

# THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

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February 18, 2025

White Rock Oil & Gas LLC  
5810 Tennyson Pkwy Ste 500  
Plano, TX 75024-3523

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 42M 30163352

Dear Applicant,

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

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no response is received by March 11, 2025, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

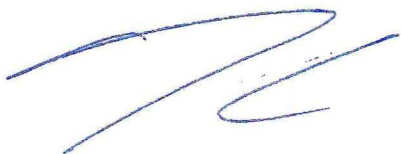
Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.



DNRC.MT.GOV

Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

Ashley Kemmis  
Water Resource Specialist  
Water Rights Bureau  
Water Resources Division

CC:

Aspect Consulting c/o Bryan Gartland and Jared Bean Via Email



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

\*\*\*\*\*

**APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 42M 30163352 BY WHITE ROCK OIL AND GAS LLC } DRAFT PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On October 16, 2024, White Rock Oil & Gas LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 42M 30163352 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4.1 CFS and 235.6 AF. 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 November 5, 2024. The Applicant responded with information dated November 21, 2024. A preapplication meeting was held between the Department and the Applicant on March 26, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Checklist on July 18, 2024. The Department delivered the Department- completed technical analyses on August 20, 2024. The application was determined to be correct and complete as of December 20, 2024. An Environmental Assessment for this application was completed on February 14, 2024.

**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:
  - Bureau of Reclamation Special Use Permit 24-LM-60-5374
- Maps: Undated aerial imagery depicting the place of use and point of diversion
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated August 20, 2024

**Information Received after Application Filed**

- Deficiency response received November 21, 2024

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- Email with Applicant clarifying pump information, dated January 21, 2025
- Email with Applicant regarding leases with MT DNRC Trust Lands, dated January 2, 2025
- Email from DNRC Agriculture and Grazing Management Bureau Water Rights Specialist Letty Miller, dated December 20, 2024

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

The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents.

- Flow records for USGS gage #06327500, Yellowstone River at Glendive, MT
- DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
- DNRC Water Right Database Records
- DNRC ArcGIS web application, Converge

The Department has fully reviewed and considered the evidence and argument submitted in this application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and BBL means a barrel (42 gallons).

### **PROPOSED APPROPRIATION**

#### **FINDINGS OF FACT**

1. The Applicant proposes to divert water from the Yellowstone River, by means of a diversion dam, from May 1 through September 30 at 4.1 CFS up to 235.6 AF, from a point in the NENWNW, Section 36, T18N, R56E, near Intake, Dawson County, for industrial use from January 1 through December 31. From the diversion dam, water will be transported via the United States Bureau of Reclamation (BOR) Lower Yellowstone Canal, to three secondary points of diversion, which are in the SWSESW Section 16, T23N, R59E, Richland County, SENWSW Section 6, T22N, R59E, Richland County, and NENENE Section 13, T22N, R58E, Richland County. The Lower Yellowstone Canal is operated by the Lower Yellowstone Irrigation Project. The Applicant also proposes to construct a lined storage pond with 34.4 AF capacity to enable year-round operation.

The storage pond will be located in NESE, Section 16, T23N, R58E.

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2. The Applicant proposes to use water for oil field development. The place of use is listed in Table 1.

Table 1: Place of Use					
State	Section	Township	Range	Quarter Quarter	Lots
MT	36*	23N	57E	NWNE	
MT	36	23N	59E	NWNW	Lot 2
MT	36*	23N	57E	NENW	
MT	35	23N	57E	SWSW	
MT	34	23N	57E	NWNE	
MT	34	23N	57E	NENE	
MT	32	23N	57E	SESE	
MT	32	23N	57E	NENE	
MT	31	23N	57E	NWNE	
MT	29	23N	59E	NENE	
MT	29	22N	58E	NENE	
MT	28	23N	59E	NENW	
MT	28	23N	59E	NENW	
MT	28	23N	57E	SESW	
MT	28	23N	57E	NENW	
MT	28	23N	57E	NENE	
MT	26	23N	59E	SESE	Lot 4
MT	26	22N	58E	SWSW	
MT	26	23N	57E	SESW	
MT	26	23N	57E	NWSW	
MT	25	22N	58E	SESE	
MT	25	23N	57E	NWNE	
MT	24	23N	57E	SESE	
MT	24	23N	56E	NENE	
MT	23	22N	58E	NWNW	
MT	23	23N	57E	NENW	
MT	22	22N	58E	NENE	
MT	22	22N	58E	NWNE	
MT	22	23N	57E	SESE	
MT	22	23N	57E	SWSW	
MT	21	22N	58E	NENE	
MT	20	22N	58E	NWNW	
MT	20	23N	57E	NWSE	
MT	20	23N	57E	SESW	
MT	19	22N	58E	NENE	
MT	19	23N	57E	SWSE	
MT	18	22N	58E	NWNW	Lot 1
MT	18	22N	59E	NWNW	Lot 1

MT	18	22N	59E	NWNW	Lot 1
MT	18	22N	59E	NWNW	Lot 1
MT	18	22N	58E	SESE	
MT	18	23N	57E	NESE	
MT	18	23N	57E	SENE	
MT	17	23N	59E	SWNW	
MT	17	22N	58E	NWNW	
MT	16*	22N	58E	SWSW	
MT	16*	23N	57E	NWNW	
MT	15	22N	58E	SWSW	
MT	15	23N	57E	NWNE	
MT	13	23N	57E	SENE	
MT	13	23N	57E	NWSW	
MT	13	23N	57E	NWSW	
MT	13	23N	56E	SESW	
MT	11	23N	56E	NENW	
MT	11	23N	56E	SESW	
MT	11	23N	56E	SWSE	
MT	09	22N	58E	NENW	
MT	09	23N	57E	NESE	
MT	08	23N	57E	SESW	
MT	08	22N	58E	NWSE	
MT	08	22N	58E	NWNW	
MT	08	23N	57E	SESW	
MT	07	22N	58E	SWNW	Lot 2
MT	07	22N	58E	SENE	
MT	06	22N	59E	SESE	
MT	05	22N	57E	NWNE	Lot 2
MT	05	22N	59E	SESE	Lot 18
MT	04	22N	58E	SENE	
MT	04	22N	58E	SENE	
MT	03	22N	58E	SENE	
MT	03	23N	56E	SESW	
MT	02	22N	58E	NWNW	Lot 4
MT	02	22N	58E	NWNE	Lot 2
MT	01	22N	57E	NWNE	Lot 2
MT	16**	23N	58E	NESE	

\*Located on MT DNRC Trust Lands

\*\*Storage Pond Location

3. There will be no supplemental water rights associated with the proposed appropriation, or the place of use. Lower Yellowstone Irrigation District, Savage Irrigation District, Intake Irrigation District, Conradsen Brothers Inc., and Montana State Board of Land Commissioners appropriate water in the BOR canal from the same point of diversion and means of conveyance. The Applicant has sent written notice of the application to each appropriator, as well as to BOR, in October 2024 per 85-2-302(4)(c) MCA.

4. Four of the places of use are located on MT Trust Lands (identified in Table 1). An email from DNRC Agriculture and Grazing Management Bureau Water Rights Specialist Letty Miller, dated December 20, 2024 stated that Trust Lands will not assert water right ownership on the four places of use owned by Trust Lands.

5. This is a temporary permit, the appropriations will cease by December 31, 2034.

6. The Applicant and BOR signed Special Use Permit 24-LM-60-5374 on January 22, 2024, to take effect from January 22, 2024, to December 31, 2034. The Special Use Permit authorized the Applicant to withdraw BOR canal water from May through September not to exceed 1,850 gallons per minute (4.1 CFS) from specified secondary PODs. The Special Use Permit also authorized that the allotted volume shall be the volume allowed in the BOR Water Service Contract to be issued in conjunction with a DNRC beneficial water use permit.

7. 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.



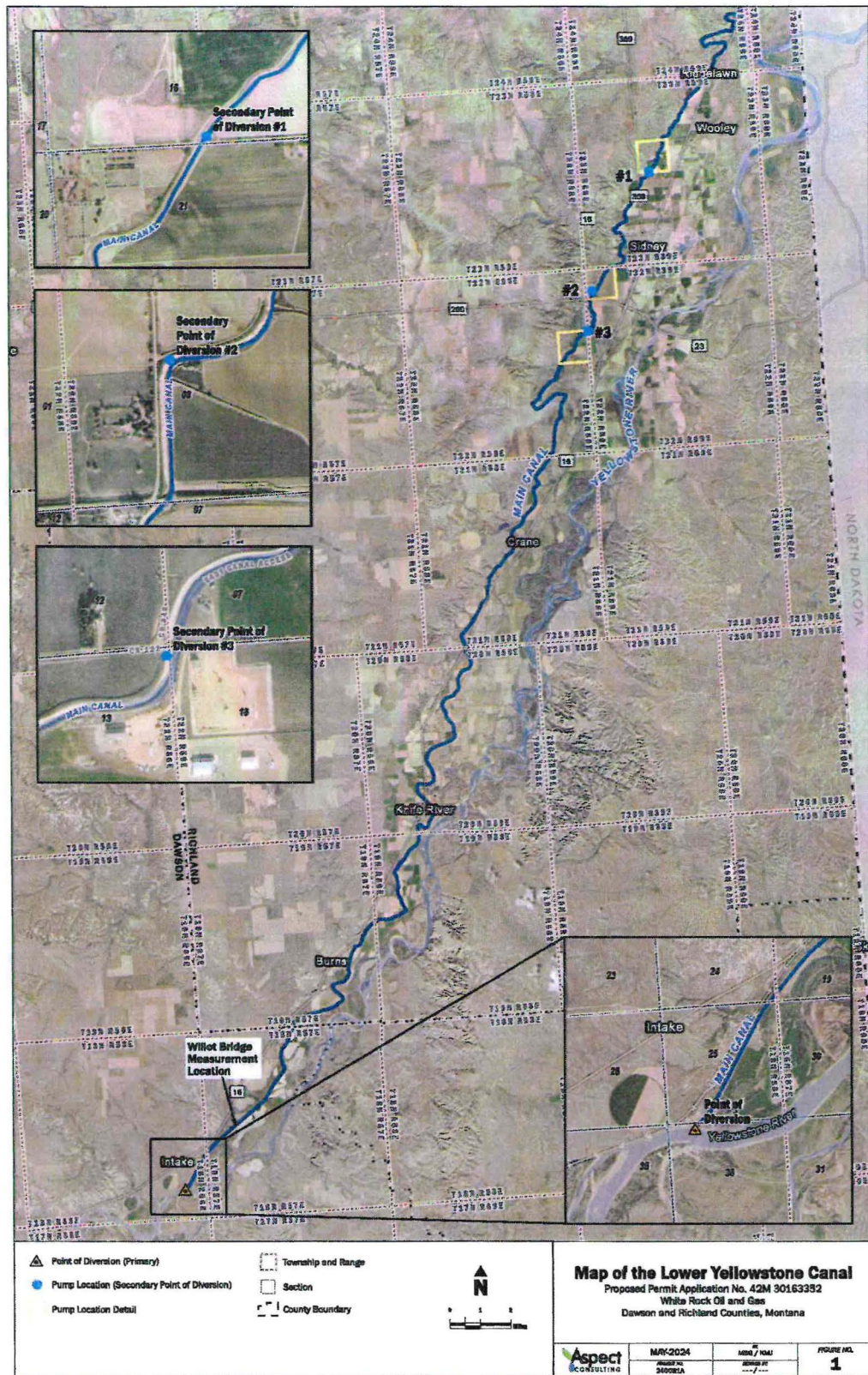


Figure 1: Map of the Applicant's Proposed Primary and Secondary PODs



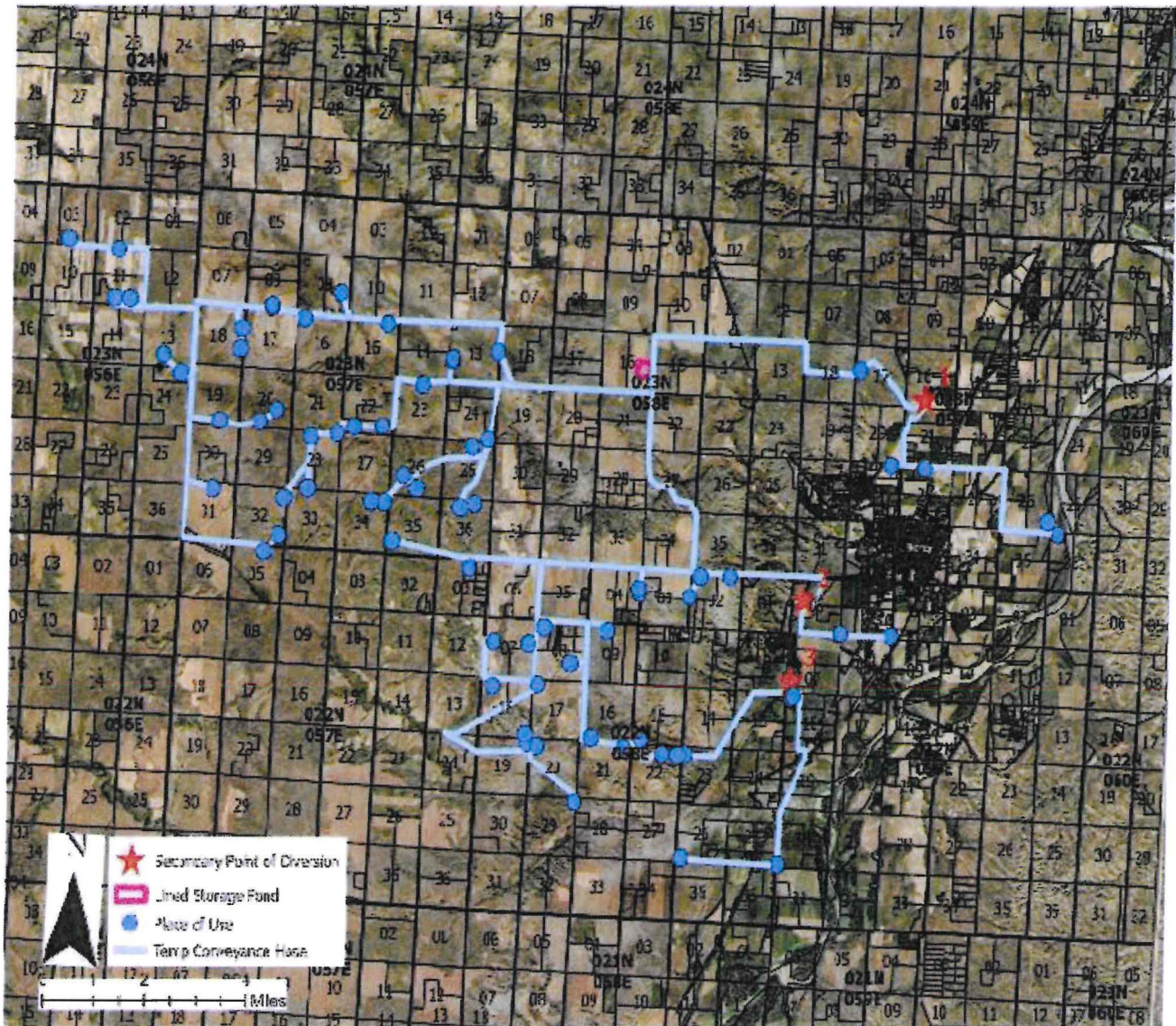


Figure 2: Map of the Applicant's Secondary PODs and Proposed Place of Use

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

### GENERAL CONCLUSIONS OF LAW

8. 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 . . .

9. 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.

10. 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.

11. 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).

12. 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.

13. 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**

14. The Applicant is requesting to divert water May 1 through September 30 for industrial use from the Yellowstone River at a rate of 4.1 CFS up to 235.6 AF per year. This is a temporary permit and the appropriation will cease by December 31, 2034.

15. 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 #06327500, Yellowstone River near Glendive, is approximately 18 river miles upstream of the proposed POD. The period of record for the gage was October 1897 through April 2024.
- b. The Department calculated median of the mean monthly flow rates for the Yellowstone River USGS Gage #06327500 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.

<b>Table 2: Median of the Mean Monthly Gage Data (USGS Gage #06327500)</b>		
<b>A</b>	<b>B</b>	<b>C</b>
<b>Month</b>	<b>Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)</b>	<b>Median of the Mean Monthly Volume at Gage 06185500 (AF)</b>
May	19,940	1,223,917
June	42,970	2,552,418
July	24,540	1,506,265
August	9,286	569,975
September	7,640	453,816

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

17. The Department calculated the monthly flows (Table 3, column B) and volumes (Table 3, column C) following procedure outlined in the Department permit manual:

- 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 3.07 AF/Acre per Department water use standards for a high consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

Table 3: Water Rights Between USGS Gage #06327500 and the Proposed POD			
A	B	C	D
Water Right Number	Flow Rate (CFS)	Volume (AF)	Period of Diversion
42M 165351 00	100 (March through July) 25 (August to February)	40,000.00	01/01 to 12/31
42M 30140568*	0.08	0.07	01/01 to 12/31
42M 163718 00*	0.09	9.35	01/01 to 12/31
42M 135848 00*	0.09	8.36	01/01 to 12/31
42M 30140572*	0.08	0.14	01/01 to 12/31
42M 163443 00*	0.10	15.64	01/01 to 12/31
42M 117135 00*	0.10	17.00	01/01 to 12/31
42M 30140573*	0.08	0.51	01/01 to 12/31
42M 137583 00*	0.08	2.92	01/01 to 12/31
42M 188428 00	0.10	13.60	01/01 to 12/31
42M 11679 00	7.80	405.60	01/01 to 12/31
42M 114739 00	2.60	320.00	01/01 to 12/31
42M 111464 00	1.80	500.00	01/01 to 12/31
42M 9251 00	9.83	853.00	01/01 to 12/31
42M 10802 00	0.08	10.12	01/01 to 12/31
42M 11681 00	2.23	330.00	01/01 to 12/31
42M 11680 00	12.25	645.90	01/01 to 12/31
42M 30006470	0.07	9.30	01/01 to 12/31

42M 17726 00	10.66	216.00	01/01 to 12/31
42M 30011028	3.00	384.00	01/01 to 12/31
42M 117141 00**	5.66	1,350.80	01/01 to 12/31
42M 163478 00**	3.94	445.15	01/01 to 12/31
42M 163442 00**	7.77	614.00	01/01 to 12/31
42M 49235 00**	10.91	884.16	01/01 to 12/31
42M 114769 00	0.70	54.00	01/01 to 12/31
42M 30006008	1.60	170.00	01/01 to 12/31
42M 111403 00	1.90	262.00	01/01 to 12/31
42M 30001427	4.00	578.00	01/01 to 12/31
42M 74875 00	4.50	860.00	01/01 to 12/31
42M 163184 00**	6.70	543.39	04/01 to 09/15
42M 163708 00**	0.45	36.84	04/01 to 10/01
42M 66255 00	0.03	2.50	04/01 to 10/15
42M 117142 00**	7.30	592.51	04/01 to 10/15
42M 7563 00	1.60	489.00	04/01 to 10/15
42M 30010295	5.90	492.00	04/01 to 10/15
42M 117143 00**	6.67	540.32	04/01 to 10/15
42M 34430 00**	2.01	224.11	04/01 to 10/15
42M 34432 00**	5.90	288.58	04/01 to 11/01
42M 7421 00	0.04	2.00	04/01 to 11/04
42M 5174 00	11.14	900.00	04/15 to 10/15
42M 9517 00	2.00	112.00	04/15 to 10/15
42M 164459 00**	0.99	80.13	04/15 to 10/15
42M 163151 00**	0.09	15.35	04/15 to 10/19
42M 9516 00	14.99	190.00	04/15 to 10/19
42M 2403 00**	2.45	103.46	04/15 to 10/19
42M 163186 00*	0.09	6.80	04/15 to 11/15

\*Livestock direct from source – volume and flow rate determined by animal units per Department standards

\*\*Irrigation volume Determined from climatic area per Department standards

18. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the monthly flow rates and volumes of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. See Table 4.

Table 4: Physical Availability at the Point of Diversion on the Yellowstone River						
A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow at Gage 06327500 (CFS)	Median of the Mean Monthly Volume at Gage 06327500 (AF)	Existing Rights from the Gage 06327500 to POD (CFS)	Existing Rights from the Gage 06327500 to POD (AF)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
May	19,940.00	1,223,917.20	260.37	15,981.49	19,679.63	1,207,935.71
June	42,970.00	2,552,418.00	260.37	15,465.96	42,709.63	2,536,952.04
July	24,540.00	1,506,265.20	260.37	15,981.49	24,279.63	1,490,283.71
Aug	9,286.00	569,974.68	185.37	11,377.99	9,100.63	558,596.69
Sep	7,640.00	453,816.00	185.46	11,016.15	7,454.54	442,799.85

19. 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**

20. The Department determined the area of potential impact is approximately five miles downstream of the proposed point of diversion. A total of 19 surface water rights exist within this reach.

21. The Yellowstone River is a major surface water source compared to other streams in the area. This area of potential impact is appropriate because there are no major tributaries or confluences within this reach, and the next significant irrigation demand is 4 miles further downstream.

22. A list of senior surface water rights that are appropriated from the Yellowstone within the reach of the area of potential impact 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 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 moderately high consumptive use climatic area.



d. Evenly distributing each water right's volume by months within the period of diversion. These downstream legal demands are summarized in Table 5.

Table 5: Water Rights on Yellowstone River in the Area of Potential Impact				
A	B	D	E	F
Water Right #	Period of Diversion	Flow Rate (CFS)	Volume (AF)	Type of Water Right
42M 85551 00	04/01 to 11/01	7.13	435.00	CONSERVATION DISTRICT RECORD
42M 71445 00	04/20 to 09/20	1.80	200.00	CONSERVATION DISTRICT RECORD
42M 40814 00 <sup>4</sup>	04/15 to 10/19	-	-	IRRIGATION DISTRICT
42M 40805 00 <sup>4</sup>	04/15 to 10/19	-	-	IRRIGATION DISTRICT
42M 40810 00 <sup>4</sup>	04/15 to 10/19	-	-	IRRIGATION DISTRICT
42M 97792 00 <sup>2</sup>	04/01 to 10/31	14.00	5,881.15	PROVISIONAL PERMIT
42M 40818 00	10/01 to 02/29	8.90	3,275.00	STATEMENT OF CLAIM
42M 37556 00 <sup>2</sup>	04/01 to 10/31	4.73	336.25	STATEMENT OF CLAIM
42M 40806 00 <sup>2</sup>	04/15 to 10/15	1,000.00	152,291.66	STATEMENT OF CLAIM
42M 40807 00 <sup>3</sup>	04/15 to 10/15	300.00		STATEMENT OF CLAIM
42M 40808 00	04/15 to 10/15	18.00	2,291.88	STATEMENT OF CLAIM
42M 40809 00	04/15 to 10/15	42.00	6,668.51	STATEMENT OF CLAIM
42M 137583 00 <sup>1</sup>	01/01 to 12/31	0.08	2.92	STATEMENT OF CLAIM
42M 135836 00 <sup>1</sup>	01/01 to 12/31	0.08	2.99	STATEMENT OF CLAIM
42M 135838 00 <sup>1</sup>	01/01 to 12/31	0.08	2.99	STATEMENT OF CLAIM
42M 188428 00 <sup>1</sup>	01/01 to 12/31	0.08	13.60	STATEMENT OF CLAIM
42M 163487 00 <sup>2</sup>	04/01 to 09/30	0.95	67.25	STATEMENT OF CLAIM
42M 135837 00 <sup>1</sup>	01/01 to 12/31	0.08	2.99	STATEMENT OF CLAIM
42K 30017771 <sup>5</sup>	01/01 – 12/31	3,862 to 26,188	5,578,892 AF MAX	WATER RESERVATION

<sup>1</sup>Livestock direct from source – volume and flow rate determined by animal units per Department standards

<sup>2</sup>Irrigation volume Determined from climatic area per Department standards

<sup>3</sup>Filed for additional flow rate, no volume assigned

<sup>4</sup>Irrigation District – per abstract, it does not reflect a water right, but the filing of an 'Irrigation District' form

<sup>5</sup>FWP Reservation – this reservation covers the area of the Yellowstone River from Miles City to Sidney

23. 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.

Table 6: Legal Availability Analysis of the Yellowstone River Area of Potential Impact								
A	B	C	D	E	F	G	H	I
Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands Downstream of the Proposed POD (CFS)	Existing Legal Demands Downstream of the Proposed POD (AF)	FWP Res. Flow Rate CFS	FWP Res. Volume AF	Legally Available Water (CFS)	Legally Available Water (AF)
May	19,680	1,207,936	1,389	27,877	12,280	839,003	6,011	341,056
Jun	42,710	2,536,952	1,389	27,879	26,188	1,638,073	15,133	871,000
July	24,280	1,490,284	1,389	27,879	10,278	716,120	12,613	746,285
Aug	9,101	558,597	1,389	27,879	3,862	322,306	3,850	208,412
Sep	7,455	442,800	1,389	27,879	4,338	340,183	1,728	74,738

24. Table 7 compares the legally available flow rate and volume with the requested amount. 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 diversion ( $235.6 \text{ AF} / 5 \text{ months} = 47.12 \text{ AF/month}$ ). Table 7 shows that water is legally available for the requested amount throughout the proposed period of diversion at the proposed source of supply. Availability exists in all months, even if the full volume is diverted in that 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)
May	6,011	341,056	4.1	47.12	6,007	341,009
June	15,133	871,000	4.1	47.12	15,129	870,953
July	12,613	746,285	4.1	47.12	12,609	746,238
August	3,850	208,412	4.1	47.12	3,846	208,365
Sept.	1,728	74,738	4.1	47.12	1,723	74,691

25. The Department finds the proposed appropriation of 4.1 CFS and up to 235.6 AF to be legally available during the proposed period of diversion.

**ADVERSE EFFECT**

**FINDINGS OF FACT**

26. Water is both physically and legally available in the source. In the event of a water shortage, the Applicant will cease diversion until flows return to a level where all senior water right demands are satisfied.

27. The Applicant has proven that enough water remains in the Yellowstone River to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 4.1 CFS and 235.6 AF.

28. The Department finds the proposed use of 4.1 CFS and 235.6 AF year-round will not have an adverse effect on existing water users.

**ADEQUATE MEANS OF DIVERSION**

**FINDINGS OF FACT**

29. The Applicant proposes to divert water from the Yellowstone River, by means of a diversion dam, from May 1 through September 30 at 4.1 CFS up to 235.6 AF, from a point in the NENWNW, Section 36, T18N, R56E, Dawson County, for industrial use from January 1 through December

31. From the diversion dam, water will be transported via the United States Bureau of Reclamation's Lower Yellowstone Canal for approximately 40 miles, to three secondary points of diversion, which are in the SWSESW Section 16, T23N, R59E, Richland County, SENWSW Section 6, T22N, R59E, Richland County, and NENENE Section 13, T22N, R58E, Richland County. The Lower Yellowstone Canal is operated by the Lower Yellowstone Irrigation Project.

30. The Applicant also proposes to construct a lined storage pond with 34.4 AF capacity to enable year-round operation. The pond will be approximately 3.44 acres and 20 feet deep, to be located in NESE, Section 16, T23N, R58E. Approximately 5.6 AF of water will be lost to conveyance from the storage pond ( $1.63 \text{ ft net evaporation/acre} \times 3.44 \text{ acres} = 5.6 \text{ AF}$ ).

31. According to James Brower (Project Manager, Lower Yellowstone Irrigation Project), the Lower Yellowstone Canal has a capacity of over 1,430 CFS with an estimated conveyance loss of 15%, and the current canal capacity exceeds existing use by 50-100 CFS. Special Use Permit 24-LM-60-5374 was obtained by the Applicant from the Bureau of Reclamation. This permit specifies the conditions the Applicant must comply with when withdrawing water from the canal, including installation of a check valve to prevent back flow into canal.

32. Each secondary diversion point from the canal will consist of a floating river screen, 10" suction line, and a Redi-Prime 10"x8" 325-HP, or two Godwin 200s, water transfer pumps. The

pump types can be used interchangeably. Both pumps are powered by diesel engines that meet tier 3/Stage III EPA emissions regulations. Pump curves supplied in the application materials show that the pumps are capable of supplying the requested flow rate. Additional pumps can be added to the distribution system to deliver the desired flow rate at each place of use. The secondary diversions can be run concurrently or separately as operational demands require, but will not exceed the maximum proposed flow rate.

33. Filters are placed at each intake to protect wildlife and the pumps from solids. Water will then be conveyed by temporary 10" or 12" lay-flat hose to the lined storage pond and then to each place of use. The lined storage pond can be bypassed by the temporary lay-flat hose when not in use. At each place of use are ten temporary 500-BBL frac storage tanks with a total capacity of 5,000 BBLs of water, which ensure a steady supply of water for each frac stage.

34. The length and configuration of the lay-flat hose depends on the site-specific details of each place of use. Multiple segments of standard size 660' lay-flat hose can be connected as needed. As conditioned in the BOR Special Use Permit, the Applicant is to work with landowners to secure easements for the conveyance system, and protect road crossings by various sizes of temporary drive-overs.

35. In the winter months, White Rock plans to utilize preventative measures such as flushing lines and pumps with hot water as necessary. This can be done without changing the proposed conveyance system. Hot water will be purchased from third party vendors and is common practice in oilfield operations. All equipment will be sourced from Montana/North Dakota and is designed for winter operations.

36. Diversion of water is limited to the period from May 1 to September 30 when the irrigation districts operate the BOR canal. In the event of inclement weather (freezing or ice flows), operations can be postponed until conditions improve. In this instance, the equipment would be removed to avoid damage.

37. A Water Specialties Propeller Meter by McCrometer will be installed after the pump trailer and before the filter pod trailer to measure the amount of water diverted. They will also be utilized at all places of use.

38. The Department finds that the proposed means of diversion and conveyance are capable of diverting and conveying the proposed flow rate and volume to the places of use.



## **BENEFICIAL USE**

### **FINDINGS OF FACT**

39. The Applicant requests to divert up to 235.6 AF of water at a rate of 4.1 CFS annually, for industrial use supporting oil field development. No Department standard exists for industrial use; the Applicant is able to explain how the proposed flow rate and volume meet the beneficial use as required in ARM 36.12.1801.

40. The requested volume of 235.6 AF includes 200 AF for annual operational demand, 30 AF for estimated conveyance loss (200 AF x 15% conveyance loss from canal), and 5.6 AF for net evaporation (1.63 FT evaporation/acre \* 3.44 acres = 5.6 AF) from the proposed storage pond.

41. Water will be used to hydraulically fracture oil wells. The Applicant's operation includes a combination of refracturing existing wells along with new drills consisting of 2-mile and 3-mile laterals. Each refrac lateral requires approximately 94,000 BBLs (12.1 AF) of water for hydraulic fracturing and approximately 15,000 BBLs (1.9 AF) for pre- and post-frac cleanouts, for a total of 109,000 BBLs (14.0 AF) per refrac lateral. Each new 2-mile lateral requires approximately 284,000 BBLs (36.6 AF) for hydraulic fracturing and approximately 20,000 BBLs (2.6 AF) of water for post-frac cleanout, for a total of 304,000 BBLs (39.2 AF). Each new 3-mile lateral requires approximately 406,000 BBLs (52.3 AF) of water for hydraulic fracturing and approximately 25,000 BBLs (3.2 AF) of water for post-frac cleanout, for a total of 431,000 BBLs (55.6 AF).

42. Within the 74 proposed POU, the Applicant has identified 90 lateral targets. White Rock plans to complete two 2-mile wells (78.4 AF) and eight lateral refracs (112 AF) in 2025 for an estimated 190.4 AF. The requested flow rate of 4.1 CFS is needed for the duration of the project to satisfy hydraulic fracturing operations reflected in the pumping schedule.

43. Projections for future water needs through 2034 were provided in the Application materials. The annual requested volume of 235.6 AF is needed to accomplish the development plans. The proposed appropriation is temporary and will cease operation by December 31, 2034.

44. The Department finds the proposed water use is beneficial, and that the requested flow rate of 4.1 CFS and annual volume of 235.6 AF are reasonably justified per ARM 36.12.1801(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

45. 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**

46. 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.”

47. 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).

48. 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).

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

50. 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 14-19)

### **LEGAL AVAILABILITY**

51. 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).

52. 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.

53. 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);

54. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 20-25)

#### ADVERSE EFFECT

55. 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.

56. 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).

57. 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).

58. 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).

59. 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.

60. 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).

61. 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 26-28)

#### ADEQUATE DIVERSION

62. 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.

63. 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.

64. 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).

65. 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).

66. 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 29-38).

#### BENEFICIAL USE

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

68. 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).

69. 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.*

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*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).

70. 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*.

71. Applicant proposes to use water for [PURPOSE] 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 235.6 AF of diverted volume and 4.1 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 39-43)

#### POSSESSORY INTEREST

72. 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.

73. 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.

74. 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 44)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 42M 30163352 should be GRANTED.

The Department determines the Applicant may divert water from the Yellowstone River, by means of a diversion dam, from May 1 through September 30 at 4.1 CFS up to 235.6 AF, from a point in the NENWNW, Section 36, T18N, R56E, Dawson County, for industrial use from January 1 through December 31. From the diversion dam, water will be transported via the United States Bureau of Reclamation Lower Yellowstone Canal, to three secondary points of diversion, which are in the SWSESW Section 16, T23N, R59E, Richland County, SENWSW Section 6, T22N, R59E, Richland County, and NENENE Section 13, T22N, R58E, Richland County. Applicant may store water in a reservoir located in the NESE, Section 16, T23N, R58E. The place of use is listed in table 8:

Table 8: Place of Use						
ID	State	Section	Township	Range	Quarter Quarter	Lots
1	MT	36	23N	57E	NWNE	
2	MT	36	23N	59E	NWNW	Lot 2
3	MT	36	23N	57E	NENW	
4	MT	35	23N	57E	SWSW	
5	MT	34	23N	57E	NWNE	
6	MT	34	23N	57E	NENE	
7	MT	32	23N	57E	SESE	
8	MT	32	23N	57E	NENE	
9	MT	31	23N	57E	NWNE	
10	MT	29	23N	59E	NENE	
11	MT	29	22N	58E	NENE	
12	MT	28	23N	59E	NENW	
13	MT	28	23N	59E	NENW	

14	MT	28	23N	57E	SESW	
15	MT	28	23N	57E	NENW	
16	MT	28	23N	57E	NENE	
17	MT	26	23N	59E	SESE	Lot 4
18	MT	26	22N	58E	SWSW	
19	MT	26	23N	57E	SESW	
20	MT	26	23N	57E	NWSW	
21	MT	25	22N	58E	SESE	
22	MT	25	23N	57E	NWNE	
23	MT	24	23N	57E	SESE	
24	MT	24	23N	56E	NENE	
25	MT	23	22N	58E	NWNW	
26	MT	23	23N	57E	NENW	
27	MT	22	22N	58E	NENE	
28	MT	22	22N	58E	NWNE	
29	MT	22	23N	57E	SESE	
30	MT	22	23N	57E	SWSW	
31	MT	21	22N	58E	NENE	
32	MT	20	22N	58E	NWNW	
33	MT	20	23N	57E	NWSE	
34	MT	20	23N	57E	SESW	
35	MT	19	22N	58E	NENE	
36	MT	19	23N	57E	SWSE	
37	MT	18	22N	58E	NWNW	Lot 1
38	MT	18	22N	59E	NWNW	Lot 1
39	MT	18	22N	59E	NWNW	Lot 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

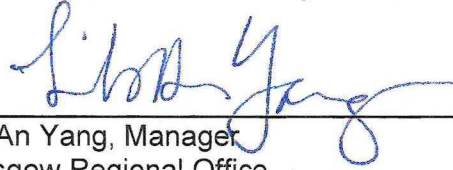
REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.



**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 18th day of FEBRUARY, 2025.



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

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 18<sup>th</sup> day of February, 2025, by first class United States mail.

WHITE ROCK OIL & GAS LLC  
5810 TENNYSON PKWY  
SUITE 500  
PLANO, TX 75024-3523

  
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GLASGOW Regional Office, (406) 228-2561