

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

\* \* \* \* \*

<b>APPLICATION FOR BENEFICIAL WATER )</b>	
<b>USE PERMIT NO. 40S 30164987 BY HYDRA )</b>	<b>DRAFT PRELIMINARY DETERMINATION</b>
<b>MT, LLC )</b>	<b>TO GRANT</b>

\* \* \* \* \*

On December 9<sup>th</sup>, 2024, Hydra MT, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30164987 to the Havre Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4,000 GPM (8.9 CFS) and 755 AF for Industrial use. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated January 8<sup>th</sup>, 2025. The Applicant responded with information dated January 15<sup>th</sup>, 2025. The application was determined to be correct and complete as of January 22<sup>nd</sup>, 2025. An Environmental Assessment for this application was completed on January 30<sup>th</sup>, 2025.

**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 and attachments
- Attachments:
  - Agreement between landowner and Hydra MT, LLC for access to land dated November 22<sup>nd</sup>, 2024.
  - Undated photos showing conveyance and storage equipment
  - Form No. 600-TAA
- Maps:
  - Undated aerial imagery depicting the places of use and point of diversion

**Information Received after Application Filed**

- List individual documents separately, with date of document, who sent it, subject, and date received by DNRC
  - Deficiency response received January 15<sup>th</sup>, 2025

#### Information within the Department's Possession/Knowledge

- Flow Records for USGS Gage #0618550
- DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
- USGS Stream Stats Web Application
- 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 Havre Regional Office at 406-265-5516 to request copies of the following documents:
  - DNRC Water Right Database Records
  - DNRC ArcGIS web application, Converge
- Department - completed technical analyses based on information provided in the 600-TAA, dated January 22<sup>nd</sup>, 2025.

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; FWP means Fish Wildlife and Parks; POD means point of diversion; POU means place of use; AC means acres; BBL means barrel; and AF/YR means acre-feet per year.

#### **PROPOSED APPROPRIATION**

##### **FINDINGS OF FACT**

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1<sup>st</sup> to December 31<sup>st</sup> at 8.9 CFS up to 755 AF, from a point in the SWSESE Section 04, T26N, R58E, Richland County, for Industrial use from January 1 to December 31. The Applicant proposes to use water for oil field development. The place of use is generally located in the following locations:

<b>Table 1: Proposed Place of Use</b>								
<b>POU #</b>	<b>1/4</b>	<b>1/4</b>	<b>1/4</b>	<b>LOT</b>	<b>SEC</b>	<b>TWP</b>	<b>RGE</b>	<b>COUNTY</b>
1		NW	NE	2	3	25N	57E	RICHLAND
2		NE	NW		13	26N	57E	RICHLAND
3		NE	NE		14	26N	57E	RICHLAND
4		NE	NW		16	26N	57E	RICHLAND
5		NW	NE		20	26N	57E	RICHLAND
6		NE	NW		22	26N	57E	RICHLAND

2. There will be no supplemental water rights associated with the proposed appropriation, or the place of use.

3. This is a temporary permit, the appropriations will cease by December 31, 2031.

4. The application will be subject to the following conditions:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

## Department of Natural Resources and Conservation

Map created by: DNRC



40S 30164987

APPLICANT: HYDRA MT LLC



POINT OF DIVERSION



PLACE OF USE



Section

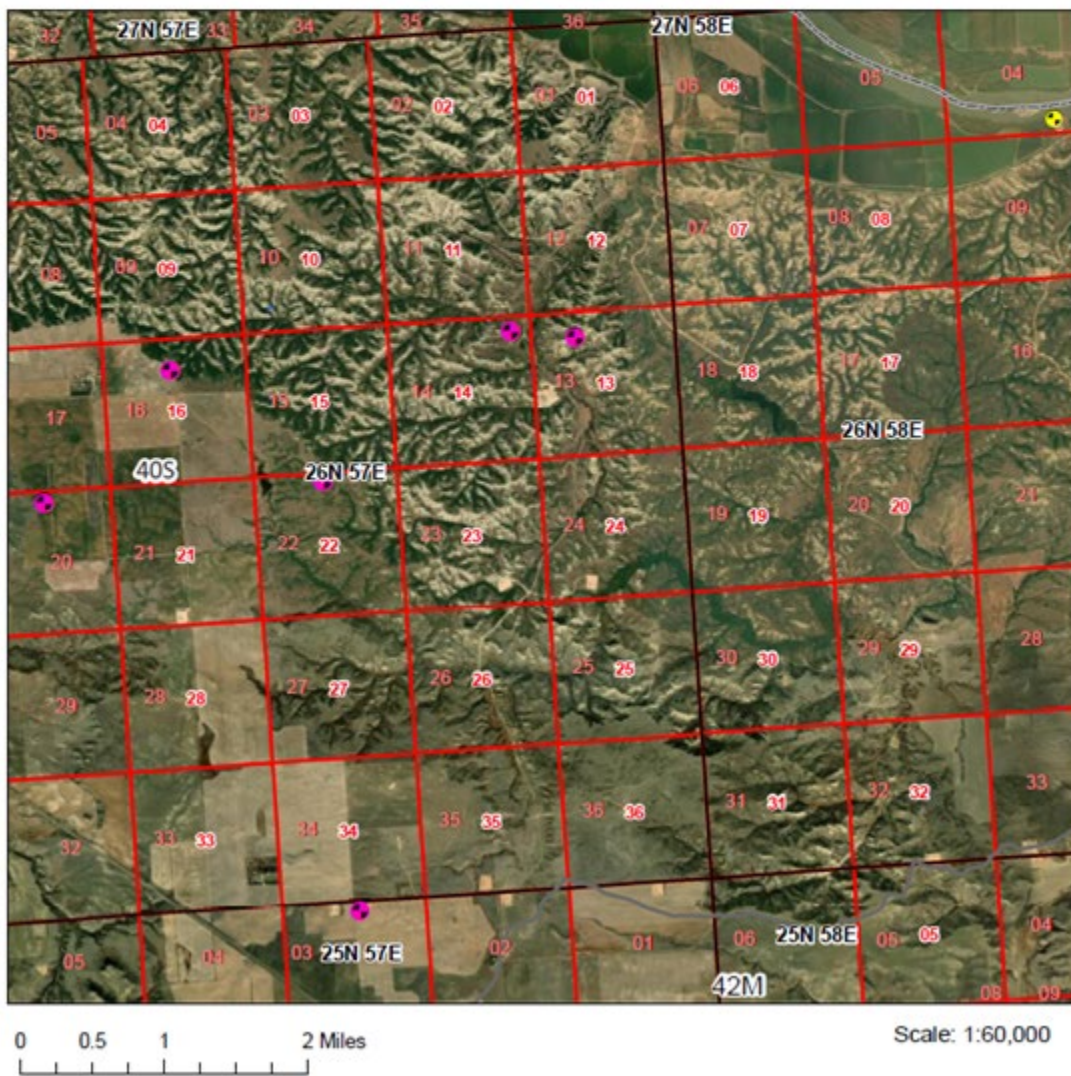


Figure 1. 40S 30164987 Proposed Point of Diversion and Place of Use

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

### **GENERAL CONCLUSIONS OF LAW**

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

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

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

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

- ... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
  - (a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
  - (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
  - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
  - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
- (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
  - (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
  - (d) the proposed use of water is a beneficial use;
  - (e) the Applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;
  - (f) the water quality of a prior appropriator will not be adversely affected;
  - (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
  - (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.
- (2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a

preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

7. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

*E.g., Montana Power Co. v. Carey* (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); *see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

8. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080 (1996), *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

*See also, Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

*Montana Power Co.*, 211 Mont. at 97-98, 685 P.2d at 340; see *also* Mont. Const. art. IX §3(1).

9. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. Section 85-2-311(6), MCA.

10. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

11. The Applicant is requesting to divert water January 1 through December 31 for Industrial use from the Missouri River at a rate of 8.9 CFS up to 755 AF per year. This is a temporary permit, and the appropriation will cease by December 31, 2031.

12. Pursuant to ARM 36.12.1702, available stream gage data are used to quantify physical availability during the proposed months of diversion.

- a. USGS Gage #06185500, Missouri River near Culbertson, is approximately 14.7 miles upstream of the point of diversion. The period of record was April 1958 through September 2024.
- b. The Department calculated median of the mean monthly flow rates for the Missouri River using USGS Gage #06185500 for each month of the proposed period of diversion (Table 2, Column B). These flows were converted to monthly volumes (AF)(Table 2, Column C) using the following equation found on DNRC Water Calculation Guide: median of the mean monthly flow (CFS) x 1.98 (AF/day/1CFS) x days per month = AF/month.

Table 2: Median of the Mean Monthly Gage Data (USGS Gage #06185500)		
A	B	C
Month	Median of the Mean Monthly Flow at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)
January	11,210	688,070
February	11,340	628,690



March	9,986	612,910
April	8,000	475,200
May	8,656	531,305
June	9,547	567,092
July	9,371	575,192
August	8,973	550,763
September	7,836	465,458
October	6,976	428,156
November	7,280	432,432
December	9,870	605,790

13. Table 3 is a list of existing water rights between the requested PODs and the specified USGS gaging station.

14. The Department calculated the monthly flows (Table 3, column D) and volumes (Table 3, column E) following the procedure outlined in the Department Permit Manual:

- 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.
- 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.
- Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.69 AF/Acre per Department water use standards for a moderate consumptive use climatic area (Climatic Area 2).
- Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

Table 3: Water Rights Between USGS Gage 06185500 and the Proposed POD				
A	B	C	D	E
WR NUMBER	PERIOD OF DIVERSION	WR TYPE	FLOW RATE (CFS)	Volume (AF)
40S 188166 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	37.96
40S 30142666 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.07
40S 77646 00	01/01 to 12/31	WATER RESERVATION	0.68	365.00
40S 188165 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 30142624 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.54
40S 186739 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 137580 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.54
40S 30071102	01/01 to 12/31	PROVISIONAL PERMIT	0.02	1.25
40S 30123529 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.10	13.60
40S 30142623 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.10

40S 188167 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 30142629 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.34
40S 188168 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 186743 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 30161904	01/01 to 12/31	PROVISIONAL PERMIT	6.68	600.00
40S 186744 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	38.00
40S 137592 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.88
40S 186738 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.14	43.06
40S 30142668 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.07
40S 135792 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.09	7.89
40S 137593 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	1.29
40S 137576 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	1.29
40S 30073093	01/01 to 12/31	PROVISIONAL PERMIT	5.50	500.00
40S 30113093	01/01 to 12/31	PROVISIONAL PERMIT	4.20	243.00
40S 30153305	01/01 to 12/31	PROVISIONAL PERMIT	1.50	210.00
40S 30132248 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.10	17.00
40S 30142622 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	2.45
40S 137594 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	1.90
40S 135791 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.09	10.34
40S 172341 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.13	34.00
40S 30063074	01/01 to 12/31	PROVISIONAL PERMIT	4.50	140.00
40S 74618 00	04/01 to 09/15	PROVISIONAL PERMIT	2.23	540.00
40S 114654 00	04/01 to 10/15	CONSERVATION DISTRICT	2.70	451.00
40S 7832 00	04/01 to 10/15	PROVISIONAL PERMIT	4.46	2125.00
40S 109529 00	04/01 to 10/15	PROVISIONAL PERMIT	10.67	2620.06
40S 109530 00	04/01 to 10/15	CONSERVATION DISTRICT	21.40	282.00
40S 106990 00	04/01 to 10/31	CONSERVATION DISTRICT	4.20	636.00
40S 215560 00 <sup>4</sup>	04/01 to 11/04	STATEMENT OF CLAIM	1.44	102.22
40S 106915 00	04/15 to 10/15	CONSERVATION DISTRICT	3.90	520.00
40S 30072269	04/15 to 10/15	PROVISIONAL PERMIT	4.01	396.40
40S 186742 00 <sup>4</sup>	04/15 to 10/19	STATEMENT OF CLAIM	2.90	1038.34
40S 171255 00 <sup>4</sup>	04/15 to 10/19	STATEMENT OF CLAIM	15.60	2022.88
40S 12708 00	04/15 to 11/15	PROVISIONAL PERMIT	8.02	1388.00
40S 66294 00	04/20 to 10/01	PROVISIONAL PERMIT	8.91	165.00
40S 106914 00	05/01 to 09/30	CONSERVATION DISTRICT	5.10	804.00
40S 97742 00	05/01 to 09/30	PROVISIONAL PERMIT	2.67	542.70
40S 99060 00	05/01 to 09/30	PROVISIONAL PERMIT	2.23	309.70
40S 13498 00	05/01 to 10/01	PROVISIONAL PERMIT	2.23	324.00
40S 17852 00	05/01 to 10/01	PROVISIONAL PERMIT	8.91	200.00
40S 4010 00	05/01 to 10/01	PROVISIONAL PERMIT	13.37	1440.00

<sup>2</sup>Flow rate and volume assigned per department standards

<sup>3</sup> Assigned volume as claimed

<sup>4</sup> Volume calculated using department standard water use for irrigation in climatic area 2

15. The Departments practice for physical availability analyses, where the gage used is upstream of the POD, is to subtract the monthly flow rates and volumes of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. See calculation details below in Table 4.

<b>Table 4: Physical Availability at the Point of Diversion on the Missouri River</b>						
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>
<b>Month</b>	<b>Median of the Mean Monthly Flow at Gage 06185500 (CFS)</b>	<b>Median of the Mean Monthly Volume at Gage 06185500 (AF)</b>	<b>Existing Rights from Gage 06185500 to POD (CFS)</b>	<b>Existing Rights from the POD to Gage 06185500 (AF)</b>	<b>Physically Available Water at POD (CFS)</b>	<b>Physically Available Water at POD (AF)</b>
January	11,210	688,070	25.51	11,446.97	11,184.49	676,622.83
February	11,340	628,690	25.51	11,446.97	11,314.49	617,242.63
March	9,986	612,910	25.51	11,446.97	9,959.99	601,463.02
April	8,000	475,200	115.95	52,036.45	7,884.05	423,163.55
May	8,656	531,305	150.46	67,524.53	8,505.54	463,780.75
June	9,547	567,092	150.46	67,524.53	9,396.54	499,567.27
July	9,371	575,192	150.46	67,524.53	9,220.54	507,667.45
August	8,973	550,763	150.46	67,524.53	8,822.54	483,238.21
September	7,836	465,458	150.46	67,524.53	7,685.54	397,933.87
October	6,976	428,156	138.23	62,037.62	6,837.27	366,118.57
November	7,280	432,432	34.97	15,694.54	7,245.03	416,737.46
December	9,870	605,790	25.51	11,448.89	9,843.99	594,341.02

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

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

17. The Department determined the area of potential impact is 14.5 miles downstream from the proposed point of diversion to the Montana/North Dakota border. A total of 61 surface water rights exists within this reach.

18. The Missouri River is a major surface water source compared to other streams in the area. Because there are no significant tributaries or confluences between the POD and the exit of the Missouri River into North Dakota, the Department will designate the said reach as the area of potential impact.

19. A list of surface water rights, as shown in Table 5, divert from the Missouri River in the location between the POD (SWSESE Section 04, T26N, R58E, Richland County) and the Montana/North Dakota state border (Section 24, T26N, R59E, Richland County) were compiled using the DNRC GIS web application Converge. A flow rate and volume were assigned to any unquantified water rights following Department standards per the DNRC permit manual by:

- a. Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
- b. Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
- c. Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.69 AF/Acre per Department water use standards for a moderate consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

<b>Table 5: Water Rights on Missouri River in the Area of Potential Impact</b>				
<b>WR NUMBER</b>	<b>PERIOD OF DIVERSION</b>	<b>WR TYPE</b>	<b>FLOW RATE (CFS)</b>	<b>Volume (AF)</b>
40S 30048277	01/01 to 12/31	PROVISIONAL PERMIT	4.50	522.1
40S 9852 00	01/01 to 12/31	PROVISIONAL PERMIT	1.67	60
40S 12810 00	01/01 to 12/31	PROVISIONAL PERMIT	13.37	540
40S 30142625 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.204
40S 30142667 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.204
40S 172341 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	1.46	34
40S 135783 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.10	0.476
40S 135784 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.544
40S 135782 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.272
40S 30142670 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.476
40S 30142615 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.476
40S 135793 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.10	13.6
40S 130567 00 <sup>1</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.00	172
40S 187284 00	01/01 to 12/31	STATEMENT OF CLAIM	0.01	3
40S 187283 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	2.04
40S 142799 00 <sup>3</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.89	225
40S 137598 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.09	7.752
40S 135790 00 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.884
40S 30117875	01/01 to 12/31	TEMPORARY PERMIT	4.20	580

40S 30017671	01/01 to 12/31	WATER RESERVATION	5,178.00	3,748,500.00
40S 30142626 <sup>2</sup>	01/01 to 12/31	STATEMENT OF CLAIM	0.08	0.306
40S 30152855	01/01 to 12/31	TEMPORARY PERMIT	5.71	925
40S 171290 00 <sup>4</sup>	03/01 to 11/01	STATEMENT OF CLAIM	4.46	188.3
40S 130516 00 <sup>3</sup>	03/01 to 11/30	STATEMENT OF CLAIM	1.67	60
40S 3227 00 <sup>3</sup>	03/15 to 10/31	STATEMENT OF CLAIM	20.05	1693
40S 77506 00	04/01 to 10/01	PROVISIONAL PERMIT	11.14	416
40S 111449 00	04/01 to 10/15	CONSERVATION DISTRICT	10.00	408
40S 114723 00	04/01 to 10/15	CONSERVATION DISTRICT	2.20	340
40S 109530 00	04/01 to 10/15	CONSERVATION DISTRICT	21.40	974
40S 30043999	04/01 to 10/15	CONSERVATION DISTRICT	8.91	159.6
40S 30004263	04/01 to 10/15	CONSERVATION DISTRICT	3.01	330
40S 103653 00	04/01 to 10/15	CONSERVATION DISTRICT	1.3	147
40S 30010979	04/01 to 10/15	CONSERVATION DISTRICT	6.7	536
40S 30003106 <sup>5</sup>	04/01 to 10/15	CONSERVATION DISTRICT	1.67	24
40S 30015443	04/01 to 10/15	CONSERVATION DISTRICT	0.33	20
40S 30069082	04/01 to 10/15	CONSERVATION DISTRICT	1.56	60
40S 7832 00	04/01 to 10/15	PROVISIONAL PERMIT	4.46	2125
40S 109529 00	04/01 to 10/15	PROVISIONAL PERMIT	10.67	974
40S 74095 00	04/01 to 10/31	PROVISIONAL PERMIT	8.91	130
40S 130566 00 <sup>4</sup>	04/01 to 10/31	STATEMENT OF CLAIM	10.54	747.82
40S 171828 00 <sup>3</sup>	04/01 to 10/31	STATEMENT OF CLAIM	1.78	285
40S 46536 00 <sup>4</sup>	04/01 to 10/31	STATEMENT OF CLAIM	2.5	295.9
40S 84851 00	04/01 to 11/01	PROVISIONAL PERMIT	21.83	1451
40S 215567 00 <sup>7</sup>	04/01 to 11/04	STATEMENT OF CLAIM	x	86.08
40S 172261 00 <sup>4</sup>	04/01 to 11/30	STATEMENT OF CLAIM	41.1	2,636.55
40S 114722 00	04/15 to 10/15	CONSERVATION DISTRICT	3.4	203
40S 106912 00	04/15 to 10/15	CONSERVATION DISTRICT	5.6	150
40S 111301 00	04/15 to 10/15	CONSERVATION DISTRICT	5.1	302
40S 104510 00	04/15 to 10/15	CONSERVATION DISTRICT	2.6	145
40S 7826 00	04/15 to 10/15	PROVISIONAL PERMIT	5.56	380
40S 30031187	04/15 to 10/15	PROVISIONAL PERMIT	2.67	168.7
40S 11818 00 <sup>5</sup>	04/15 to 10/15	PROVISIONAL PERMIT	x	184.00
40S 7775 00	04/15 to 10/15	PROVISIONAL PERMIT	6.68	1500
40S 30030363 <sup>3</sup>	04/15 to 10/19	STATEMENT OF CLAIM	20.05	498.15
40S 19231 00 <sup>8</sup>	04/15 to 11/04	PROVISIONAL PERMIT	25.06	3340
40S 66293 00	04/20 to 10/01	PROVISIONAL PERMIT	8.91	408
40S 41349 00 <sup>3</sup>	05/01 - 09/19	STATEMENT OF CLAIM	9	491.4
40S 5479 00 <sup>3</sup>	05/01 to 06/30	STATEMENT OF CLAIM	2.67	50
40S 4213 00	05/01 to 08/31	PROVISIONAL PERMIT	8.91	176

40S 5477 00 <sup>3</sup>	05/01 to 08/31	STATEMENT OF CLAIM	10.03	600
40S 30 00 <sup>8</sup>	05/01 to 09/30	PROVISIONAL PERMIT	x	x

<sup>1</sup> No assigned flow rate for water spreading purposes

<sup>2</sup> Flow rate and volume assigned per department standards

<sup>3</sup> Assigned volume as claimed

<sup>4</sup> Volume calculated per department standard water use for irrigation in climatic area 2

<sup>5</sup> Combined flow rate of 1.67 CFS

<sup>6</sup> Assigned period of diversion per department standards

<sup>7</sup> Waste/Seepage Claim. No Flow Rate Issued.

<sup>8</sup> Permit is only to extend period of use on permit 40S 30 00

20. Table 6 shows the legally available water for appropriation during the period of diversion requested. The monthly volume of downstream water rights was calculated by dividing the appropriated volumes by the number of months in the period of use.

<b>Table 6: Legal Availability Analysis of the Missouri River from the Proposed POD to the North Dakota Border</b>						
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>
<b>Month</b>	<b>Physically Available Water (CFS)</b>	<b>Physically Available Water (AF)</b>	<b>Existing Legal Demands Downstream of the Proposed POD (CFS)</b>	<b>Existing Legal Demands Downstream of the Proposed POD (AF)</b>	<b>Legally Available Water (CFS)</b>	<b>Legally Available Water (AF)</b>
January	11,184.49	676,622.83	5,210.80	319,838.90	5,973.69	356,783.92
February	11,314.49	617,242.63	5,210.80	288,886.75	6,103.69	328,355.87
March	9,959.99	601,463.02	5,236.99	321,446.45	4,723.00	280,016.57
April	7,884.05	423,163.55	5,472.59	325,071.85	2,411.46	98,091.71
May	8,505.54	463,780.75	5,503.20	337,786.42	3,002.34	125,994.33
June	9,396.54	499,567.27	5,503.20	326,890.08	3,893.34	172,677.19
July	9,220.54	507,667.45	5,500.53	337,622.53	3,720.01	170,044.92
August	8,822.54	483,238.21	5,500.53	337,622.53	3,322.01	145,615.68
September	7,685.54	397,933.87	5,481.59	325,606.45	2,203.95	72,327.42
October	6,837.27	366,118.57	5,472.59	335,907.57	1,364.68	30,210.99
November	7,245.03	416,737.46	5,304.93	315,112.84	1,940.10	101,624.62
December	9,843.99	594,341.02	5,210.80	319,838.90	4,633.19	274,502.12

21. Table 7 compares the legally available flow rate and volume with the requested amount. Table 5 shows that water is legally available for the requested amount throughout the proposed period of diversion at the proposed source of supply. Even though proposed water use will be variable as dictated by oil drilling schedule, for comparison purpose, the monthly requested

volumes are equal to the total requested volume divided by the period of use (755AF/12months = 62.92 AF/month)

Table 7: Legal Availability Comparison Flow Rate and Volume						
A	B	C	D	E	F	G
Month	Legally Available Water (CFS)	Legally Available Water (AF)	Applicant Requested Flow Rate (CFS)	Applicant Requested Volume (AF)	Remaining Legally Available Water (CFS)	Remaining Legally Available Water (AF)
January	5,973.69	356,783.92	8.9	62.92	5,964.79	356,721.00
February	6,103.69	328,355.87	8.9	62.92	6,094.79	328,292.95
March	4,723.00	280,016.57	8.9	62.92	4,714.10	279,953.65
April	2,411.46	98,091.71	8.9	62.92	2,402.56	98,028.79
May	3,002.34	125,994.33	8.9	62.92	2,993.44	125,931.41
June	3,893.34	172,677.19	8.9	62.92	3,884.44	172,614.27
July	3,720.01	170,044.92	8.9	62.92	3,711.11	169,982.00
August	3,322.01	145,615.68	8.9	62.92	3,313.11	145,552.76
September	2,203.95	72,327.42	8.9	62.92	2,195.05	72,264.50
October	1,364.68	30,210.99	8.9	62.92	1,355.78	30,148.07
November	1,940.10	101,624.62	8.9	62.92	1,931.20	101,561.70
December	4,633.19	274,502.12	8.9	62.92	4,624.29	274,439.20

22. The Assiniboine and Sioux tribes of the Fort Peck Indian reservation (Tribes) possess a Tribal Water Right, as defined in Article III the Fort Peck-Montana Compact, §85-20-201, MCA. The tribes are entitled to divert up to 950,000 AF per year from the Missouri River on Fort Peck Reservoir. Art. III.F. In the legal availability analysis for this application, the Department did not include the Tribal Right as an existing legal demand. Art. III.I. states water may be diverted from the mainstem of the Missouri River within or adjacent to the Reservation. The proposed appropriation in this application is approximately 26 river miles downstream of the Fort Peck Reservation boundary and is not considered adjacent to the reservation.

23. The Department finds the proposed appropriation of 8.9 CFS and up to 755 AF to be legally available during the proposed period of use.

## **ADVERSE EFFECT**

### **FINDINGS OF FACT**

24. Water is both physically and legally available in the source. In the event of a water shortage, the Applicant will cease diversion if a valid call is made. In addition, a licensed water transfer company will be contracted to monitor the entirety of the diversion process.

25. The Department finds that the following measurement condition should be applied in order to prevent adverse effects to existing senior water users: THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

26. The Applicant has proven that enough water remains in the Missouri River to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 8.9 CFS and 755 AF.

27. The Department finds the proposed use of 8.9 CFS and 755 AF year-round will not have an adverse effect on existing water users.

## **ADEQUATE MEANS OF DIVERSION**

### **FINDINGS OF FACT**

28. The Applicant plans to divert water at a rate of 8.9 CFS up to 755 AF from the Missouri River, from a diversion point in SWSESE Section 04, T26N, R58E, Richland County, using a portable 10"x8" diesel-powered Pioneer standard centrifugal pump (Cat. No SC108S17L71).

29. Water will flow from the POD into a screened aluminum pipe. The pump will discharge water into a portable trailer, that has an ModMag Electromagnetic in-line flow meter capable of taking continuous measurement. The water is then discharged into the 10" lay-flat pipeline which is used to convey the water to the POU's. In freezing conditions, water will be discharged into a hot oiler



before being diverted into the 10" lay-flat pipeline. Along the route, Hydra and Kraken will secure easements where appropriate for any railway, county road, state highway, or private land crossings where lay flat line will be laid.

30. The Applicant has submitted pump curves showing that the diesel-powered pump will be capable of pumping 8.9 CFS depending upon elevation and overall distance from the source to POU. The diesel engine and pump will only be in place while being used. More inline pumps can be installed, if necessary, in order to maintain adequate pressure and volume.

31. Once the water reaches the place of use, it is delivered into a portable, 50' x 200', RhinoKore above-ground frac tank with 20,000 BBL capacity, which will be installed at well pad (POU) during the completion phase of operations. Because of the high rate necessary for completions, the RhinoKore is able to act as a median between the transfer of water from the source to the downhole fracturing process.

32. The Department finds that the proposed means of diversion and operation are capable of diverting and conveying the proposed flow rate and volume.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

33. The Applicant requests to divert up to 755 AF of water at a rate of 8.9 CFS annually, for Industrial use by the oil and gas industry. No Department standard exists for Industrial use; the Applicant has explained how the proposed flow rate and volume meet the beneficial use as required in ARM 36.12.1801.

34. Water will be used to drill and complete wells in Richland County, MT with an average lateral length of 15,000-ft. A typical 3-mile lateral (15,000-ft) is 90 stages and required 5,000 BBL per stage. Approximately 450,000 BBL (58 AF) of fresh water as shown on the typical pump schedule provided by the Applicant in the Application.

35. The drilling and subsequent completion plan includes up to 13 3-mile wells within a calendar year, requiring roughly 5.85 million BBL of water. The total of the 13 wells completed with average-length laterals equates to 754.03 AF per year (rounded to 755 AF for variability). No more than 755 AF of water will be used annually. The proposed appropriation is to expire on December 31, 2031.

36. The Department finds the proposed water use is beneficial, and that the requested flow rate of 8.9 CFS and annual volume of 755 AF are reasonably justified per ARM 36.12.1801(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

37. 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**

### **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. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF [11-16])

### **LEGAL AVAILABILITY**

42. 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).

43. 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.

44. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

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 17-23)]

#### 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 [24-27])

### 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. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

56. 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).

57. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF [28-32])

### BENEFICIAL USE

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

59. 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).

60. 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).

61. 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*.

62. Applicant proposes to use water for Industrial use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence Industrial use is a beneficial use and that 755 AF of diverted volume and 8.9 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF [33-36])

### POSSESSORY INTEREST

63. 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.

64. 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.

65. 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. 40S 30164987 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri, by means of a pump, from January 1 to December 31 at 8.9 CFS up to 755 AF, from a point in the SWSESE Section 04, T26N, R58E, Richland County, for Industrial use from January 1 to December 31. The place of use is located in various locations as shown in Table 1.

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

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

## **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 20<sup>th</sup> day of February, 2025.

**Matt Miles**

Digitally signed by Matt  
Miles  
Date: 2025.02.20 10:43:44  
-07'00'

---

Matt Miles, Regional Manager  
Havre 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 20<sup>th</sup> day of February, 2025, by first class United States mail.

HYDRA MT, LLC  
C/O KANE FONTENOT  
945 BUNKER HILL RD. STE 1200  
HOUSTON, TX 77024-1593

**Kailee Ingalls**

Digitally signed by Kailee  
Ingalls  
Date: 2025.02.20 10:01:20  
-07'00'

---

HAVRE Regional Office, (406) 265-5516