

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41L 30150126 BY HORIZON COLONY, INC.)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On October 26, 2020, Horizon Colony, Inc. (Applicant) submitted Application for Beneficial Water Use Permit No. 41L 30150126 (Application) to the Havre Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for a volume of 1.8 acre-feet (AF) from Unnamed Tributary of Old Maids Coulee for lawn and garden irrigation. 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 March 25, 2021. The Applicant responded with information dated April 6, 2021. The Applicant later amended the Application on April 29, 2022, which reset the priority date. The Application was determined to be correct and complete as of July 8, 2022. An Environmental Assessment for this Application was completed on September 29, 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: Horizon Colony Runoff Collection Plan

Information Received after Application Filed

- Deficiency Letter response from Applicant to DNRC dated April 6, 2021

- Application Amendment received April 29, 2022. The amendment changed the stormwater pond's dimensions.

Information within the Department's Possession/Knowledge

- Water right records for surrounding area
- Department's Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration, dated November 8, 2019
- Department's Technical Report completed on January 4th, 2022. Amended technical report was completed on July 8th, 2022.

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 is proposing to divert water year-around (January 1 through December 31) at a total annual volume of 17.7 acre-feet (AF) from Unnamed Tributary of Old Maids Coulee in Glacier County, by means of a stormwater collection system, for the purpose of irrigating 4.9 acres of lawn and garden (12.3 AF). The point of diversion is located in the NESW of Sec. 11, Twp. 34N., Rge. 5W, Glacier County.
2. The proposed 4.9 acres of garden irrigation is in the NESW & SWSW of Sec. 11, Twp. 34N., Rge. 5W, Glacier County. The proposed period of use is May 15th to October 15th. Stormwater will be collected from building roofs and yard areas between buildings then conveyed via PVC piping to a lined storage pond with a surface area of 1.86-acres and capacity of 7.45 AF located in the NESW Section 11 T34N R5W Glacier County.
3. Evaporation will contribute an additional 5.4 AF of volume to the proposed appropriation (Potts 75% Eo (Cut Bank): 885/yr converted to 34.8 inches/yr converted to 2.9 ft/yr. 1.86 acres multiplied by 2.9 ft/yr equals 5.4 AC-FT/yr

4. The area from which stormwater runoff will be collected amounts to approximately 28 acres, consisting of building roofs and general yard areas. The annual runoff from the area is estimated to be approximately 24.9 AF.

5. A flow rate is not being assigned to this proposed appropriation, because this application involves the collection of precipitation, and the rate of that collection is a variable that cannot be controlled.



Figure 1: Horizon Colony Runoff Collection Plan Submitted by Applicant

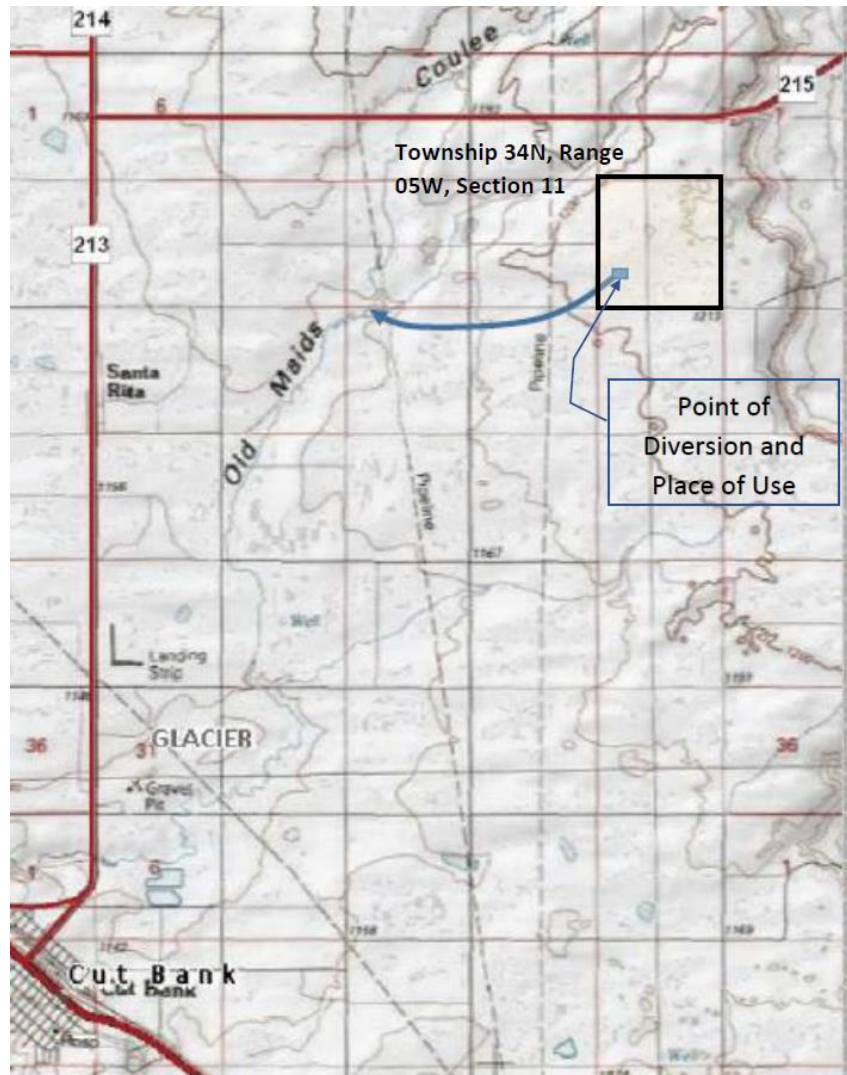


Figure 2: Horizon Colony Approximate Overflow Route Submitted by Applicant

PHYSICAL AVAILABILITY
FINDINGS OF FACT

6. The Department finds that because the source of water for this permit is rain and other precipitation, the source will be listed as Unnamed Tributary of Old Maids Coulee since water that would normally collect and flow in this source will be intercepted by the Applicant's

stormwater catchment system (as shown in Figure 2). Flow rate is not being examined in the physical availability as this application is for precipitation, which is a variable that is not able to be controlled.

7. The Applicant retained the services of a professional engineer to design the proposed stormwater catchment system. The data for the monthly climate normal values was provided by the Applicant’s engineer and was obtained from the precipitation data in Cut Bank, MT from NOAA (1991-2020) and used to determine the distribution of the annual to monthly precipitation values. Using the climatic and precipitation data, the Applicant, through their engineer provided an estimate runoff for the proposed stormwater collection area, which is 28 acres.

8. The estimated annual runoff volume was calculated by the Applicant’s engineer by multiplying the annual average precipitation value of a runoff basin (12 inches in the Applicant’s stormwater collection basin) by the estimated average runoff volume (37,253 ft³ or 24.9 AF in per inch of rainfall in the Applicant’s 28-acre runoff basin) (8,114,910 gallons or 24.9 AF total). The sum of the average runoff estimates from the yard (17,329 ft³) and the building (19,294 ft³) is 37,253 ft³. In estimating average runoff estimates, the Applicant’s engineer used runoff coefficients of 0.9 for the building and 0.3 for the yard, both of which fall within a typical range (0.35 – 0.95) of values for runoff coefficients. Runoff is being captured by draining collected precipitation through underground PVC pipes to the storage pond.

9. Figure 3 summarizes the monthly results of the Applicant’s precipitation runoff estimates, which equates to an estimate of physical availability of water within the Applicant’s stormwater catchment area.

Table 1: Monthly Climate Normal (1991 – 2020) Shelby, MT data used to estimate physical availability of water within Applicant’s stormwater catchment area

Month	Total Precipitation Normal (inches)	Monthly Runoff from precipitation (gallons)	Monthly Runoff from precipitation (AF)
January	0.46	162,925	0.5
February	0.36	162,925	0.5
March	0.63	260,681	0.8

April	1.34	716,872	2.2
May	1.77	1,238,420	3.8
June	2.85	2,085,760	6.4
July	1.14	977,700	3
August	0.85	716,872	2.2
September	1.01	814,627	2.5
October	0.74	423,606	1.3
November	0.52	325,851	1
December	0.46	228,096	0.7
Annual:	12.13	8,114,910	24.9

10. A Department Regional Engineer reviewed the Applicant’s calculations and methodology used to determine the amount of water available for the proposed appropriation and found that them to be credible. Therefore, the Department finds that 24.9 AF of water to be physically available for the proposed appropriation.

CONCLUSIONS OF LAW

11. 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.”

12. 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).

13. 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).

14. 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 6-10)

LEGAL AVAILABILITY

FINDINGS OF FACT

15. The reach five miles below the Applicant's proposed point of diversion on the Unnamed Tributary of Old Maids Coulee was identified as the area of potential impact. The Department found no legal demands within that area of potential impact.

16. The Department finds the requested volume 17.7 AF to be legally available during the proposed periods of diversion.

CONCLUSIONS OF LAW

17. 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).

18. 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.

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

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

21. *In the Matter of Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management* (DNRC Final Order 1991) (Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses).

22. 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 15-16)

ADVERSE EFFECT

FINDINGS OF FACT

23. During exceptional runoff events when storage capacity might be exceeded, the Applicants plan to discharge overflow water to prevent adverse effect to downstream users. To allow discharge without overtopping the pond berm, an overflow discharge pipe of approximately 18-inch diameter is included in the pond design. Additionally, the pond will have a minimum of 3-foot freeboard above the overflow elevation. The Department finds this to be a valid assertion.

24. Water will be diverted whenever there is precipitation occurring within the stormwater catchment area. During times of water shortage, it is unlikely that any surface runoff in adequate volume to use will occur. The amount of water appropriated will be controlled by the Applicant through the use of an overflow pipe from the reservoir. As such, the Department finds that this water diversion will not cause adverse effect to senior water users.

CONCLUSIONS OF LAW

25. 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.

26. 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(8).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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 23, 24)

ADEQUATE DIVERSION

FINDINGS OF FACT

32. Water runoff from seven building roofs and yard areas, with a combined surface area of 519, 808 ft², near and between buildings will drain through underground PVC pipes to the storage pond. The point of diversion is located in the NESW Section 11 T34N R5W Glacier

County. Pipe diameters will be sized for expected flow rates with smaller branch pipes leading to larger pipes draining into the pond. The runoff would be stored in a constructed impoundment of up to 7.45 AF. Additionally, an overflow discharge pipe of approximately 18-inch diameter is included in the pond design and the pond will have a minimum of 3-feet freeboard above the overflow elevation. Excavated soil would be used to form a berm around the perimeter. The pond will be lined with HDPE or bentonite to limit percolation. All pumps used for this project will be electric centrifugal pumps with manual start and timed, manual, or water low level automatic off functions. A submersible pump will be used to pump water from the pond to use point.

33. Based on the system specifications and additional information provided in the application materials, the Department finds that the proposed system infrastructure is adequate to accommodate diversion of the requested 17.7 AF of collected stormwater.

CONCLUSIONS OF LAW

34. 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.

35. 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.

36. Collection of snowmelt and rain in lined ponds considered adequate means of diversion. *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989).

37. 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 32, 33).

BENEFICIAL USE

FINDINGS OF FACT

38. Applicant proposes to use water for garden irrigation from collected stormwater. Irrigation is identified as a beneficial use of water pursuant to §85-2-102(5)(a), MCA.

39. The Applicant proposes to irrigate 4.9 acres of garden from May 15th through September 15th. Using the Department's water use standards of 2.5 AF per acre for lawn and garden use up to 4.9 acres, equals 12.3 AF.

40. The requested volume (17.7 AF) is the sum of the beneficial use and the net evaporation loss from the pond. The reservoir has a storage capacity of 7.45 AF. The evaporation loss was estimated to be 5.4 AF per year based on a surface area of 1.86 acres, and evaporation of 34.8 inches (2.9 ft) therefore (1.86 acres x 2.9 ft) = 5.4 AF. No flow rate will be assigned to this permit application because it utilizes the collection and storage of precipitation.

41. No flow rate will be assigned to this permit application because it utilizes the collection and storage of precipitation.

CONCLUSIONS OF LAW

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

43. #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).

44. 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).

45. Applicant proposes to use water in the amount of 17.7 AF for 4.9 acres of lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that lawn and garden irrigation is a beneficial use and that 17.7 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 38-41)

Possessory Interest

FINDINGS OF FACT

46. The Applicant signed the application form affirming the applicant has 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.

CONCLUSIONS OF LAW

47. 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.

48. 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.

49. 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 46)

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. 41L 30150126 should be GRANTED.

The Department determines the Applicant may divert water from the Unnamed Tributary of Old Maids Coulee, by means of a stormwater collection, from January 1st – December 31st up to 17.7 AF, from the NESW Section 11 T34N R05W Glacier County, for garden irrigation of 4.9 acres (12.3 AF), from May 15th – September 15th. The place of storage is a 7.45 AF reservoir located in the NESWSW of Section 11 T34N R5W Glacier County. The place of use is located in the NESW & SWSW Sec. 11 T34N R05W Glacier County.

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 3rd day of November, 2022.

/Original signed by Matt Miles/

Matt Miles, Manager

Havre Regional 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 3rd day of November, 2022, by first class United States mail.

HORIZON COLONY
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CUT BANK, MT 59427

STEPHEN T. SMITH
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HELENA, MT 59601

NAME

DATE