

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

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**IN THE MATTER OF APPLICATION FOR        )  
BENEFICIAL WATER USE PERMIT NO. 40S-   )  
30119937 BY TRANSCANADA KEYSTONE       )  
PIPELINE LP                                        )**

**FINAL ORDER**

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**BACKGROUND AND PROCEDURAL HISTORY**

On October 9, 2018 TransCanada Keystone Pipeline, LP (Applicant or TransCanada) submitted Application for Beneficial Water Use Permit No. 40S 30119937 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 6.68 CFS (3000 GPM) and 189.13 AF. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated March 26, 2019. The Applicant responded with information dated April 9, 2019. The Application was determined to be correct and complete as of April 10, 2019. An Environmental Assessment for this Application was completed on April 11, 2019.

The Applicant proposes to temporarily<sup>1</sup> divert water from the Missouri River by means of a pump. The requested surface water diversion is for 6.68 CFS up to 189.13 AF, from points on either side of the Missouri River in the NE Section 32, T27N, R42E, Valley and McCone Counties, for industrial use from January 1-December 31. The industrial use is comprised of horizontal directional drilling, hydrostatic testing, pump station construction and dust control. The horizontal directional drilling process will occur within the NE Section 32, T27N, R42E, Valley and McCone Counties. The hydrostatic testing water will enter the pipe at the proposed points of diversion to fill the pipe within Phillips, Valley, McCone, and Dawson Counties. Water used in the hydrostatic testing process will be used to test portions of the pipeline, both north and south of the river, and ultimately be discharged into plastic lined filtering structures located within the NE corner of Section 32, T27N, R42E, in Valley County and the SW corner of Section 33, T27N, R42E, in

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<sup>1</sup> TransCanada applied for a temporary permit with a term of five years. If granted, TransCanada would have five years from the date of issuance of the permit to put the water to beneficial use.

McCone County. Water for pump station construction and dust control will be trucked to locations along the pipeline route.

The proposed place of use is the right-of-way and access roads along the pipeline route beginning in the NW of Section 5, T37N, R32E, Phillips County, passing through Valley and McCone Counties, and ending in the NW of Section 27, T18N, R50E, Dawson County (File).

The water used for pump station construction, horizontal directional drilling, and dust control is not expected to return to the source; therefore, these uses are assumed to be 100% consumptive. Water used for hydrostatic testing will return to the source near the two points of diversion.

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) and (2) 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.

The Department conducted an extensive analysis of the Application and determined that all of the applicable criteria of § 85-2-311, MCA, have been proven by a preponderance of the evidence. The Department issued a "Preliminary Determination to Grant Permit" (PD) on April 24, 2019. Notice of the PD was sent to interested individuals on May 14, 2019 and was published in the Glasgow Courier and Circle Banner on May 15, 2019.

As a result of the public notice, the Application received one valid objection pursuant to § 85-2-308, MCA. Objection # 86169 was filed by the Assiniboine and Sioux Tribes of the Fort Peck Reservation (Objectors or Tribes) on July 1, 2019. The objection was deemed valid for the criteria of legal availability and water quality. This matter was scheduled for a contested case hearing pursuant to § 85-2-309, MCA.

On December 31, 2019, the Tribes filed a "Motion for Continuance of Hearing" then scheduled for January 22 – 23, 2020. The Motion for Continuance was based on the Tribes' discovery that legal availability in the PD was based on fifty percent of the Tribes' compacted water rights from the Missouri River as set forth in the Fort Peck-Montana Compact, Art. III(F)(1) ("Compact"). Section 85-20-201, MCA. The Tribes assert that legal availability should be based on one hundred percent of the Tribes' compacted water right and that "it has become apparent that controversies exist between the Tribes, on one hand, and the Department of Natural Resources and Conservation and TransCanada on the other hand, as to the meaning of the Fort Peck-Montana Compact, Mont. Code Ann. 85-20-201." The Tribes therefore filed a "Petition for

Declaratory Relief” before the Fort Peck-Montana Compact Board pursuant to Mont. Code Ann. 85-20-201, Art. VI(D), and the Rules and Regulations of the Fort Peck-Montana Compact Board.

On January 3, 2020, TransCanada filed a “Motion *In Limine*” to exclude certain testimony at the contested case hearing. TransCanada requested that the Hearing Examiner exclude, or at least limit, the testimony of tribal Chairman Floyd Azure and Dr. Kenneth Ryan because their expected testimony is irrelevant to any of the criteria at issue in this matter. TransCanada based its motion on reviewing the affidavits of Chairman Azure and Dr. Ryan. TransCanada characterized Chairman Azure’s affidavit as a description of the “Tribes’ relationship with the Missouri River and the river’s importance to the Tribes’ way of life, including its status as their primary source of water for irrigation, residential, commercial, and industrial uses; its importance to wildlife in the area; and its importance to the Tribes’ religious and cultural practices.” Motion *In Limine* 3. TransCanada characterizes Dr. Ryan’s affidavit similarly to that of Chairman Azure’s but focuses on the river’s position in the Tribes’ religious belief system. TransCanada asserts that those are not considerations as to whether TransCanada’s appropriation will degrade water quality in the river.

After the motions were fully briefed, on February 21, 2020, TransCanada filed its “Notice of DNRC Position on Compact” which included a letter from the Director of DNRC (related to the Petition) of the same date “agree[ing] that the Tribes have a guaranteed right to the maximum monthly amount of water in the Missouri River as provided in Article III(F)(1) of the Compact, and such amount must be considered in full as legal demands in the Department’s legal availability analysis conducted pursuant to Montana Code Annotated § 85-2-311 for the issuance of new beneficial water use permits.” The Director goes on to state “[i]t is my understanding that the Tribes’ Petition was necessitated because the Tribes objected to the legal availability analysis conducted in the Preliminary Determination to Grant Beneficial Water Use Permit Application No. 30119937, by TransCanada Keystone Pipeline LP, pursuant to which the Department divided the Tribes’ maximum amounts of Missouri River water between the Fort Peck Reservoir and the mainstem Missouri River.” TransCanada’s filing confirms that DNRC does not dispute the position of the Tribes with respect to the amount of water the Tribes are entitled to divert under the Fort Peck-Montana Compact and that TransCanada also has no dispute with the Tribes regarding that interpretation of the Compact.

On February 24, 2020, the Tribes filed a “Notice of the Status of the Controversy between Objector and State” essentially disagreeing that the controversy between the State and the Tribes (the Petition) is resolved by the February 21, 2020 letter.

In light of DNRC’s and TransCanada’s agreement over the amount of water the Tribes are entitled to under the Compact, this Hearing Examiner conducted a telephonic pre-hearing conference with the parties on March 12, 2020 to discuss the effect of that agreement related to the instant proceeding and how best to move forward towards a hearing. After considerable discussion it was agreed that both the parties and the Department’s positions regarding the instant application was that the Tribes have a guaranteed right to the maximum monthly amount of water in the Missouri River as provided in Article III(F)(1) of the Compact, and such amounts must be considered in full as legal demands in the legal availability analysis conducted pursuant to § 85-2-311, MCA for the issuance of new beneficial water use permits, including the instant application being considered for TransCanada. It was further agreed that TransCanada needs to provide an analysis of legal availability based on the maximum monthly amount of water guaranteed to the Tribes in addition to all other legal demands on the Missouri River after which the contested case hearing could proceed.

Because the parties agreed to the new legal availability analysis, by order dated March 16, 2020, this Hearing Examiner denied the Tribes’ December 31, 2019 Motion for Continuance. That order also informed the parties that a ruling on the Motion *In Limine* would be provided at a future date.

On March 24, 2020 TransCanada filed its “Disclosure of Revised Expert Witness Report” wherein TransCanada’s expert witness Mr. Jung-Hoe Hopgood provided a new legal availability analysis based on the terms of the March 12, 2020 agreement and as set forth in the March 16, 2020 Order. That analysis is discussed below.

On October 2, 2020, this Hearing Examiner issued his “Order Granting Motion *In Limine* in Part; Order for Brief Re: Confidentiality.” That order granted TransCanada’s Motion *In Limine* “to the extent that any testimony based on the affidavits of Chairman Azure and Dr. Ryan would be immaterial and not useful in determining the issue of adverse effect on water quality.” The order was based on two grounds:

First, as the parties were previously advised in the November 14, 2019 “Administrative Hearing Questionnaire,” this proceeding is limited to the Department’s authority to issue a permit under the Water Use Act, § 85-2-301, MCA, *et. seq.* and the Water Use Act defines

a permit as “... a permit to appropriate ...” and “appropriate” means “to divert, impound or withdraw ... water for a beneficial use.” § 85-2-102(20) and -102(1), MCA. The Water Use Act confers no jurisdiction to the Department over the ultimate fate of how an appropriator handles any industrial by-product or effluent after the appropriator has put the water to beneficial use. As described above, both affidavits appear to address concerns, not with the appropriation of water, but rather what will or may occur after the beneficial use. As such, any testimony based on the affidavits would not be relevant to the question of how the *appropriation* will affect water quality.

Finally, both affidavits focus on the Tribes uses and importance of water in the Missouri River for their livelihood and cultural and religious significance. Even if testimony based on the affidavits could be tied to the narrative Tribal or State WQS, it would provide no metric for this Hearing Examiner to evaluate if the water quality of a prior appropriator would be adversely affected. Any decision based on such a non-measurable basis could clearly be challenged as arbitrary and capricious.

On October 9, 2020, the Tribes filed a “Motion to Certify Applicant’s Motion *In Limine* to Director and for Continuance of Water Quality Portion of Hearing.” TransCanada filed a response brief on October 16, 2020.

The Hearing in this matter scheduled for October 20 – 22, 2020 commenced promptly at 9:00 a.m. on October 20, 2020 with the first issue to be presented being the issue of legal availability followed by the issue of water quality as agreed by the parties.

### **HEARING**

Pursuant to the provisions of §§ 85-2-309 through 311, MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, this matter was heard as a contested case before the Department. The purpose of the contested case was to resolve objections to Application for Beneficial Water Use Permit No. 40S 30119937 by TransCanada Keystone Pipeline LP, for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on April 24, 2019. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PD) which is hereby incorporated by reference.

### **APPEARANCES**

Renee L. Coppock and Justin Harkins from Crowley Fleck PLLP appeared as counsel for Applicant TransCanada. Denise Biggar, former DNRC Regional Manager, provided testimony

regarding the PD; Jung-Hoe Hopgood, Senior Engineer EXP Energy Service; and Jon Schmidt, Vice President EXP Energy Services, testified on behalf of the Applicant.

Majel M. Russel and Daniel S. Wenner from Elk River Law Office PLLP and Reid Peyton Chambers (*pro hac vice*) and Frank S. Holleman (*pro hac vice*) from Sonosky, Chambers, Sachse, Endreson & Perry, LLP appeared as counsel for the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Tom Hughes, Montana Water Rights Consulting, LLC, testified on behalf of the Objectors.

### **EXHIBITS**

Applicant's Exhibits 1 – 3, and 5 were discussed at the hearing but were not offered or officially admitted as they are already part of the record.

The following Applicant exhibits were offered and admitted at the hearing:

**Exhibit 4** – a 2-page “Adoption of Existing Environmental Review” dated April 11, 2019.

**Exhibit 6** – a 4-page resume of Mr. Jung-Hoe Hopgood.

**Exhibit 7** – a 21-page memorandum prepared by Mr. Hopgood detailing his analysis.

**Exhibit 8** – a 9-page resume of Jon Schmidt.

The following Objector exhibits were offered and admitted at the hearing:

**Exhibit 1** – a 3-page resume of Mr. Tom Hughes.

**Exhibit 2** – an 18-page report from Mr. Hughes detailing his analysis of legal availability of water.

### **ISSUES**

As stated above, only two issues were initially presented by the Objectors in this matter – the issues of legal availability and adverse effect to the water quality of a prior appropriator. (§ 85-2-311(1)(a)(ii) and –(f), MCA)

### **Legal Availability**

### **FINDINGS OF FACT**

1. TransCanada provided a revised legal availability analysis prepared by Jung-Hoe Hopgood (Hopgood) using the same methodology as used by the Department in the PD. However, this analysis included the Tribes' full monthly allocation of water as described in the Compact and contributions to the flow of the Missouri River by the Milk River.

2. Both the Department, through the PD, and the Applicant (Exhibit A-7) provided an estimate of physical availability at the point of diversion using the median of the mean monthly flows at USGS stream gage No. 06132000 located approximately 1.8 miles upstream from the proposed point of diversion and then subtracting water rights located between the gage and the point of diversion Those results are presented in the following tables:

**Table 1. Physically available flow at POD**

Month	USGS 06132000 Flow (cfs) Hopgood and PD	WR Peak Diversion Between Gage and POD Hopgood and PD	Remaining Flow at POD (cfs) Hopgood and PD
Jan	9,840	0	9,840
Feb	9,316	0	9,316
Mar	6,901	0	6,901
Apr	6,644	22	6,622
May	7,684	22	7,662
Jun	8,334	22	8,311
Jul	8,576	22	8,554
Aug	9,094	22	9,071
Sep	8,045	22	8,023
Oct	7,748	22	7,726
Nov	7,830	12	7,818
Dec	9,365	0	9,365

**Table 2. Physically available volume of water at POD<sup>2</sup>**

Month	USGS 06132000 Volume - Hopgood (AF)	USGS 06132000 Volume - PD (AF)	WR Volume Between Gage and POD Hopgood (AF)	WR Volume Between Gage and POD- PD (AF)	Remaining Volume at POD Hopgood (AF)	Remaining Volume at POD - PD (AF)
Jan	605,038	603,979	0	0	605,038	603,979
Feb	517,384	516,479	0	0	517,384	516,479
Mar	424,326	423,583	0	0	424,326	423,583
Apr	395,345	394,654	274	274	395,071	394,380
May	472,471	471,644	293	274	472,177	471,370
Jun	495,878	495,040	284	274	495,594	494,766
Jul	527,318	521,078	293	274	527,024	520,804
Aug	559,138	558,190	293	274	558,844	557,916

2. The Hearing Examiner notes that there is some discrepancy between the physical availability of volumes between the PD and the Hopgood Report it appears that those discrepancies are a result of rounding the conversion factors of CFS to AF/Year.



Month	USGS 06132000 Volume - Hopgood (AF)	USGS 06132000 Volume – PD (AF)	WR Volume Between Gage and POD Hopgood (AF)	WR Volume Between Gage and POD- PD (AF)	Remaining Volume at POD Hopgood (AF)	Remaining Volume at POD - PD (AF)
Sep	478,711	477,873	284	274	478,427	477,599
Oct	476,406	475,572	293	274	476,113	475,298
Nov	465,917	465,102	90	189	465,827	464,913
Dec	575,831	574,824	0	0	575,831	574,824

3. While the remaining volume estimates at the POD in Table 2 are very close to the same, the Hearing Examiner finds that because there was no objection to the Department's findings on physical availability of volume remaining at the POD found in the PD, those figures should be used in the legal availability analysis under § 85-2-311(1)(a)(ii), MCA.

4. As noted above, the analysis in the PD relied on fifty percent of the amount of water the Tribes have a right to divert from the Missouri River as provided in Art. III(F)(1) of the Compact as the figure to use in the legal availability analysis. The Tribes argued that the proper figure to use was one hundred percent of their water right as a legal demand at the point of diversion. As a result, DNRC retracted that position and both DNRC and TransCanada agreed that the correct figure to use for the legal availability analysis is one hundred percent of the Tribes' water right. This Hearing Examiner agrees with the parties and finds that the one hundred percent figure is the correct figure to use as the Tribes have the right to their full water right at any point on the mainstem of the Missouri River including at the proposed points of diversion.

5. Had the Department used the one hundred percent figure in Tables 6 and 7 of the PD those Tables would have looked as follows:

**Table 3. Legal Availability – Flow Rate (CFS) (PD Table 6)**

Month	Flow Rate Physically Available at POD	FWP Instream Flow Right	Downstream Water Rights	Fort Peck Tribes Reserved Right	Flow Rate Legally Available
Jan	9840	5178	0	325 650	4337 4012
Feb	9316	5178	0	360 720	3778 3418

Month	Flow Rate Physically Available at POD	FWP Instream Flow Right	Downstream Water Rights	Fort Peck Tribes Reserved Right	Flow Rate Legally Available
Mar	6901	5178	0	325 650	4398 1073
Apr	6622	5178	85	420 840	939 519
May	7662	5178	85	854 1708	1545 691
Jun	8312	5178	85	4220 2440	1829 609
Jul	8554	5178	85	4750 3500	1544 (209)
Aug	9072	5178	85	4465 2930	2344 879
Sep	8023	5178	85	883 1766	1877 994
Oct	7726	5178	85	407 814	2056 1649
Nov	7818	5178	69	336 672	2235 1899
Dec	9365	5178	0	325 650	3862 3537

**Table 4. Legal Availability – Volume (AF) (PD – Table 7)**

Month	Volume Physically Available at POD	FWP Instream Flow Right	Downstream Water Rights	Fort Peck Tribes Reserved Right	Volume Legally Available
Jan	603979	317826	4	20000 40000	266149 249149
Feb	516479	287068	4	20000 40000	209407 189407
Mar	423583	317826	4	20000 40000	85753 65753
Apr	394380	307573	391	25000 50000	61416 36416
May	471370	317826	391	52500 105000	100653 48153
June	494766	307572	391	72500 145000	114302 41802
Jul	520804	317826	391	407500 215000	95087 (12413)
Aug	557916	317826	391	90000 18000	149699 59699
Sep	477599	307573	391	52500 105000	117135 64635
Oct	475928	317826	391	25000 50000	432084 107081
Nov	464913	397573	271	20000 40000	437069 117069
Dec	574824	317826	4	20000 40000	236994 216994

6. Using the results from Tables 3 and 4, above would result in Tables 8 and 9 in the PD to be adjusted as follows:

**Table 8. Comparison-Flow Rate (CFS)(adjusted PD)**

<b>Month</b>	<b>Flow Rate Legally Available at POD</b>	<b>Flow Rate Requested</b>	<b>Flow Rate Remaining</b>
Jan	4012	6.68	4005
Feb	3418	6.68	3411
Mar	1073	6.68	1066
Apr	519	6.68	512
May	691	6.68	684
Jun	609	6.68	602
Jul	(209)	6.68	(216)
Aug	879	6.68	872
Sep	994	6.68	987
Oct	1649	6.68	1642
Nov	1899	6.68	1892
Dec	3537	6.68	3530

**Table 9. Comparison-Volume (AF)(adjusted PD)**

<b>Month</b>	<b>Volume Legally Available at POD</b>	<b>Volume Requested</b>	<b>Volume Remaining</b>
Jan	249149	15.8	249133
Feb	189407	15.8	189391
Mar	65753	15.8	65737

Month	Volume Legally Available at POD	Volume Requested	Volume Remaining
Apr	36416	15.8	36400
May	48153	15.8	48137
Jun	41802	15.8	41786
Jul	(12413)	15.8	(12428)
Aug	59699	15.8	59683
Sep	64635	15.8	64619
Oct	107081	15.8	107065
Nov	117069	15.8	117053
Dec	216994	15.8	216978

7. Based on the above, water can reasonably be considered legally available in both terms of flow rate and volume in all months of the year except July when analyzed using the Department's methodology for determining physical availability and legal demands under ARM 36.2.1702, -1704, and -1705. Ms. Biggar confirmed at the Hearing that there would be no legally available water at the POD using the Tribes' full allocation of water in the month of July. (Audio Tk. 04 @ 41:35)

8. The Tribes next argue that inclusion of the flow of the Milk River was in error because the Milk River enters the Missouri River *below* TransCanada's point of diversion. (Objector's Post-Hearing Brief on Legal Availability, pp. 6, 15; Audio Tk. 06). This Hearing Examiner agrees. § 85-2-311(1)(a)(ii)(C) provides that the legal availability analysis be based on "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" (emphasis provided). The Tribes' water right is equally applicable upstream of the Milk River confluence as it is below. (§ 85-20-201(Art. III)(H), MCA)

9. The Hearing Examiner finds that the Hopgood analysis, while hydrologically sound, does not address legal availability at the point of diversion. That analysis, however, is useful in

comparing the corrected PD analysis above with an independent analysis. Had the Hopgood analysis not added the contributions to flow volume from the Milk River and subtracted water right volumes downstream of the Milk River, volume from the Hopgood Table 8 would also show a deficit for the month of July.  $(527024 \text{ AF (from Hopgood Table 7)} - 318383 \text{ AF (FWP volume)} - 215000 \text{ AF (Tribe volume)}) = -6359 \text{ AF}$ . All other months of the year would show a surplus of water for legal availability. (Hopgood, Tables 7, 8)

10. The Tribes presented an analysis by Mr. Tom Hughes. Mr. Hughes' analysis is based on his determination of what represents a "low flow" year, an "average flow" year, and a "high flow" year at USGS gage No. 06132000 below Fort Peck Dam. He concludes that water would not be legally available during a "low flow" year in parts of February, March, June, and November and not available at all in July, August, September, and October. Similarly, he concludes that during an "average flow" year water would not be legally available for parts of July, August, September, October, November, or December. For a "high flow" year he finds water would be legally available in all months of the year. (Objectors' Exhibit 2, Graphs 3, 5, 7) Mr. Hughes conducts the same kind of analysis for downstream USGS gages located near Wolf Point and Culbertson with similar results. (Objectors Exhibit 2)

11. While Mr. Hughes' analysis demonstrates the expected natural variability of yearly and daily flow, this Hearing Examiner finds that Mr. Hughes' analysis did not use the Department's legally promulgated rule for determining legal availability – i.e. the median of the mean monthly flows – and as such is not determinative as to whether water can be considered reasonably legally available at the POD. (ARM 36.2.1702, -1704, -1705)

12. The Tribes argue in their Post Hearing Brief that use of the median of the mean monthly flow is not appropriate in this matter because the flows generated from that analysis would deprive the Tribes of their full amount of water in certain years. However, the Tribes conflate the "reasonably be considered legal availability" criteria (§ 85-2-311(1)(a)(ii), MCA) with the "adverse effect" criteria (§ 85-2-311(1)(b), MCA) (a criteria not validly objected to here).

13. The Tribes argue in their Post Hearing Brief (p. 18) that – due to the existence of the Tribes' reserved water rights and FWP's instream water reservation – "there is no water legally available for TransCanada to divert at its proposed point of diversion." Obviously, there will be times when the actual flow in the river falls below the legal demands, which include the Tribes water rights and FWP's water reservation, such as during drought. However, that situation is

resolved by the applicants plan to prevent *adverse effect* to senior appropriators – in this case TransCanada’s commitment to not divert during times of shortage. (PD ¶ 31). Assuming, without deciding, that the Tribes’ water right can be construed similarly to the FWP instream flow reservation, Tables 3 and 4, above, account for the Tribes’ full water right as if it was treated similarly to the FWP instream flow reservation for purposes of determining reasonable legal availability.

14. The Department adopted the “median of the mean monthly flow” for reasonable legal availability precisely because it recognized the wide variability of flows in natural systems and the “median of the mean” smooths out those variations and provides a reasonable estimate of the water legally available. This Hearing Examiner finds that the “median of the mean monthly flows” is the proper standard for determining reasonable legal availability of water.

15. Using the Department’s methodology for determining reasonable legal availability this Hearing Examiner finds that water can reasonably be considered legally available in all months of the year exclusive of the month of July.

#### CONCLUSIONS OF LAW

16. Tables 6 and 7 of the PD should be replaced with Tables 3 and 4, above, of this Order. Additionally, Tables 8 and 9 of the PD should be adjusted as shown above in § 6, above. For that reason, the Hearing Examiner rejects paragraphs 22, 23, and 24 of the PD and replaces them as follows:

22. The Department determined the area of potential impact on the Missouri River as approximately five miles downstream of the proposed point of diversion. A list of existing legal demands with the area of impact including the Montana Department of Fish, Wildlife & Parks instream flow reservation, was generated and used to compare the physical availability (median of mean monthly flow rates and volumes) of water to the amount of water already appropriated under the existing water rights, water reservations and the Fort Peck Tribal right. The Department finds calculated flows and volumes in the tables below show legal availability of water for appropriation for all months of the period of diversion except July. The volume of downstream water rights was calculated by dividing the claimed volumes of the downstream water rights by the number of months of the claimed

period of use (Table 5). The Applicant is requesting a flow rate of 6.68 CFS up to 189.13 AF per year.

23. The legal availability is summarized in Tables 6 and 7 below.

**Table 6. Legal Availability – Flow Rate (CFS)**

Month	Flow Rate Physically Available at POD	FWP Instream Flow Right	Downstream Water Rights	Fort Peck Tribes Reserved Right	Flow Rate Legally Available
Jan	9840	5178	0	650	4012
Feb	9316	5178	0	720	3418
Mar	6901	5178	0	650	1073
Apr	6622	5178	85	840	519
May	7662	5178	85	1708	691
Jun	8312	5178	85	2440	609
Jul	8554	5178	85	3500	(209)
Aug	9072	5178	85	2930	879
Sep	8023	5178	85	1766	994
Oct	7726	5178	85	814	1649
Nov	7818	5178	69	672	1899
Dec	9365	5178	0	650	3537

**Table 7. Legal Availability – Volume (AF)**

Month	Volume Physically Available at POD	FWP Instream Flow Right	Downstream Water Rights	Fort Peck Tribes Reserved Right	Volume Legally Available
Jan	603979	317826	4	40000	249149
Feb	516479	287068	4	40000	189407
Mar	423583	317826	4	40000	65753
Apr	394380	307573	391	50000	36416
May	471370	317826	391	105000	48153
June	494766	307572	391	145000	41802
Jul	520804	317826	391	215000	(12413)

Aug	557916	317826	391	18000	59699
Sep	477599	307573	391	105000	64635
Oct	475928	317826	391	50000	107081
Nov	464913	397573	271	40000	117069
Dec	574824	317826	4	40000	216994

24. The comparisons in Tables 8 and 9 of the PD, as adjusted in this Final Order, show water can reasonably be considered legally available in all months throughout the proposed period of diversion except the month of July. The full or any portion of the 189.13 AF volume requested can be taken in any month except the month of July. The authorization will be conditioned to reflect that water can only be diverted from the mainstem of the Missouri River at the proposed points of diversion from January 1 through June 30 and from August 1 through December 31 of any year.

17. Additionally, ¶ 31 of the PD should be stricken and replaced with:

31. The Department finds there will be no adverse effect because the amount of water requested can reasonably be considered legally available in all months exclusive of July at the points of diversion on the Missouri River and the Applicant's plan to curtail their appropriation during times of water shortage is adequate.

## **Water Quality**

### **FINDINGS OF FACT**

18. On October 20, 2020, at the start of the hearing in this matter, the Hearing Examiner heard oral argument on the Tribes' "Motion to Certify Applicant's Motion *In Limine* to Director and for Continuance of Water Quality Portion of Hearing." The underlying Motion *In Limine* was granted by the Hearing Examiner by Order dated October 2, 2020.

19. Just prior to recessing the hearing in this matter for the day, this Hearing Examiner orally pronounced that he would not certify the Motion *In Limine* to the Director of the Department of Natural Resources and Conservation and would not continue the water quality portion of the hearing, which would resume on October 21, 2020.



20. Later in the day on October 20, 2020, the Hearing Examiner received a “Notice of Voluntary Dismissal of Water Quality Objection” filed by the Tribes electronically with hard copy to follow. The Tribes’ dismissal of their water quality objection essentially extinguishes the issue of alleged adverse effect to water quality.

21. This Hearing Examiner entered an order on November 10, 2020 memorializing the October 20, 2020 pronouncement and denying Objectors Motion to Certify Applicant’s Motion *In Limine* to Director and for Continuance of Water Quality Portion of Hearing.

22. Section 85-2-311(2), MCA provides “[t] 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.” The Tribes’ Voluntary Dismissal of Water Quality Objection results in no valid objection to the § 85-2-311(1)(f) criteria.

### CONCLUSIONS OF LAW

23. TransCanada is not required to prove lack of adverse effect on water quality pursuant to § 85-2-311(2), MCA.

### ORDER

Subject to the terms and analysis found in the PD and this Final Order, as modified by ¶¶ 6 and 16, above, Application for Beneficial Water Use Permit No. 40S 30119937 is **GRANTED** with the following condition:

Applicant may temporarily divert water, for a period of up to five years, from the Missouri River, by means of a pump, from January 1 – June 30, and August 1 – December 31 at 6.68 CFS up to 189.13 AF, from points of diversion on either side of the river in the NE of Section 32, T27N, R42E, Valley and McCone Counties, for industrial use. The proposed place of use is the right-of-way and access roads along the pipeline route beginning in the NW of Section 5, T37N, R32E, Phillips County, passing through Valley and McCone Counties, and ending in the NW of Section 27, T18N, R50E, Dawson County.

### NOTICE

This *Final Order* is the Department’s final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 16<sup>th</sup> day of March 2021.

/Original signed by David A. Vogler/  
David A. Vogler, Hearing Examiner  
Department of Natural Resources and Conservation  
Office of Administrative Hearings  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-6835

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 16<sup>th</sup> day of March 2021 by First Class United States mail and by electronic mail (e-mail).

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