

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30155207 BY SHIRLEY M. MCCREA)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
--	-------------	--

On March 28, 2022 Shirley M. McCrea (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30155207 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1,134 GPM and 441 AF. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated July 14, 2022. The Applicant responded with an amendment to the Application on August 25, 2022, which reset the priority date and amended the flow rate to 1,458 GPM and volume 497 AF. The Application was determined to be correct and complete on September 8, 2022. An Environmental Assessment for this Application was completed on October 6, 2022.

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-SW
- Attachments
- Maps: Aerial photos depicting the points of diversion and places of use.

Information Received after Application Filed

- Amendment to the Application received August 25, 2022--Proposed flow rate and volume were increased.

Information within the Department’s Possession/Knowledge

- USGS gaging station records (Station # 06177000, Missouri River near Wolf Point, MT) from October, 1942 to January, 2022.
- Information contained in the active file of Provisional Permit 40S 15984-00.
- Department water right records of existing rights.

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).

PROPOSED APPROPRIATION

FINDINGS OF FACT

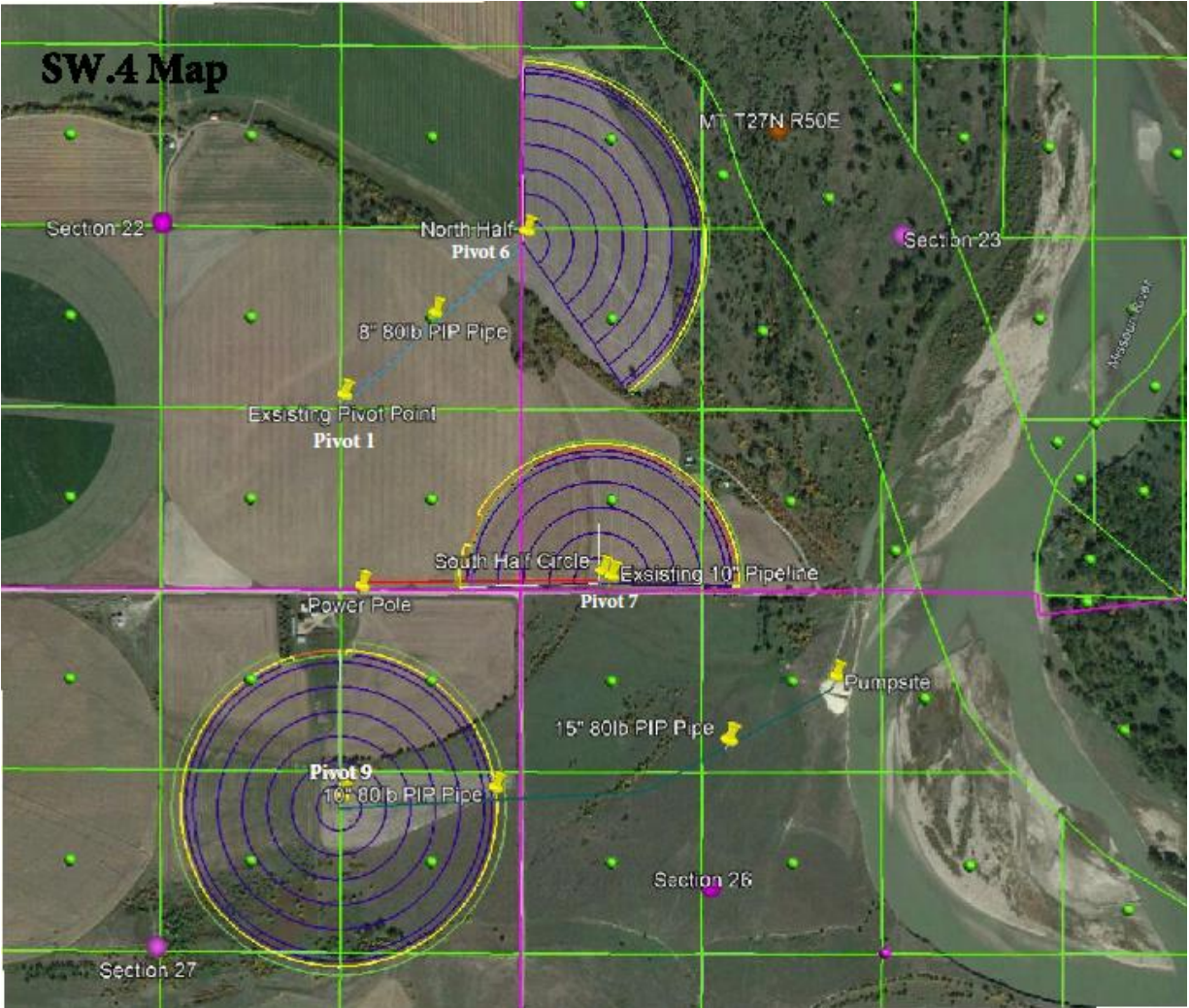
1. The Applicant proposes to divert water from the Missouri River by means of a pump, from April 1 to October 31. The requested surface water diversion is for 1,458 GPM (3.25 CFS) up to 497 AF, from a point on the south bank of the river in the SENENW Section 26, Township (T)27N, Range (R)50E, McCone County, for irrigation by center pivot. The Applicants intends to irrigate 198.9 acres in McCone County in the following places of use:

<u>Acres</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
6.1	SESESE	22	27N	50E	McCone
29.4	Lot 2, SWNW	23	27N	50E	McCone
57.7	W2SW	23	27N	50E	McCone
105.7	NE	27	27N	50E	McCone

2. The proposed point of diversion also supplies an existing water right permit 40S 15984-00, also owned by Shirley M. McCrea. Water right 40S 15984-00 irrigates 130 acres in SE Section 22, T27N, R50E with a flow rate of 1,000 GPM and 351 AF. This water right will share

the same pump and point of diversion but does not share the same place of use as the proposed application.

Figure 1: Map of the proposed project area supplied by the Applicant. Pivots 6, 7, and 9 are the proposed places of use.



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

GENERAL CONCLUSIONS OF LAW

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

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

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

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

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

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

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

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, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *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. § 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 is requesting a maximum flow rate of 1,458 GPM (3.25 CFS) from the Missouri River. The proposed point of diversion is located approximately 14.5 linear miles downstream from the USGS gaging station on the Missouri River near Wolf Point, MT (USGS Station # 06177000). The median of mean monthly flow rates were obtained from the gaging station records. The median of mean monthly volumes were calculated by converting CFS to AF (CFS x 1.98 x days per month = AF).

Table 1: Median of the Mean Monthly Gage Data						
	January	February	March	April	May	June
Flow Rate (CFS)	10100	10250	8263	7601	8474	9002
Volume (AF)	619938	568260	507183	451499	520134	534719

	July	August	September	October	November	December
Flow Rate (CFS)	9182	9758	8347	8101	7658	9063
Volume (AF)	563591	598946	495812	497209	454885	556286.9

10. The following table lists the existing water rights between the USGS gaging station (USGS Station # 06177000) and the proposed point of diversion:

Table 2: Existing Water Rights Between Gaging Station and the Proposed POD							
Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion	Water Right #	Flow (CFS)	Volume (AF)	Period of Diversion
40S 135788 00	0.1	3.8	01/01 to 12/31	40S 111430 00	4.9	676.5	04/01 to 10/15
40S 30141751	0.1	0.03	01/01 to 12/31	40S 111429 00	4.9	628.1	04/01 to 10/15
40S 30141744	0.1	2.7	01/01 to 12/31	40S 215784 00	4.1	271.5	04/01 to 10/31
40S 30141745	0.1	3.1	01/01 to 12/31	40S 170297 00	5.0	65	04/01 to 10/31
40S 172384 00	0.1	10.1	01/01 to 12/31	40S 15984 00	2.2	351	04/01 to 10/31
40S 30141750	0.1	0.8	01/01 to 12/31	40S 215783 00	15.2	1002.5	04/01 to 10/31
40S 30132346	0.1	33.6	01/01 to 12/31	40S 166063 00	1.4	100.75	04/01 to 11/30
40S 30141747	0.1	0.03	01/01 to 12/31	40S 18593 00	5.6	77	04/15 to 10/15
40S 30064200	9.3	2843.0	01/01 to 12/31	40S 106983 00	6.9	1114	04/15 to 10/15
40S 187281 00	80.0	10187.5	01/01 to 12/31	40S 102771 00	9.0	1420	04/15 to 10/15
40S 4236 00	12.0	295.0	03/01 to 10/31	40S 102763 00	5.7	980	04/15 to 10/15
40S 165479 00	2.7	175.0	03/01 to 11/30	40S 11394 00	2.2	465	04/15 to 10/15
40S 34798 00	10.0	4450.0	03/01 to 11/30	40S 106040 00	12.0	220	04/15 to 10/19
40S 16093 00	0.9	94.5	03/01 to 11/30	40S 17220 00	11.1	457.5	04/15 to 10/19
40S 171349 00	12.3	535.0	03/15 to 11/04	40S 168893 00	9.7	640	04/15 to 11/19
40S 113898 00	6.7	66.3	04/01 to 09/04	40S 215786 00	3.6	433	05/01 to 09/04
40S 117928 00	14.2	940.0	04/01 to 09/30	40S 171321 00	1.3	92.5	05/01 to 09/30
40S 30006005	2.7	240.0	04/01 to 10/15	40S 15093 00	0.4	25	05/01 to 11/30
40S 30044048	12.0	571.0	04/01 to 10/15				

11. The water rights in Table 2 were used to evaluate the flow rate physically available at the point of diversion. Because the gaging station is upstream of the point of diversion, physical availability is determined by subtracting the sum of monthly flow rates of existing water rights from the median of mean monthly flow rates measured at the gaging station (see Table 3). The existing water rights in Table 2 were also used to evaluate the volume physically available each month. The monthly volume diverted by the existing water rights is calculated by dividing the total volume for each water right by the number of months each diversion takes place. Because the gaging station is upstream of the point of diversion, physical availability is calculated by subtracting the sum of monthly diverted volumes of existing water rights from the median of mean monthly volumes measured at the gaging station.

Table 3: Missouri River Physical Availability --Flow Rate (CFS)			
	Median Monthly Flow at Wolf Point Gage	Water Rights between Gage and POD	Flow Rate Physically Available at POD
January	10100	90	10010
February	10250	90	10160
March	8263	128	8135
April	7601	263	7338
May	8474	269	8205
June	9002	269	8733
July	9182	269	8913
August	9758	269	9489
September	8347	259	8089
October	8101	190	7910
November	7658	105	7553
December	9063	90	8973

Table 4: Missouri River Physical Availability --Volume (AF)			
	Median Monthly Volume at Wolf Point Gage*	Water Rights between Gage and POD	Volume Physically Available at POD
January	619938	1091	618847
February	568260	1091	567169
March	507183	1719	505464
April	451499	3325	448174
May	520134	3456	516679
June	534719	3456	531263
July	563591	3456	560136
August	598946	3456	595490
September	495812	3334	492478
October	497209	2370	494839
November	454885	1631	453254
December	556287	1091	555196

**The median of the mean monthly volumes was calculated by multiplying the median of the mean monthly flow rates in CFS by the number of days in the month by 1.98 AF/CFS/day.*

12. The Department finds water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate.

CONCLUSIONS OF LAW

13. 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.”

14. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 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).

15. 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).

16. Use of published upstream gage data minus rights of record between gage 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).

17. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-12)

Legal Availability:

FINDINGS OF FACT

18. The Department determined that the area of potential impact on the Missouri River is approximately 5 miles downstream of the proposed point of diversion. For notice purposes the

Department has historically identified an area of potential impact of 3-5 miles downstream of the proposed point of diversion for the Missouri River below Fort Peck Dam. A list of existing legal demands within the area of impact was generated and used by the Department to compare the physical availability of water to the amount already appropriated under existing private water rights, Montana Department of Fish, Wildlife and Parks (MT FWP) water reservations and the Fort Peck Tribal right. The monthly volume of downstream water rights was calculated by dividing the claimed volumes by the number of months in the claimed period of use (Table 5). The Applicant is requesting a flow rate of 3.25 CFS up to 497 AF per year.

Table 5: Missouri River Downstream Users

Water Right Numbers	Flow Rate (CFS)	Volume (AF)	POD Twp, Rge & Sec	Period of Diversion
40S 30132346*	0.1	34	27N50E25	01/01 to 12/31
40S 30141750*	0.1	1	27N50E26	01/01 to 12/31
40S 6417 00*	0.1	7	27N51E19	01/01 to 12/31
40S 30141707*	0.1	1	27N50E25	01/01 to 12/31
40S 30141750*	0.1	1	27N50E26	01/01 to 12/31
40S 165479 00**	2.7	175	27N50E23	03/01 to 11/30
40S 15984 00	2.2	351	27N50E26	04/01 to 10/31
40S 77141 00	7.8	189	27N51E19	04/01 to 10/31
40S 30041682	6.0	802	27N51E30	04/01 to 11/01
40S 384 00	7.1	300	27N51E30	05/01 to 09/15
40S 171295	3.0	162	27N51E8	05/01 to 09/30
40S 168962 00**	6.7	453	27N50E25	05/01 to 10/31

* These statements of claims were issued for livestock drinking directly from source. Flow rate and volume were not given; rather, these rights were assigned a consumptive rate of 30 gallons per day per animal unit. For legal availability purpose, volume is calculated by multiplying the number of animal units by 30 gallons by the number of days in the claimed period of use. Flow rate is then converted from the volume.

** These statements of claims were issued for irrigation in which a volume was not given. For legal availability purpose, volume is calculated by multiplying the number of acres by 2.5 AF/ac, an irrigation standard within those set by ARM 36.12.115(2)(e).

19. The legal availability is summarized in the tables 6 and 7 below.

Table 6: Missouri River Legal Availability --Flow Rate (CFS)					
	Flow Rate Physically Available	Downstream Users Water Rights	MT FWP Instream Reservation*	Fort Peck Tribal Right**	Flow Rate Legally Available
January	10010	0.5	5178	652	4180
February	10160	0.5	5178	722	4260
March	8135	3.2	5178	652	2302
April	7338	19.2	5178	842	1299
May	8205	36.0	5178	1711	1281
June	8733	36.0	5178	2441	1078
July	8913	36.0	5178	3503	197
August	9489	36.0	5178	2933	1343
September	8089	36.0	5178	1768	1107
October	7910	25.8	5178	815	1892
November	7553	3.2	5178	673	1698
December	8973	0.5	5178	652	3143

* Water Right 40S 30017671

** Assuming full development of Fort Peck-Montana Compact, MCA §85-20-201, Article III F.1. Flow rate in CFS is calculated by dividing monthly volume in AF by the number of days in the month by 1.98 AF/day.

Table 7: Missouri River Legal Availability --Volume (AF)					
	Volume Physically Available	Downstream Users Water Rights	MT FWP Instream Right*	Fort Peck Tribal Right**	Volume Legally Available
January	618847	4	317826	40000	261018
February	567169	4	287068	40000	240098
March	505464	23	317826	40000	147616
April	448174	215	307573	50000	90386
May	516679	383	317826	105000	93470
June	531263	383	307573	145000	78308
July	560136	383	317826	215000	26927
August	595490	383	317826	180000	97282
September	492478	383	307573	105000	79522
October	494839	290	317826	50000	126723

November	453254	23	307573	40000	105658
December	555196	4	317826	40000	197367

* Water Right 40S 30017671

** Assuming full development of Fort Peck-Montana Compact, MCA §85-20-201, Article III F.1.

20. The comparison in Tables 8 and 9 shows that water is legally available throughout the proposed period of diversion. For the analysis below, the monthly volumes are equal to the total requested volume (497 AF) as if the entire appropriation was done in a single month; however, the Applicant is limited to a total annual diversion of 497 AF.

Table 8: A comparison of the legally available flow rate (CFS) at the point of diversion to the proposed appropriation			
	Flow Rate Legally Available at POD	Flow Rate Requested	Flow Rate Remaining
January	4180	0	4180
February	4260	0	4260
March	2302	0	2302
April	1299	3.3	1295
May	1281	3.3	1277
June	1078	3.3	1075
July	197	3.3	193
August	1343	3.3	1339
September	1107	3.3	1104
October	1892	3.3	1888
November	1698	0	1698
December	3143	0	3143

Table 9: A comparison of the legally available volume (AF) at the point of diversion to the proposed appropriation			
	Volume Legally Available at POD	Volume Requested*	Volume Remaining
January	261018	0	261018
February	240098	0	240098
March	147616	0	147616
April	90386	497	89889
May	93470	497	92973
June	78308	497	77811
July	26927	497	26430
August	97282	497	96785
September	79522	497	79025
October	126723	497	126226
November	105658	0	105658
December	197367	0	197367

21. The Department finds calculated flows and volumes in the tables above show legal availability of water for appropriation during the proposed period of diversion.

CONCLUSIONS OF LAW

22. 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).

23. 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.

24. Use of published upstream gage data minus rights of record between gage 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);

25. 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. § 85-2-311(1)(a)(ii), MCA (FOF 18-21).

Adverse Effect

FINDINGS OF FACT

26. The Applicant is proposing to divert 497 AF to irrigate 198.9 acres in McCone County from April 1 to October 31.
27. During times of water shortage, the Applicant will cease diversion so that senior water right holders are able to exercise their appropriations.
28. The pump is equipped with variable-frequency drive which controls the speed of the pump to meet a certain flow rate, depending on the demand of water. The variable-frequency drive also communicates with pivots and with individual electronic butterfly valves wired in the pivot panel. This system allows the Applicant to control water diversion on demand with accuracy.
29. The Department finds there will be no adverse effect because the amount of water requested is legally available at the point of diversion on the Missouri River and the Applicant's plan to cease appropriation during times of water shortage is adequate.

CONCLUSIONS OF LAW

30. 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. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.
31. 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*, (2011) Pg. 4.
32. 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 (1991), 249 Mont. 425, 816 P.2d 1054.

33. 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*, (2011) Pg. 7 (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). (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.

34. 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*, (2011) Pg. 8.

35. 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. § 85-2-311(1)(b) , MCA. (FOF 26-29)

Adequate Diversion

FINDINGS OF FACT

36. Pivot 1 is the original pivot permitted under the existing Water Right 40S 15984-00. It is currently served by a Cornell 4RB 25HP pump. Water Right 40S 15984-00 is appropriated for irrigation on 130 acres at a maximum of 1,000 GPM and 351 AF, from April 1 to October 31. The proposed application involves Pivots 6, 7 and 9. A new pump will be installed to serve all four pivots. Therefore, water Right 40S 15984-00 and the proposed application will share the same pump and point of diversion.

37. Ames floating pump assembly with a Cornell 150HP 6HH pump will be installed at the point of diversion to supply to all four pivots. For the three pivots in this application, water will be pumped out of the Missouri River at a maximum rate of 1,458 GPM, from April 1 to October 31, to supply 497 AF to Pivots 6, 7 and 9 over 198.9 acres. In conjunction with Pivot 1 of the

existing Water Right 40S 15984-00, the pump will be able to supply a maximum of 2,458 GPM and maintain a total dynamic head of 177 ft to the system. Of the four pivots, Pivot 7 runs at the lowest flow rate of 280 GPM, which is the pump's lowest operating point. The pump's efficiency varies according to how the pivots are operated; 86% efficiency is achieved when all pivots are running at full capacity. The pivots have an average efficiency rating of 85% for the climatic factors of the project location.

38. A 10" steel manifold at the pump site will deliver water to four pivots via branching pipelines. The manifold contains a 10" chemigation check valve to prevent backflow into the river. The irrigation system is designed by AGRI Industries of Sidney, MT.

39. Pivot 1 is connected to the proposed pump site via an existing 10" pipeline 5,197 ft long. Pivot 1 irrigates at a maximum of 1,000 GPM and 351 AF per year on 130 acres. Feeding off of this long pipeline, halfway between the pump site and Pivot 1, is Pivot 7. Pivot 7 will run at 280 GPM on 39.5 acres. At Pivot 1, the pipeline also branches off northeast 1,800 ft to Pivot 6, the northern-most pivot of the project. Pivot 6 will operate at 378 GPM on 53.7 acres. From the pump site manifold, another pipeline runs 3,800 ft southwest to supply Pivot 9. Pivot 9 will operate at 800 GPM to irrigate 105.7 acres.

40. The proposed pump has the ability to run at different speeds depending on the demand of water. It can also manage the incoming water pressure so that each pivot can run independently. All pivots will run simultaneously about 75% of the time. With the pump's electronic variable-frequency drive, the Applicant could accurately customize the pivots' timing and flow rate in accordance with the crop needs and weather condition.

41. The applicant proposes to operate the pivots with a three-days-on and three-days-off rotation. During active watering, 0.75-inch water will be applied. This pattern will repeat generally 28 times for soybean and 17 times for the wheat and peas rotation, depending on each year's growing conditions.

42. Department finds the diversion means and operation are adequate for the proposed irrigation use.

CONCLUSIONS OF LAW

43. 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.

44. 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.

45. 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. § 85-2-311(1)(c), MCA (FOF 36-42).

Beneficial Use

FINDINGS OF FACT

46. The Applicant proposes to use the water to irrigate 198.9 acres in McCone County that were previously dryland fields. Water will be diverted from the Missouri River at a flow rate of 1,458 GPM (3.25 CFS) and supplied to three pivots. In conjunction with the existing Provisional Permit 40S 15984-00 which supplies to an existing pivot in an adjacent field, the Applicant will rotate wheat, peas and soybeans. One year the pivots will grow a mix of peas and wheat; the next year all will grow soybeans. Provisional Permit 40S 15984-00 is also owned by the Applicant.

47. Requested volume of 497 AF is based on the peak consumptive need of soybean, since soybean has the highest demand of the crops that the Applicant plans to grow. The Applicant will need to apply 7 GPM/acre based on the design plans and efficiency of the system. Over the course of the proposed irrigation schedule (approximately 6 days per cycle, 28 cycles), which equates to approximately 5.5 months growing season, the fields will receive an average of 2.5 AF per acre. This is within the standard for sprinkler irrigation in Climatic Area II set by ARM 36.12.115(2)(e). The diversion structure has been designed and will be constructed by Agri-Industries in Sidney, MT. Design specifications are contained in Appendices A-F in the file.

48. The Applicant is proposing to begin operating Pivots 6 and 7 on April 1, 2023. Pivot 9 will be completed for the 2025 growing season.

49. The Department finds the proposed use of 497 AF at a flow rate of 1,458 GPM (3.25 CFS) for the purpose of irrigation on 198.9 acres is a beneficial use of water.

CONCLUSIONS OF LAW

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

51. 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, supra; 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 et al*, 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).

52. 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*, (2011) Pg. 3 (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).

53. Applicant proposes to use water for irrigation purpose which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that irrigation is

a beneficial use and that 497 AF of diverted volume at 1,458 GPM is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 46-49)

Possessory Interest

FINDINGS OF FACT

54. The Applicant signed the application form affirming that the Applicant has possessory interest in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

55. 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.

56. 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.

57. 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. § 85-2-311(1)(e), MCA. (FOF 54)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30155207 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from April 1 to October 31 at a flow rate of 1,458 GPM (3.25 CFS) up to 497 AF, from a point on the south bank of the river in the SENENW Section 26, T27N, R50E, McCone County. The beneficial use is irrigation on 198.9 acres in the following places of use:

<u>Acres</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
6.1	SESESE	22	27N	50E	McCone
29.4	Lot 2, SWNW	23	27N	50E	McCone
57.7	W2SW	23	27N	50E	McCone
105.7	NE	27	27N	50E	McCone

NOTICE

This 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 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, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined

to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 25th day of October, 2022.

/Original signed by Todd Netto/
Todd Netto, Regional Manager
Glasgow Water Resources Office
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 25th day of October, 2022, by first class United States mail.

SHIRLEY M. MCCREA
7009 NB LOOP
WOLF POINT, MT 59201

LEE LOENDORF
PO BOX 730
WOLF POINT, MT 59201

NAME

DATE