. 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.

86. 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).

87. 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).

88. 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).

89. 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.

90. 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).

91. 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 37-52)

ADEQUATE DIVERSION

92. 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.

93. 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.

94. 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).

95. 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).

96. 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 53-61).

BENEFICIAL USE

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

98. 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).

99. 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).

100. 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.

101. 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).

102. 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

Preliminary Determination to GRANT

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Application for Beneficial Water Use Permit No. 42M 30164947

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.*

103. Applicant proposes to use water for water marketing use 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 500 AF of diverted volume and 8.91 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 62-69)

POSSESSORY INTEREST

104. 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.

105. 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.

106. 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. (70-74)

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. 42M 30164947 should be GRANTED.

The Department determines the Applicant may divert water from the Yellowstone River, by means of a pump, from January 1 to December 31 at 8.91 CFS up to 500 AF, from a point in Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County, for water marketing use from January 1 to December 31. The place of use is the point of sale, which is in Gov't Lot 3, NESWNW, Section 11, T22N, R59E, Richland County.

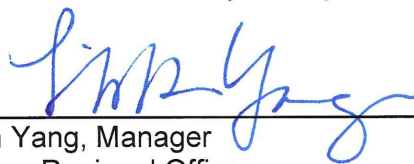
The application will be subject to the following conditions, limitations, or restrictions:

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 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 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 5th day of May, 2026.

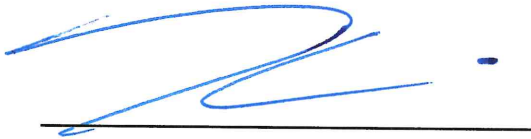


Lih-An Yang, Manager
Glasgow Regional Office
Montana Department of Natural Resources and
Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 5th day of May, 2026, by first class United States mail and electronic mail (e-mail).

YELLOWSTONE LAND & LIVESTOCK, LLC
PO BOX 1588
SIDNEY, MT 59270

A handwritten signature in blue ink, consisting of a stylized 'R' followed by a period, positioned above a horizontal line.

GLASGOW Regional Office, (406) 228-2561