

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

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30073093 BY WILD CAT WATER SOLUTIONS INC</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On April 29, 2015, Wild Cat Water Solutions Inc (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 30073093 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 5.5 Cubic Feet per Second (CFS) up to 500 Acre-Feet (AF) per annum from the Missouri River for water marketing. The Department published receipt of the Application on its website. A minor amendment to the Application was received on May 21, 2015. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 21, 2015. The Applicant responded with information dated November 18, 2015. A minor amendment to the Application was received on February 8, 2016. The Application was determined to be correct and complete as of February10, 2016. An Environmental Assessment for this Application was completed on March 1, 2016.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments with supplemental information to application
- Map: Topographic map showing point of diversion and places of use
- Water Marketing Purpose Addendum
- Letters of Intent to Purchase Water from Kraken Oil and Trust T Trucking Inc for up to 300 AF/year

### Information Received after Application Filed

- Minor Amendment to the Application Received on May 21, 2015 to remove the stock purpose.
- Contract with Kraken Operating LLC for 500 AF was Received on September 16, 2015 (the contract replaced the letters of intent submitted with the original application)
- Deficiency Response Received November 18, 2015
- Minor Amendment to the Application Received on February 8, 2016 to reduce the volume.

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

- USGS gaging station records (Station # 06185500, Missouri River near Culbertson MT) from April 1958 – May 2015
- Department water right records of existing rights

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

## **PROPOSED APPROPRIATION**

### FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1-December 31 at 5.5 CFS up to 500 AF, from the SESENE Section 28, T27N, R57E, Roosevelt County, to use for Water Marketing from January 1-December 31. The places of use (water depots) are located in the NWNES Section 7, T27N, R58E; the SESENE Section 15, T27N, R57E; and the SESENE Section 25, T28N, R57E, all in Roosevelt County. The Applicant provided a general service area map which covers an area approximately 36 miles by 23 miles surrounding the proposed project, limited to the state of Montana.

2. Water from the proposed diversion will be trucked from the site or transferred via temporary pipelines for use in oil well development. The consumptive use of the proposed diversion is considered 100 percent.
3. The water sold under this Application will be used in the oil field industry. Water sales will be dependent on oil field activity during the year. In order to substantiate the beneficial use criteria and ensure that the requested flow rate and volume is not exceeded during years of high oil field activity, monitoring and flow rate reporting is necessary. The Applicant's design plans include the use of totalizing flow meters installed at the diversion and at each of the three depot locations.
4. The Applicant provided a contract to purchase water which included a condition stating that water purchased will not be used outside the state of Montana. A condition which states that the water cannot be transported outside the state will also be added to the permit to limit use of the water to within Montana. Depot access will be limited to valid contract holders through a keyed entry and unique user id. Each user will receive a unique pin number to track their water purchases and allow entry to the facility.

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

#### **GENERAL CONCLUSIONS OF LAW**

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

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the

state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

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

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

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

(A) identification of physical water availability;

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

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

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

controlled so the water right of a prior appropriator will be satisfied;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Physical Availability**

#### **FINDINGS OF FACT**

11. The Applicant is requesting a maximum flow rate of 5.5 CFS up to 500 AF annually from the Missouri River. The proposed point of diversion is located approximately 7.5 miles downstream from the USGS gaging station, Missouri River near Culbertson, MT (Station # 06185500). The median of mean monthly flows were obtained from the gaging station records. The volumes were calculated by converting the median of mean monthly flows in CFS to Acre-Feet (CFS x 1.98 x days per month).

12. The following is a list of existing water rights between the gaging station and the proposed point of diversion.

### Water Rights between Gage and Point of Diversion

Wr Number	Purp	Flow Rate (CFS)	Max Volume (AF)	Qtr Sec	Sec	Twp	N S	Rge	E W	Period of Diversion
12708	IR	8.02	1388.00	SWSENE	28	27	N	57	E	4/15-11/15
13498	IR	2.23	324.00	NULL	13	27	N	56	E	5/1-10/1
97742	IR	2.67	542.70	SESWSE	13	27	N	56	E	5/1-9/30
106914	IR	5.10	804.00	NULL	13	27	N	56	E	4/15-10/15
106915	IR	3.90	520.00	NULL	13	27	N	56	E	4/15-10/15
106990	IR	4.20	636.00	NESWNW	11	27	N	56	E	4/15-10/15
114654	IR	2.70	451.00	SESWSE	13	27	N	56	E	4/1-10/15
137580	ST	.08	.27	S2	13	27	N	56	E	1/1-12/31
137592	ST	Stock Direct	.44	N2S2	20	27	N	57	E	1/1-12/31
171255	IR	15.60	2023.00	NENESW	19	27	N	57	E	4/15-10/19
186738	ST	Stock Direct	300.00	N2SW	21	27	N	57	E	1/1-12/31
186739	ST	Stock Direct	Same Cows as 186738	N2	11	27	N	56	E	1/1-12/31
186742	IR	2.90	544.00	SESESE	13	27	N	56	E	4/15-10/15
186743	ST	Stock Direct	Same Cows as 186738	N2	19	27	N	57	E	1/1-12/31
186744	ST	Stock Direct	Same Cows as 186738	S2N2	20	27	N	57	E	1/1-12/31
188165	ST	Stock Direct	Same Cows as 186738	SENE	3	27	N	56	E	1/1-12/31
188166	ST	Stock Direct	Same Cows as 186738	W2SW	2	27	N	56	E	1/1-12/31
188167	ST	Stock Direct	Same Cows as 186738	NE	14	27	N	56	E	1/1-12/31
215560	IR	1.44	102.00	NENESW	19	27	N	57	E	4/1-11/1
30071102	ST	.02	2.24	SE	13	27	N	56	E	4/1-10/31
<b>Totals</b>		<b>48.86</b>	<b>7637.65</b>							

13. This list was used to evaluate the flow rate physically available at the point of diversion by determining the sum of the monthly diversions for existing water rights, and subtracting these values from the median of mean flow values for the gaging station since the requested point of diversion is downstream of the gaging station. The result is the median of mean monthly flow rate for the Missouri River physically available at the point of diversion proposed by the

Applicant. In order to account for the livestock direct from source water rights, it was assumed that all stock rights combined would not exceed a flow rate demand of 35 GPM (0.08 CFS).

Physical availability of water at the requested POD is summarized in the tables below.

	<b>Physical Availability-Flow Rate (CFS)</b>											
	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
Median of Mean Monthly Flows	11210	11560	10200	7979	8403	9261	9255	8742	7836	7323	7478	9894
Water Rights between Gage and POD	1	1	1	44	49	49	49	49	49	44	8	1
Flow Rate Physically Available	11209	11559	10199	7935	8354	9212	9206	8693	7787	7279	7470	9893

14. The list of existing water rights between the USGS gaging station (# 06185500) and the point of diversion was also used to evaluate the volume physically available each month by determining the monthly volume being diverted. This was done by dividing the total volume for each right by the number of months each diversion takes place. The sum of these values were then subtracted from the calculated monthly volumes measured at the USGS gaging station for each month the use occurs to determine the volume physically available at the point of diversion proposed by the Applicant.

	<b>Physical Availability-Volume (AF)</b>											
	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
Monthly Volumes	688076	640892	626076	473940	515778	550110	568075	536579	465450	449469	444180	607290
Water Rights between Gage and POD	25	25	25	925	1098	1098	1098	1098	1098	925	199	25
Volume Physically Available	688051	640867	626051	473015	514680	549012	566977	535481	464352	448544	443981	607265

15. The Department finds that water is physically available in the requested amount of 5.5 CFS and 500 AF per year.

#### CONCLUSIONS OF LAW

16. 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.”

17. It is the Applicant’s burden to provide the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

18. 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).

19. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 11-15)

#### **Legal Availability:**

#### FINDINGS OF FACT

20. The Department determined the area of potential impact on the Missouri River as approximately 5 miles downstream of the proposed point of diversion. The following list of existing legal demands within the area of impact, plus the Montana Department of Fish, Wildlife, & Parks instream flow reservation, was used to compare the physical availability (median of mean monthly flows and resulting volumes) of water to the amount of water already appropriated under the existing water rights and reservations.

Basin	Wr Number	Purp	Flow Rate (CFS)	Max Volume (AF)	Qtr Sec	Sec	Twp	N S	Rge	E W	Period of Diversion
40S	74618	IR	2.23	540.00	SESWNE	36	27	N	57	E	4/1-9/15
40S	99060	IR	2.23	309.70	SESWNE	36	27	N	57	E	5/1-9/30
40S	135791	ST	.08	4.44	S2	34	27	N	57	E	1/1-12/31
40S	137576	ST	Stock Direct	.64	NWSE	28	27	N	57	E	1/1-12/31
40S	137593	ST	Stock Direct	.64	SWNE	28	27	N	57	E	1/1-12/31
40S	137594	ST	Stock Direct	.94	W2NW	34	27	N	57	E	1/1-12/31
	<b>Totals</b>		<b>4.54</b>	<b>856.36</b>							

21. The volume of water rights downstream of the requested point of diversion was calculated by dividing the volumes of the downstream rights by the number of months of the period of use. The Applicant is requesting a flow of 5.5 CFS up to 500 AF per year. The legal availability is summarized in the tables below.

	<b>Legal Availability-Flow Rate (CFS)</b>											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Flow Rate Physically Available	11209	11559	10199	7935	8354	9212	9206	8693	7787	7279	7470	9893
FWP Instream Right	5178	5178	5178	5178	5178	5178	5178	5178	5178	5178	5178	5178
Downstream Water Rights	1	1	1	2	5	5	5	5	5	1	1	1
Flow Rate Legally Available	6030	6380	5020	2755	3171	4029	4023	3510	2604	2100	2291	4714

	<b>Legal Availability-Volume (AF)</b>											
	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
Water Physically Available	688051	640867	626051	473015	514680	549012	566977	535481	464352	448544	443981	607265
FWP Instream Right	317826	287068	317826	307573	317826	307573	317826	317826	307573	317826	307573	317826
Downstream Water Rights	1	1	1	91	153	153	153	153	153	1	1	1
Volume Legally Available	370224	353798	308224	165351	196701	241286	248998	217502	156626	130717	136407	289438

22. The comparison in the following table shows water is legally available throughout the proposed period of diversion in the amount the Applicant is requesting. The monthly volumes for the comparison are equal to the total requested volume divided by the period of use, rounded to a whole number (500 AF/12 months= 42 AF/month).

<b>Comparison-Flow Rate (CFS)</b>				<b>Comparison-Volume (AF)</b>			
<b>Month</b>	<b>Flow Rate Legally Available at POD</b>	<b>Flow Rate Requested</b>	<b>Flow Rate Remaining</b>	<b>Month</b>	<b>Volume Legally Available at POD</b>	<b>Volume Requested</b>	<b>Volume Remaining</b>
Jan	6030	6	6024	Jan	370224	42	370182
Feb	6380	6	6374	Feb	353798	42	353756
Mar	5020	6	5014	Mar	308224	42	308182
Apr	2755	6	2749	Apr	165351	42	165309
May	3071	6	3065	May	196701	42	196659
Jun	4029	6	4023	Jun	241286	42	241244
Jul	4023	6	4017	Jul	248998	42	248956
Aug	3510	6	3504	Aug	217502	42	217460
Sep	2604	6	2598	Sep	156626	42	156584
Oct	2100	6	2094	Oct	130717	42	130675
Nov	2291	6	2285	Nov	136407	42	136365
Dec	4714	6	4708	Dec	289438	42	289396

## CONCLUSIONS OF LAW

23. 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).

24. 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.

25. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also* Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial*

*Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

26. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *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 analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont

cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, *supra*.

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

28. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 20-22)

### **Adverse Effect**

#### **FINDINGS OF FACT**

29. In the event of a water shortage, the Applicant plans to cease pumping if call is made. The Applicant will not begin pumping until water becomes available again.

30. The Applicant plans to install a flow meter at the diversion to monitor withdrawal flow rate and volume. In the case of a water shortage, the Applicant will be able to turn off their pumps until such a time where the water shortage is no longer in effect.

31. The Department finds that there will be no adverse effect because the amount of water requested is physically and legally available on the Missouri River at the point of diversion and the Applicant's plan to curtail his appropriation during times of water shortage is adequate.

#### CONCLUSIONS OF LAW

32. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

33. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

34. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

35. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

36. It is the applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7

(legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

37. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

38. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 29-31)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

39. The water intake is designed as a concrete structure with two 21 inch diameter stainless steel screens with openings of 0.093 inch. The screen design allows the entire diversion rate to be obtained from one screen at a velocity of 0.3 feet per second or less. The two screens provide for redundancy in case one is damaged from river debris or ice. Both screens are housed within a concrete structure that will include provisions for air backwashing of the concrete channel, protection of the screens on three sides and a trash rack covering the concrete channel. The screens will be attached to a wet well via 16 inch supply lines.

40. The pump station includes two wet wells, vertical turbine pumps, sand separators, a diesel generator with diesel storage, an air backwash system, controls and flow meter. The first wet well will be used as a settling basin. Water will then be delivered to the second wet well through sediment filtering media via a low head vertical turbine pump. One of two 200 HP vertical turbine will pump the water from the second wet well through 12 inch pipes into the distribution system. Each pump is capable of providing the requested 5.5 CFS but only one pump will run at

a time. Two pumps allow for backup capability. The flow meters will be installed immediately after the diversion pumps.

41. The sediment filtration equipment requires backwashing at least once a day for 90 seconds. The backwash water will be piped to an unlined basin where the water will infiltrate back into the ground, leaving the sediment behind. Sediment will be cleaned out of the basin in the spring and fall of each year.

42. Distribution lines will be a combination of 24, 28 and 12 inch HDPE lines that will serve the three water depots. Four storage tanks will be located within the system, one at each depot site and central storage. The central storage will contain water level equipment linked to a SCADA (supervisory control and data acquisition) system that will be used to call the pumps at the pump station. Water from the depots will be provided without the use of pumps. The depot located on highway 2 will be capable of filling 10 trucks simultaneously. The other two depot sites will be capable of filling 2 trucks simultaneously. All three depots will also provide provisions to hook a temporary water line to the facility, which would allow temporary piping across the ground that would transport water directly to oil well sites.

43. The project was designed by Morrison Maierle Inc. A complete set of design plans and specifications for the project were provided by the Applicant.

#### CONCLUSIONS OF LAW

44. 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.

45. 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.

46. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 39-43).

### **Beneficial Use**

#### **FINDINGS OF FACT**

47. The purpose of the proposed diversion is water marketing which is a recognized beneficial use (§85-2-102(4), MCA). The volume requested is 500 AF per year, which is supported by a copy of a signed contract between Wild Cat Water Solutions Inc (seller) and Kraken Operating LLC (purchaser) for the entire requested volume.

48. Large quantities of water are needed for oil well development and hydraulic fracturing, frequently within a relatively short period of time. The requested flow rate of 5.5 CFS along with the storage tanks are needed to supply enough water to the system during times of peak demand.

#### **CONCLUSIONS OF LAW**

49. An applicant must prove by a preponderance of the evidence that the proposed use is a beneficial use. §§ 85-2-102(4), -311(1)(d), MCA; Admin.R.M. 36.12.1801. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The amount of water that may be authorized for a permit is limited to the amount of water necessary to sustain the beneficial use. E.g., Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(A water user may not appropriate water for mere future speculative profit or advantage; “He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); St Onge v. Blakely, 76 Mont, 1, 245 P. 532 (1926)(beneficial use may be prospective or contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and due diligence in putting water to actual use); Sitz Ranch

v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing Bitterroot River Protective Ass'n v. Siebel, 2005 MT 60, ¶¶33-35, 326 Mont. 241, 108 P.3d 518, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

50. Applicant seeks a permit to market water to others for beneficial use, which is a recognized beneficial use. § 85-2-102(4), and -310(9)(c)(v), MCA; Mont. Const. Art. IX, § 3(2) (1972). The Montana Legislature enacted additional requirements upon applicants seeking permits to market water to others for use, codified at § 85-2-310(9)(c)(v), MCA, which provides:

- (v) except as provided in subsection (10), if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:
  - (A) each person who will use the water and the amount of water each person will use;
  - (B) the proposed place of use of all water by each person;
  - (C) the nature of the relationship between the applicant and each person using the water; and
  - (D) each firm contractual agreement for the specified amount of water for each person using the water;

Failure to satisfy these criteria mandates that “the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. . . .” § 85-2-310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(4), and -311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

51. The legislative purpose of § 85-2-310(9)(v), MCA was to prohibit the appropriations of water based upon a speculative intent. Chapter 399, Laws of Montana 1985. To that end § 85-2-310(9), MCA, includes express criteria for the DNRC to consider when evaluating an application for a permit to market water to others for use. See DNRC Written Testimony, HB No. 396 (Mar. 25, 1985). These criteria ensure that other water users are committed to the beneficial use of the full quantity of water requested by the applicant. The terms of a "firm contractual agreement" must include sufficient certainty to ensure that a specific volume of water will actually be put to

beneficial use by the contracting party in order to comply with the anti-speculation doctrine and satisfy the requirement of bona fide intent to put the water to beneficial use. See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566 (Colo. 1979) (applicant failed to prove intent to appropriate water for beneficial use where it did not have firm contractual commitments or other evidence of privity between the applicant and the actual beneficial user of the water).

52. Applicant proposes to market water to others for beneficial use, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has provided firm contractual agreements which identify each person who will use the water and the amount each person will use, in addition to information identifying the proposed place of use of all water used, and the relationship between the applicant and each person using the water. (FOF No. 47) Whether based upon one firm contract or many, a permit may only be granted for the total volume of water for which firm contracts have been entered with an applicant. Accordingly, applicant has proven by a preponderance of the evidence that the specific water marketing use proposed in the application is a beneficial use, and that 500 AF of diverted volume and 5.5 CFS flow rate of water requested is the amount needed to sustain the beneficial use proven by the applicant. §§ 85-2-310(9)(c), and -311(1)(d), MCA; (FOF Nos. 47-48)

### **Possessory Interest**

#### **FINDINGS OF FACT**

53. This Application is for instream flow, sale, rental, distribution, or is a municipal use application in which water is supplied to another. It is clear that the ultimate user will not accept the supply without consenting to the use of water. 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.

## CONCLUSIONS OF LAW

54. 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.

55. 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.

The place of use for sale or marketing is the point at which the ownership of the use of the water transfers. *In the Matter of Application Nos. 42B-30011045 and 42B-30014358 for Beneficial Water Use Permit by Fidelity Exploration and Production Company (DNRC 2007), rev'd on other grounds, Northern Plains Resources Council et al. v. Montana Department of Natural Resources et al.*, Cause No. CDV-2007-425, Montana First Judicial District Court *Memorandum and Order on Petition for Judicial Review* (December 15, 2008); see also *Masters Report*, Water Court Case No. 76HE-166 (“place of use” for water marketing at State-owned Painted Rocks Reservoir is the dam because the ownership of the water transfers at the dam). In this case, this

point is the depot where the water trucks are filled. The ultimate place of use of the water is represented in the contracts for sale of the water. The Applicant has provided a general service area to further describe where the water will ultimately be used for oil field production. This water may only be used in the State of Montana.

56. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 53)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30073093 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, from January 1-December 31 at 5.5 CFS up to 500 AF, from a point in the SESENE Section 28, T27N, R57E, Roosevelt County, for water marketing use from January 1-December 31. The places of use (water depots) are located in the NWNESE Section 7, T27N, R58E; the SESENW Section 15, T27N, R57E; and the SESENE Section 25, T28N, R57E, all in Roosevelt County. The Applicant provided a general service area map which covers the area approximately 36 miles by 23 miles surrounding the proposed project, limited to the state of Montana.

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

1. 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 31<sup>ST</sup> 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 WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

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2. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.
3. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.
4. THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT OF THE WORK COMPLETED UNDER THIS RIGHT BY JANUARY 31<sup>st</sup> OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR UNTIL COMPLETION OF THE PROJECT. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF THE PERMIT. THE REPORTS MUST BE SENT TO THE GLASGOW WATER RESOURCE OFFICE.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 3<sup>rd</sup> day of March, 2016.

*Original Signed by Denise Biggar*  
Denise Biggar, Regional Manager  
Glasgow Water Resources Office  
Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 3<sup>rd</sup> day of March, 2016, by first class United States mail.

WILD CAT WATER SOLUTIONS  
ATTN: TIM HYATT  
6013 RD 1011  
BAINVILLE, MT 59212

MORRISON MAIERLE INC  
ATTN: PAT ELLER  
PO BOX 1113  
BOZEMAN, MT 59715

\_\_\_\_\_  
NAME

\_\_\_\_\_  
DATE