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September 22, 2026

Rod and Lesley Gibbs
732 RD 130
Fallon, MT 59330

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 42M 30174134

Dear Applicant,

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

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no written request for an extension is received by October 14, 2026, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

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

Please let me know if you have any questions.

Best,

Ashley Kemmis
Water Conservation Specialist
Water Rights Bureau
Water Resources Division

CC: Beau Gibbs at beau.gibbs@gmail.com

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

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| | | |
|---|---|---|
| **APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 42M 30174134 BY RODERICK D GIBBS AND LESLEY J GIBBS** | ) ) ) | **DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT** |

* * * * * * *

On June 9, 2026, Roderick D. Gibbs and Lesley J. Gibbs (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30174134 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 5.46 CFS and 587.6 AF for irrigation. 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 June 24, 2026. The Applicant responded with information dated June 25, 2026. A preapplication meeting was held between the Department and the Applicant on February 26, 2026, 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 April 13, 2026. The Department delivered the Department-completed Technical Analyses on May 27, 2026. The application was determined to be correct and complete as of July 24, 2026. An Environmental Assessment for this application was completed on September 17, 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
- Attachments:
    - Cornell Pump Data Sheet

- "Data and Calculations for Gibbs Irrigation Project" showing field acreages, pipe dimensional data; lengths, stationing and elevations of pipelines, calculations for dynamic head for two common operating scenarios.

- Maps: Undated aerial imagery depicting the proposed place of use
- Department- completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated May 27, 2026

Information Received after Application Filed

- Email from Beau Gibbs to DNRC dated June 25, 2026, Re: Deficiency Response

Information within the Department's Possession/Knowledge

- Flow records for USGS Gage 06327500, Yellowstone River Near Glendive, MT
- Order of Board of Natural Resources Establishing Water Reservations, dated December 15, 1978

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.

- 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
- WaterMapper Water Information Resource: https://experience.arcgis.com/experience/cde31f7944ea4fe883b3c465388c2055

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; T means township; R means range; NRCS means

National Resources Conservation Service; MT FWP means Montana Fish Wildlife and Parks; 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 April 15 to October 31 at a rate of 5.46 CFS. The applicant proposes to divert a total volume of 587.6 AF from a point in the NENENW, Sec. 25, T14N, R54E, Dawson County, for irrigation use from April 15 to October 31. Table 1 summarizes the proposed appropriation. The place of use is shown in Table 2.

**Table 1: Summary of Proposed Use**

| Flow Rate (CFS) | Volume (AF) | Purpose | Period Of Use/Period of Diversion | Place Of Use | Point Of Diversion | Priority Date |
|---|---|---|---|---|---|---|
| 5.46 | 587.6 | Irrigation | 4/15-10/31 | See Table 2 | NENENW, Sec. 25, T14N, R54E, Dawson County | June 9, 2026 |

**Table 2: Place of Use**

| Acres | Gov't Lot | ¼, ¼, ¼ | Sec. | Twp. | Rge. | County |
|---|---|---|---|---|---|---|
| 145 | | NW | 36 | 14N | 54E | Dawson |
| 5 | | W2W2NE | 36 | 14N | 54E | Dawson |
| 9 | | E2SENW | 25 | 14N | 54E | Dawson |
| 4 | 3 | E2NENW | 25 | 14N | 54E | Dawson |
| 14 | 2 | S2NWNE | 25 | 14N | 54E | Dawson |
| 6 | | N2SWNE | 25 | 14N | 54E | Dawson |
| 22 | | SESE | 26 | 14N | 54E | Dawson |
| 32 | | SWSW | 25 | 14N | 54E | Dawson |
| 13 | | NWSW | 25 | 14N | 54E | Dawson |
| 250 | Total Acres | | | | | |

2. This permit will be supplemental to existing Statement of Claim, 42M 165796 00. Statement of Claim 42M 165796 00 is for irrigation on 310 acres in Sections 25 and 26, T14N, R54E, Dawson County. Field 2 of the proposed place of use overlaps a portion of the Statement of Claim 42M 165796 00 place of use located in W2SW, Section 25, T14N, R54E and SESE, Section 26, T14N, R54E (see Figure 1).

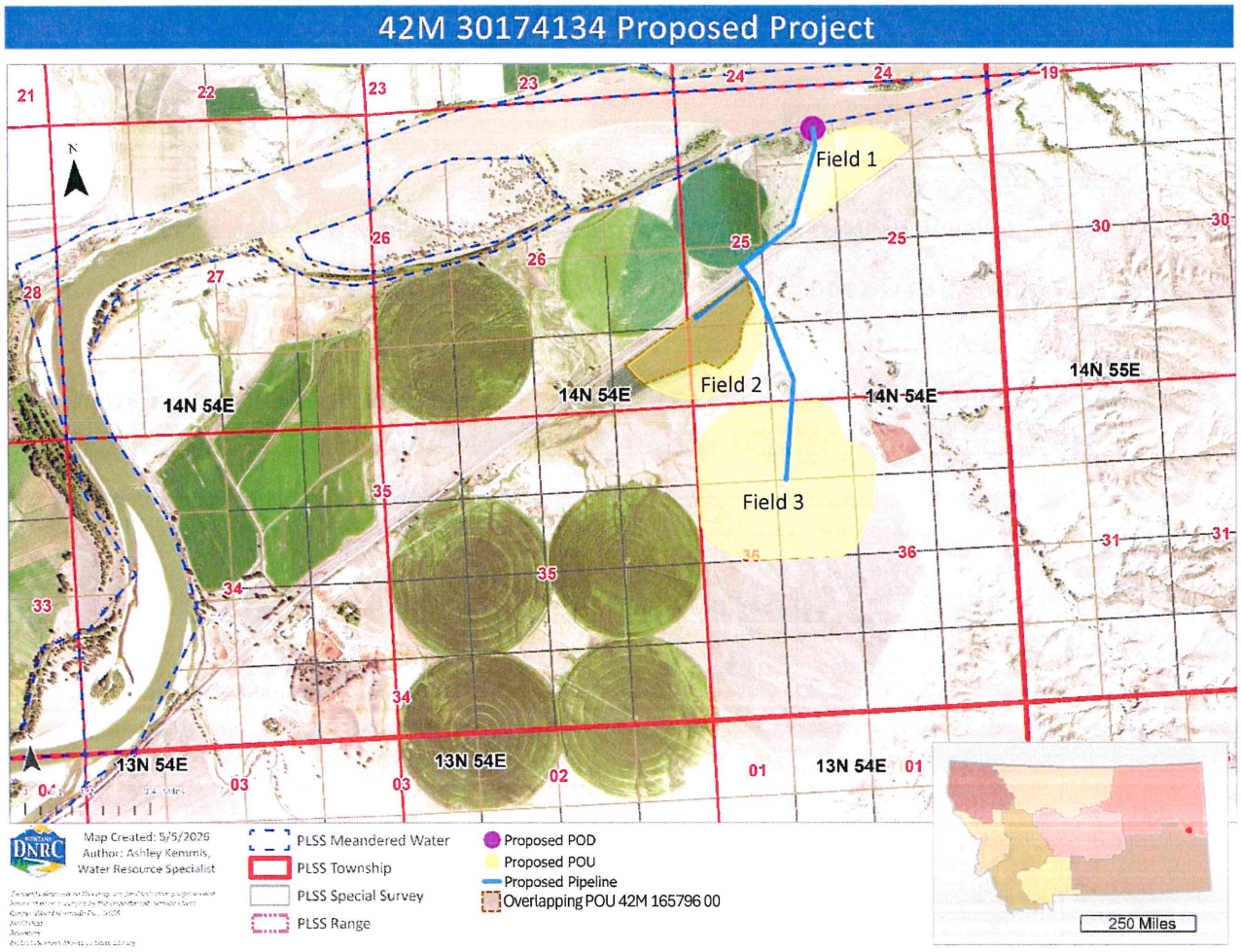



*Figure 1:Map showing the proposed point of diversion, conveyance pipeline, and place of use.*

## 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 April 15 to October 31 from Yellowstone River at a rate of 5.46 CFS and 587.6 AF annually. Water would be appropriated from April 15 to October 31 for irrigation on the places of use listed in Table 2.

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 06327500, Yellowstone River Near Glendive, MT, is the nearest gage to the proposed POD and is approximately 12 miles downstream of the POD. The date range includes October 2002 to November 2024.

11. Physical availability of the Yellowstone 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 of existing water rights between the gage and the POD to the median of the mean monthly flows at the gage. The DNRC used the

method in FOF 12-14 to quantify physically available monthly flows and volumes at the POD during the proposed period of diversion.

12. The Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Yellowstone River using USGS Gage 06327500 records for each month of the proposed period of diversion (Table 3, column B). Those flows were converted to monthly volumes in AF (Table 3, 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).

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

a. Generating a list of existing water rights from the point of diversion to USGS Gage 06327500 (Table 4);

b. Designating irrigation and lawn and garden uses with no period of diversion as occurring from April 1 to October 31;

c. Designating all other water uses with no period of diversion as year-round;

d. 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.

e. 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.

f. 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.

14. Since the gage used is downstream of the POD, the Department added the flow rates and volumes of the existing rights between USGS Gage 06327500 and the POD (Table 3, column D and E) to the median of the mean monthly gage values (Table 3, column B and C) to determine physical availability (CFS and AF) at the POD (Table 3, column F and G).

| Table 3: Physical Availability at the Point of Diversion on the Yellowstone River | | | | | | |
|---|---|---|---|---|---|---|
| A | B | C | D | E | F | G |
| Month | Median of the Mean Monthly Flow at Gage 06327500 (CFS) | Median of the Mean Monthly Volume at Gage 06327500 (AF) | Existing Rights from Gage 06327500 to the POD (CFS) | Existing Rights from Gage 06327500 to the POD (AF) | Physically Available Water at POD (CFS) | Physically Available Water at POD (AF) |
| January | 5,957.74 | 365,686.20 | 5.70 | 288.68 | 5,963.44 | 365,974.88 |
| February | 6,074.11 | 336,748.49 | 5.70 | 288.68 | 6,079.81 | 337,037.17 |
| March | 7,597.90 | 466,359.32 | 5.70 | 288.68 | 7,603.60 | 466,647.99 |
| April | 8,940.67 | 531,075.59 | 108.58 | 938.98 | 9,049.25 | 532,014.57 |
| May | 19,073.71 | 1,170,744.32 | 125.25 | 1,109.01 | 19,198.96 | 1,171,853.33 |
| June | 38,533.33 | 2,288,880.01 | 125.29 | 1,109.51 | 38,658.63 | 2,289,989.52 |
| July | 15,992.74 | 981,634.50 | 125.29 | 1,109.51 | 16,118.03 | 982,744.01 |
| August | 5,646.13 | 346,559.40 | 125.29 | 1,109.51 | 5,771.42 | 347,668.91 |
| September | 5,655.83 | 335,956.51 | 121.99 | 1,089.01 | 5,777.83 | 337,045.52 |
| October | 7,566.77 | 464,448.59 | 92.73 | 930.95 | 7,659.51 | 465,379.54 |
| November | 7,277.33 | 432,273.58 | 7.69 | 305.72 | 7,285.03 | 432,579.30 |
| December | 6,405.00 | 393,138.90 | 5.80 | 290.10 | 6,410.80 | 393,429.00 |

| Table 4: Existing Water Rights between the USGS Gage 06327500 and the Point of Diversion | | | | |
|---|---|---|---|---|
| A | B | C | D | E |
| Water Right Number | Period of Diversion | Water Right Type | Flow Rate (CFS) | Volume (AF) |
| 42M 163637 00 | 06/01 to 10/01 | STATEMENT OF CLAIM | 0.04 | 2.00 |
| 42M 163311 00 | 04/01 to 11/01 | STATEMENT OF CLAIM | 0.07 | 4.00 |
| 42M 51980 00 | 05/01 to 10/31 | PROVISIONAL PERMIT | 0.08 | 4.00 |
| 42M 13271 00[4] | 01/01 to 12/31 | PROVISIONAL PERMIT | 0.09 | 5.87 |
| 42M 36815 00 | 01/01 to 12/31 | STATEMENT OF CLAIM | 0.08 | 7.00 |
| 42M 27405 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 0.06 | 10.00 |
| 42M 11817 00 | 04/15 to 10/15 | PROVISIONAL PERMIT | 6.66 | 54.00 |
| 42M 7682 00 | 05/15 to 10/15 | PROVISIONAL PERMIT | 6.68 | 82.00 |
| 42M 11244 00 | 04/01 to 10/15 | PROVISIONAL PERMIT | 6.66 | 84.00 |
| 42M 17035 00 | 04/01 to 10/31 | PROVISIONAL PERMIT | 11.14 | 90.00 |
| 42M 13272 00 | 04/15 to 10/15 | PROVISIONAL PERMIT | 6.68 | 107.25 |
| 42M 9405 00 | 01/01 to 12/31 | PROVISIONAL PERMIT | 0.89 | 160.00 |
| 42M 10675 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 2.00 | 210.00 |
| 42M 10676 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 2.00 | 210.00 |
| 42M 11245 00 | 04/01 to 10/15 | PROVISIONAL PERMIT | 6.66 | 252.00 |
| 42M 15999 00 | 04/01 to 10/31 | PROVISIONAL PERMIT | 11.14 | 270.00 |
| 42M 15937 00 | 04/01 to 09/30 | PROVISIONAL PERMIT | 14.90 | 525.00 |
| 42M 9938 00[1] | 01/01 to 12/31 | WATER RESERVATION | 4.53 | 3,281.00 |

| | | | | |
|---|---|---|---|---|
| 42M 163485 00[2] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.42 | 86.60 |
| 42M 164209 00[2] | 04/01 to 09/30 | STATEMENT OF CLAIM | 0.48 | 31.50 |
| 42M 163649 00[2] | 04/01 to 09/30 | STATEMENT OF CLAIM | 0.52 | 34.25 |
| 42M 206680 00[2] | 05/01 to 09/20 | STATEMENT OF CLAIM | 1.04 | 41.00 |
| 42M 163656 00[2] | 04/01 to 12/01 | STATEMENT OF CLAIM | 1.89 | 125.00 |
| 42M 163263 00[2] | 04/01 to 10/31 | STATEMENT OF CLAIM | 2.84 | 225.00 |
| 42M 163446 00[2] | 04/15 to 10/31 | STATEMENT OF CLAIM | 3.98 | 315.00 |
| 42M 163688 00[2] | 05/01 to 10/15 | STATEMENT OF CLAIM | 5.57 | 762.00 |
| 42M 101518 00[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.45 | 36.84 |
| 42M 163660 00[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.91 | 73.68 |
| 42M 178324 00[3] | 04/01 to 09/30 | STATEMENT OF CLAIM | 2.92 | 125.41 |
| 42M 30049741[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 4.90 | 399.10 |
| 42M 30049751[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 4.90 | 402.17 |
| 42M 30049749[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 7.90 | 641.63 |
| 42M 165750 00[4] | 04/01 to 12/31 | STATEMENT OF CLAIM | 0.10 | 12.76 |
| 42M 163484 00[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | 0.11 | 10.20 |
| 42M 30140569[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | | 0.07 |
| 42M 56487 00 | 05/01 to 09/01 | CONSERVATION DISTRICT RECORD | 3.3 | 82.00 |
| 42M 102770 00 | 04/01 to 10/01 | CONSERVATION DISTRICT RECORD | 2.7 | 96.00 |

[1]Period of diversion assigned as 01/01 to 12/31
[2] Volume assigned as claimed in the original filing
[3] Volume calculated by multiplying the claimed acreage by the Department standard irrigation for climatic area 1
[4] Livestock Direct - Flow rate and volume assigned per department standards

15. The Department finds, by a preponderance of evidence, that surface water is physically available in the amount the Applicant seeks to appropriate during the proposed period of diversion.

## LEGAL AVAILABILITY

### FINDINGS OF FACT

16. The area of potential impact is 16.5 miles downstream from the proposed point of diversion to the confluence of Glendive Creek with the Yellowstone River. The Yellowstone River is a major surface water source compared to other streams in the area. Glendive Creek is a perennial stream and a significant tributary to the Yellowstone River. The Department finds this to be an appropriate hydrologic boundary and will designate the said reach as the area of potential impact.

17. A list of senior surface water rights that divert from the Yellowstone River in the location between the proposed POD (NENENW, Sec. 25, T14N, R54E, Dawson County) and the confluence with Glendive Creek (Gov't Lot 2, NWSW, Sec. 18, T16N, R56E, Dawson County) were compiled using the DNRC GIS web application Water Mapper. A total of 47 surface water rights exist within this reach (see Table 5). Additional to these water rights are the Dawson County Conservation District #995100 (see Table 6) and the Montana Department of Fish, Wildlife and Parks and Montana Department of Environmental Quality Reservation 42M 30017772 (see Table 7). 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 I (see DNRC Water Calculation Guide) by the number of acres.

**Table 5: Water Rights Within the Area of Potential Impact**

| A | B | C | D | E |
|---|---|---|---|---|
| **Water Right Number** | **Period of Diversion** | **Water Right Type** | **Flow Rate (CFS)** | **Volume (AF)** |
| 42M 163637 00 | 06/01 to 10/01 | STATEMENT OF CLAIM | 0.04 | 2 |
| 42M 7421 00 | 04/15 to 11/01 | PROVISIONAL PERMIT | 0.04 | 2 |
| 42M 66255 00 | 04/01 to 12/01 | PROVISIONAL PERMIT | 0.03 | 2.5 |
| 42M 163311 00 | 04/01 to 11/01 | STATEMENT OF CLAIM | 0.07 | 4 |
| 42M 51980 00 | 05/01 to 10/31 | PROVISIONAL PERMIT | 0.08 | 4 |
| 42M 13271 00[4] | 01/01 to 12/31 | PROVISIONAL PERMIT | 0.09 | 5.87 |
| 42M 36815 00 | 01/01 to 12/31 | STATEMENT OF CLAIM | 0.08 | 7 |
| 42M 30006470 | 03/15 to 11/15 | PROVISIONAL PERMIT | 0.07 | 9.3 |
| 42M 27405 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 0.06 | 10 |
| 42M 11817 00 | 04/15 to 10/15 | PROVISIONAL PERMIT | 6.66 | 54 |

| | | | | |
|---|---|---|---|---|
| 42M 7682 00 | 05/15 to 10/15 | PROVISIONAL PERMIT | 6.68 | 82 |
| 42M 11244 00 | 04/01 to 10/15 | PROVISIONAL PERMIT | 6.66 | 84 |
| 42M 17035 00 | 04/01 to 10/31 | PROVISIONAL PERMIT | 11.14 | 90 |
| 42M 13272 00 | 04/15 to 10/15 | PROVISIONAL PERMIT | 6.68 | 107.25 |
| 42M 9405 00 | 01/01 to 12/31 | PROVISIONAL PERMIT | 0.89 | 160 |
| 42M 10675 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 2.00 | 210 |
| 42M 10676 00 | 04/15 to 10/31 | PROVISIONAL PERMIT | 2.00 | 210 |
| 42M 11245 00 | 04/01 to 10/15 | PROVISIONAL PERMIT | 6.66 | 252 |
| 42M 15999 00 | 04/01 to 10/31 | PROVISIONAL PERMIT | 11.14 | 270 |
| 42M 15937 00 | 04/01 to 09/30 | PROVISIONAL PERMIT | 14.90 | 525 |
| 42M 163757 00 | 01/01 to 12/31 | STATEMENT OF CLAIM | 4.00 | 1,116.50 |
| 42M 163756 00 | 01/01 to 12/31 | STATEMENT OF CLAIM | 7.58 | 1,952.00 |
| 42M 9938 00[1] | 01/01 to 12/31 | WATER RESERVATION | 4.53 | 3,281.00 |
| 42M 163485 00[2] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.42 | 86.6 |
| 42M 164209 00[2] | 04/01 to 09/30 | STATEMENT OF CLAIM | 0.48 | 31.5 |
| 42M 163649 00[2] | 04/01 to 09/30 | STATEMENT OF CLAIM | 0.52 | 34.25 |
| 42M 206680 00[2] | 05/01 to 09/20 | STATEMENT OF CLAIM | 1.04 | 41 |
| 42M 163656 00[2] | 04/01 to 12/01 | STATEMENT OF CLAIM | 1.89 | 125 |
| 42M 163263 00[2] | 04/01 to 10/31 | STATEMENT OF CLAIM | 2.84 | 225 |
| 42M 163478 00[2] | 04/01 to 10/15 | STATEMENT OF CLAIM | 3.94 | 312 |
| 42M 163446 00[2] | 04/15 to 10/31 | STATEMENT OF CLAIM | 3.98 | 315 |
| 42M 163688 00[2] | 05/01 to 10/15 | STATEMENT OF CLAIM | 5.57 | 762 |
| 42M 163184 00[2] | 04/01 to 11/01 | STATEMENT OF CLAIM | 6.70 | 531 |
| 42M 49235 00[2] | 04/01 to 10/31 | STATEMENT OF CLAIM | 10.91 | 864 |
| 42M 101518 00[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.45 | 36.84 |
| 42M 163660 00[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 0.91 | 73.68 |
| 42M 178324 00[3] | 04/01 to 09/30 | STATEMENT OF CLAIM | 2.92 | 125.4095 |
| 42M 30049741[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 4.90 | 399.1 |
| 42M 30049751[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 4.90 | 402.17 |
| 42M 165796 00[3] | 04/15 to 10/31 | STATEMENT OF CLAIM | 7.10 | 951.7 |
| 42M 30049749[3] | 04/01 to 10/31 | STATEMENT OF CLAIM | 7.90 | 641.63 |
| 42M 165750 00[4] | 04/01 to 12/31 | STATEMENT OF CLAIM | 0.10 | 12.76164384 |
| 42M 163484 00[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | 0.11 | 10.2 |
| 42M 30140569[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | | 0.068 |
| 42M 163186 00[4] | 09/01 to 12/31 | STATEMENT OF CLAIM | | 6.8 |
| 42M 163718 00[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | | 9.35 |
| 42M 30140568[4] | 01/01 to 12/31 | STATEMENT OF CLAIM | | 0.068 |

[1]Period of diversion assigned as 01/01 to 12/31

[2] Volume assigned as claimed in the original filing

[3] Volume calculated by multiplying the claimed acreage by the Department standard irrigation for climatic area 1

[4] Livestock Direct - Flow rate and volume assigned per department standards

| Table 6: Conservation Districts Within the Area of Potential Impact | | |
|---|---|---|
| Month | Dawson CD Flow Rate (CFS) | Dawson CD Volume (AF) |
| April | 330.8 | 6,551 |
| May | 330.8 | 6,551 |
| June | 330.8 | 6,551 |
| July | 330.8 | 6,551 |
| August | 330.8 | 6,551 |
| September | 330.8 | 6,551 |
| October | 330.8 | 6,551 |

[1]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 Order of Board of Natural Resources Establishing Water Reservations dated December 15, 1978.

| Table 7: Montana Department of Fish, Wildlife & Parks Water Reservation #30017771 at Miles City | | |
|---|---|---|
| Month | Flow Rate (CFS) | Volume (AF) |
| April | 5,848 | 358,950 |
| May | 12,280 | 753,746 |
| June | 26,188 | 1,607,419 |
| July | 10,278 | 630,864 |
| August | 3,862 | 237,050 |
| September | 4,338 | 266,266 |
| October | 5,849 | 359,012 |

18. For this application, the legal demand of the Dawson County water reservation 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 8: Legal Demand of the Dawson County Conservation District #995100 | | | | | |
|---|---|---|---|---|---|
| A | B | C | D | E | F |
| Dawson CD Total Flow rate (CFS) | Dawson 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) |
| 330.8 | 45,855 | 9.5 | 1,584 | 321.3 | 44,271 |

19. To determine legal availability, the legal demands in the area of potential impact (Tables 5-8) were subtracted from the physical availability of the source at the proposed POD. While the MT FWP & DEQ reservation #30017771 has 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 9 and 10.

20. Table 9 shows that flow rate is legally available during the proposed period of diversion, April 15 to October 31.

**Table 9: Legal Availability at the Point of Diversion on the Yellowstone River (Flow Rate)**

| A | B | C | D | E | F |
|---|---|---|---|---|---|
| Month | Physically Available Flow Rate at POD (CFS) | Dawson County CD Flow Rate (CFS)[1] | Individual Water Rights Flow Rate (CFS)[2] | FWP Instream Right Flow Rate (CFS) | Legally Available Flow Rate (CFS)[3] |
| Apr | 9,049.25 | 321.30 | 146.25 | 5,848.00 | 2,733.70 |
| May | 19,198.96 | 321.30 | 159.62 | 12,280.00 | 6,438.04 |
| Jun | 38,658.63 | 321.30 | 159.66 | 26,188.00 | 11,989.66 |
| Jul | 16,118.03 | 321.30 | 159.66 | 10,278.00 | 5,359.07 |
| Aug | 5,771.42 | 321.30 | 159.66 | 3,862.00 | 1,428.46 |
| Sep | 5,777.83 | 321.30 | 159.66 | 4,338.00 | 958.86 |
| Oct | 7,659.51 | 321.30 | 139.76 | 5,849.00 | 1,349.44 |

[1] Determined by subtracting the flow of individual CD records upstream of the proposed point of diversion from the total Dawson County Conservation District flow (Table 8, column E)

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

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

21. Table 10 shows that volume is legally available during the proposed period of diversion, April 15 to October 31.

**Table 10: Legal Availability at the Point of Diversion on the Yellowstone River (Volume)**

| A | B | C | E | F | G |
|---|---|---|---|---|---|
| Month | Physically Available Water at POD (AF) | Dawson County CD Volume (AF)[1] | Individual Water Rights (AF)[2] | FWP Instream Right (AF) | Legally Available Volume (AF)[3] |
| Apr | 532,014.57 | 6,324.71 | 1,558.92 | 358,950.24 | 165,180.70 |
| May | 1,171,853.33 | 6,324.71 | 1,708.45 | 753,746.40 | 410,073.77 |
| Jun | 2,289,989.52 | 6,324.71 | 1,708.95 | 1,607,419.44 | 674,536.42 |
| Jul | 982,744.01 | 6,324.71 | 1,708.95 | 630,863.64 | 343,846.71 |
| Aug | 347,668.91 | 6,324.71 | 1,708.95 | 237,049.56 | 102,585.69 |
| Sep | 337,045.52 | 6,324.71 | 1,710.65 | 266,266.44 | 62,743.72 |

| | | | | | |
|---|---|---|---|---|---|
| Oct | 465,379.54 | 6,324.71 | 1,582.34 | 359,011.62 | 98,460.86 |

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

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

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

22. The Department compared the Applicant's proposed flow rate and volume to the legally available flow rate and volume from April 15 to October 31. To evaluate the Applicant's proposed volume, the Department divided the total requested volume by months in the proposed period of diversion, yielding a proposed monthly volume of 83.94 AF (587.6 AF ÷ 7 months = 83.94 AF/month). Table 11 shows there is water legally available for the Applicant's proposed usage from April 15 to October 31.

**Table 11: Comparison of the Proposed Appropriation to Legal Availability**

| A | B | C | D | H | F | G |
|---|---|---|---|---|---|---|
| Month | Legally Available Flow Rate (CFS) | Legally Available Volume (AF) | Applicant Requested Flow Rate (CFS) | Applicant Requested Volume (AF) | Remaining Flow Rate (CFS) | Remaining Volume (AF) |
| Apr | 1,088.52 | 98,348.23 | 5.46 | 83.94 | 2,728.24 | 165,096.76 |
| May | 790.4427 | 96,924.25 | 5.46 | 83.94 | 6,432.58 | 409,989.83 |
| Jun | 951.4427 | 92,710.77 | 5.46 | 83.94 | 11,984.20 | 674,452.48 |
| Jul | -286.557 | 31,367.62 | 5.46 | 83.94 | 5,353.61 | 343,762.77 |
| Aug | -114.557 | 41,938.38 | 5.46 | 83.94 | 1,423.00 | 102,501.75 |
| Sep | -73.8576 | 31,796.54 | 5.46 | 83.94 | 953.40 | 62,659.78 |
| Oct | 122.2163 | 51,486.30 | 5.46 | 83.94 | 1,343.98 | 98,376.92 |

23. The Department finds, by a preponderance of evidence, that water is legally available from April 15 to October 31 in the amount requested from the proposed point of diversion.

## ADVERSE EFFECT

FINDINGS OF FACT

24. The Applicant proposed to divert water from April 15 to October 31. The water rights considered for adverse effect are the same as the water rights in the Department- designated area of potential impact (see FOF 17), which are listed in Tables 5-7. The Applicant states that

pumping capacity can be modified or ceased via the electric, variable frequency drive motor if a valid call is made.

25. The Department finds, by a preponderance of 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

26. The Applicant proposes to divert water from the Yellowstone River, by means of a pump, from April 15 to October 31 at a rate of 5.46 CFS. The applicant proposes to divert a total volume of 587.6 AF from a point in the NENENW, Sec. 25, T14N, R54E, Dawson County, for irrigation use from April 15 to October 31.

27. The diversion location and conveyance facilities of Statement of Claim 42M 165796 00 will be shared. There is currently one pump and two existing pipelines associated with 42M 165796 (see the yellow and blue pipeline on Figure 2). The yellow pipeline shown in Figure 2 provides irrigation for three pivots associated with 42M 165796 00. The pipeline shown in blue has historically provided flood irrigation for field 2 under 42M 165796 00. The blue pipeline is now proposed to convey water to pivots on fields 1 and 2. The green pipeline is proposed for construction from the blue pipeline and will convey water to a pivot on field 3. The proposed appropriation will use a new pump at the shared pump site to supply water to all three fields.

28. Data and calculations were provided by the Applicant depicting the total head needed for the proposed system during common irrigating scenarios. A Cornell pump data sheet was provided demonstrating a need for an approximately 60 HP electric pump. The intake pump will have a self-constructed screen that duplicates a design that was previously approved by the NRCS and MTFWP. It will have a stainless steel 1/8" mesh and a rotating nozzle arm to clean debris from the screen.

29. The new pump will supply water to a 12" 125 psi PVC pipe and then to the existing 2,800 FT 15" PVC mainline pipeline (see blue pipeline in Figure 2). New PVC lateral pipelines (8" for field 1 and 10" for field 2) will be added to the 15" mainline to supply water to the new pivots

on field 1 and 2). The mainline will be extended by adding 2,500 FT of 12" PVC pipeline that reduces to 1,400 FT of 10" PVC pipeline to reach field 3 (see green pipeline in Figure 2).

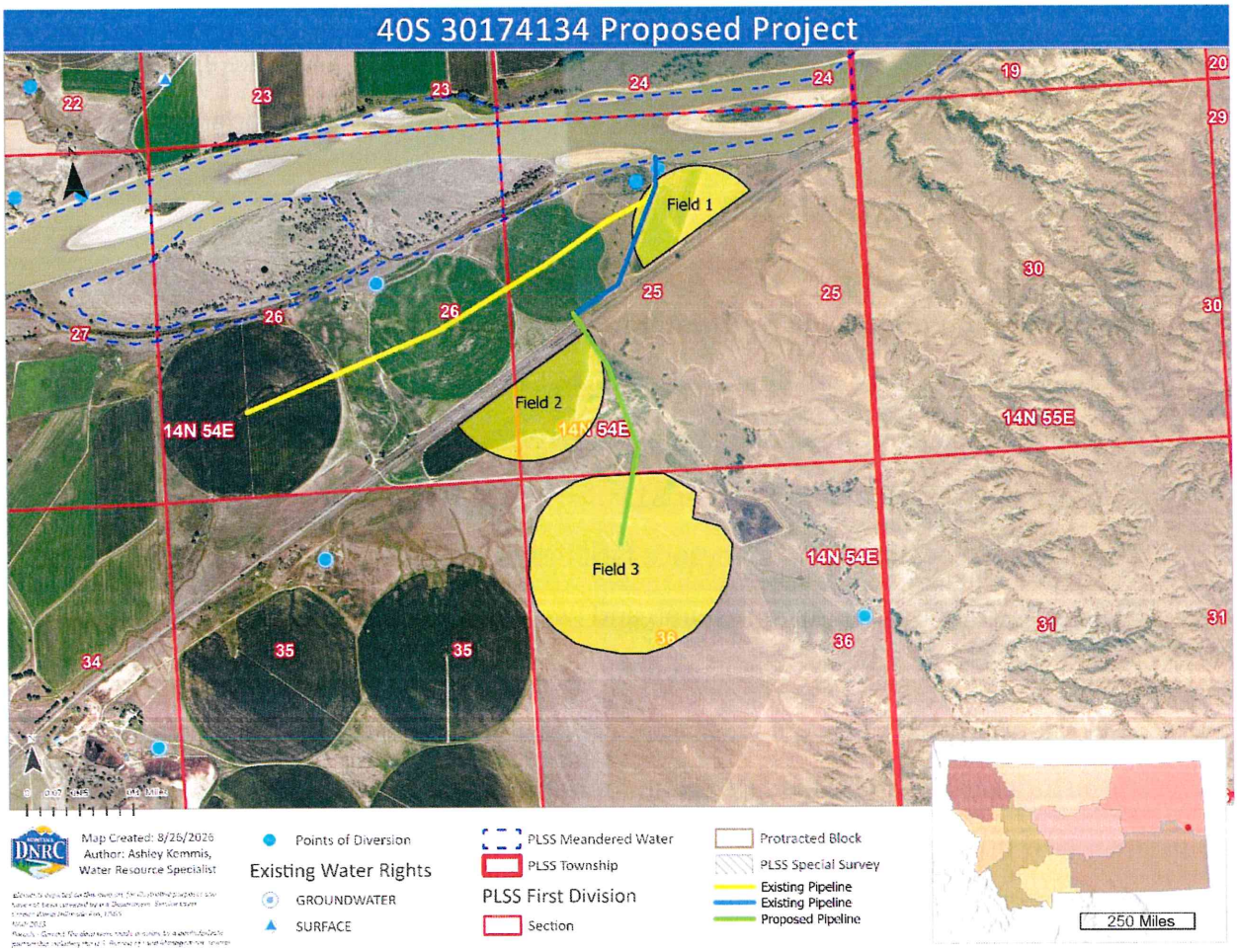



*Figure 2: Map Depicting Existing and Proposed Pipeline*

30. The proposed pipelines will have a minimum depth of 36" to distribute wheel load of passing vehicles and farm equipment. During construction, the underside of the pipe will be adequately packed and bedded to ensure the pipe is supported before backfilling. All elbows and tees will be supported with concrete thrust block designed in accordance with NRCS standards. Air vents will be installed at high spots, and pump-out drains will be installed in low spots. All pipelines will have a minimum slope of 0.1% to ensure air can escape to air vents and water will drain to pump-outs. All pipelines will be drained and pumped out at the end of each irrigation season to prevent freezing damage to the pipelines.

31. The proposed pivots will be Valley Irrigation, model 8000 machines, with ICON5 control panels that will be equipped with AgSense Valley 365 remote monitoring and control systems. The nozzles will be spaced 9' and cut to a height of 5' above the ground. Pipe spans will be $6\frac{5}{8}$" with mostly 185' span lengths. The end guns will have 5 HP boost pumps. The tires will be 11.2/38 size with non-directional treat to minimize rutting and maximize traction.

32. The Department finds, by a preponderance of evidence, that the proposed means of diversion and conveyance are capable of diverting the proposed 5.46 CFS, up to 587.6 AF for irrigation on 250 acres.

## BENEFICIAL USE

FINDINGS OF FACT

33. The Applicant proposes to divert 5.46 CFS, up to 587.6 AF from April 15 to October 31 for irrigation on 250 acres. The Applicant proposes irrigation of forage crops such as corn, alfalfa, grain, and/or high-volume grass mixtures.

34. The requested volume of 587.6 AF is the amount proposed for beneficial use based on Department water use standards for climatic area 1 per ARM 36.12.101. The standard for 250 acres of 70% efficient, pivot irrigation, would be 710 AF, assuming an average annual usage of 2.84 AF per acre (2.84 AF/acre * 250 acres = 710 AF). Statement of Claim 42M 165796 00 provides field 2 a supplemental volume of 122.4 AF/YR from 48 acres of flood irrigation that overlap the proposed POU. This was calculated based on the Department standard for Furrow irrigation in climatic area 1 at 70% efficiency and a design slope of 0.20% for an average use of 2.55 AF/acre (2.55 AF/acre*48 acres = 122.4). The total requested volume of 587.6 was calculated by subtracting the supplemental volume from the total calculated volume (710 AF - 122.4 AF = 587.6 AF/YR).

35. The requested flow rate of 5.46 CFS was determined from the desired crop coverage for each field. The calculations can be found on the "Data and Calculations for Gibbs Irrigation Project" document, which was provided by the Applicant.

36. The Department finds, by a preponderance of evidence, the proposed water use is beneficial, and that the requested flow rate of 5.46 CFS and annual volume of 587.6 AF are reasonably justified per ARM 36.12.1801(3).

## POSSESSORY INTEREST

FINDINGS OF FACT

37. 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.

## CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

38. 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."

39. 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).

40. 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).

41. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001)

42. 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 9-15)

LEGAL AVAILABILITY

43. 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).

44. 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.

45. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 16-23)

ADVERSE EFFECT

46. 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.

47. 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).

48. 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).

49. 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).

50. 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.

51. 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).

52. 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 24-25)

ADEQUATE DIVERSION

53. 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.

54. 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.

55. 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).

56. Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 26-32).

BENEFICIAL USE

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

58. 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).

59. 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).

60. It is the Applicant's burden to produce the required evidence. *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 ("issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied"); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter*

*of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); *see also Royston; Ciotti.*

61. Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 587.6 AF of diverted volume and 5.46 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 33-36)

POSSESSORY INTEREST

62. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

63. Pursuant to ARM 36.12.1802:

> (1) An Applicant or a representative shall sign the application affidavit to affirm the following:
> (a) the statements on the application and all information submitted with the application are true and correct and
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
> (2) If a representative of the Applicant signs the application form affidavit, the representative shall state the relationship of the representative to the Applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
> (3) The department may require a copy of the written consent of the person having the possessory interest.

64. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 37)

## 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 30174134 should be GRANTED.

The Department determines the Applicant may divert water from the Yellowstone River, by means of a Pump, from April 15 to October 31 at 5.46 CFS up to 587.6 AF, from a point in the NENENW, Section 25, T14N, R54E, Dawson County, for irrigation use from April 15 to October 31. The place of use is shown in Table 12. The Applicant may irrigate crops such as corn, alfalfa, grain, and/or high-volume grass mixtures on 250 acres.

**Table 12: Place of Use**

| Acres | Gov't Lot | ¼, ¼, ¼ | Sec. | Twp. | Rge. | County |
|---|---|---|---|---|---|---|
| 145 | | NW | 36 | 14N | 54E | Dawson |
| 5 | | W2W2NE | 36 | 14N | 54E | Dawson |
| 9 | | E2SENW | 25 | 14N | 54E | Dawson |
| 4 | 3 | E2NENW | 25 | 14N | 54E | Dawson |
| 14 | 2 | S2NWNE | 25 | 14N | 54E | Dawson |
| 6 | | N2SWNE | 25 | 14N | 54E | Dawson |
| 22 | | SESE | 26 | 14N | 54E | Dawson |
| 32 | | SWSW | 25 | 14N | 54E | Dawson |
| 13 | | NWSW | 25 | 14N | 54E | Dawson |
| 250 | Total Acres | | | | | |

## NOTICE

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

DATED this 21st day of September, 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 DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 22nd day of September, 2026, by first class United States mail.

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