



- 30% Design Drawings
- Basin Closure Area Addendum, Form 600 BCA
- Criteria Addendum Application for Beneficial Water Use Permit for Appropriations Greater than 5.5 CFS and 4,000 AC-FT, Form 600B
- Daily data of flow through Canyon Ferry Dam from October 1958 to December 2014.

Information Received after Application Filed

- Applicant’s response to the Department’s deficiency letter, by Abigail St. Lawrence from Bloomquist Law Firm, dated December 9, 2015.
- Minor amendment agreeing to measurement conditions and reducing the requested volume, dated February 10 and March 24, 2016.

Information within the Department’s Possession/Knowledge

- Technical Report, by Jennifer Daly, Water Resource Specialist, DNRC Helena Water Resource Regional Office.
- Engineering Assessment Memorandum dated January 8, 2016, by John Connors, P.E., Civil Engineering Specialist, DNRC Helena Water Resource Regional Office.
- 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 dam, from January 1 to December 31, at a flow rate of 1,026 CFS up to 440,814 AF, from a point in the NWSESE of Section 4, Township (T) 10 North (N), Range (R) 1 West (W), for power generation use from January 1 to December 31 of each year. The place of use is generally

located at the existing Helena Valley Irrigation District (HVID) pumping plant located on the left abutment of Canyon Ferry Dam in the NWSESE of Section 4, T10N, R1W, approximately 15 miles east/northeast of the City of Helena, Lewis and Clark County.

2. The proposed appropriation is non-consumptive. The Applicant's proposed project is to divert additional flow through the existing HVID penstock and turbines. The additional flow will be used to generate power and then be discharged back into the Missouri River, approximately 375 feet downstream of the dam.

3. The Applicant submitted a minor amendment on February 10, 2016, agreeing to three conditions to the proposed Beneficial Water Use Permit 41I 30104062. Agreement to a fourth condition was received on March 24, 2016, via email. The four conditions are listed at the end of this document.

### BASIN CLOSURE

#### FINDINGS OF FACT

4. This Application is for the purpose of power generation. The Application is located within the Upper Missouri River legislative basin closure §§ 85-2-342 and 85-2-343, MCA. The Applicant proposes to use the existing HVID turbines to divert additional flow for the purpose of power generation. The proposed appropriation will divert addition flow through the existing system, which is completely enclosed and discharge the flow approximately 375 feet downstream. Since the system is completely enclosed, the proposed appropriation is considered to be 100% non-consumptive.

#### CONCLUSIONS OF LAW

5. As provided in § 85-2-319, MCA the Department may not grant an application for a permit to appropriate water or for a state water reservation within the Upper Missouri River Basin until the final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin § 85-2-343(1), MCA. The Upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. § 85-2-342(3), MCA. This Application is within the Upper Missouri River

Basin closure and is a permit to appropriate surface water for non-consumptive power generation purposes, which falls under the exceptions for the basin closure. § 85-2-343 (2)(b), MCA.

6. The Upper Missouri River basin closures allows for limited exceptions to appropriate water. Subsection §85-2-343(2)(b), MCA, provides an exception to closure for “an application for a permit to appropriate water for a nonconsumptive use.” “Nonconsumptive Use” is defined to mean “a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.” § 85-2-342(2), MCA.

7. This Application is for an appropriation under the Basin Closure exception for non-consumptive use of surface water, 85-2-343, MCA. In order to qualify for the non-consumptive use exception to the basin closure, the Applicant is required prove its proposed use complies with the definition of non-consumptive use in §85-2-342(2), MCA. The statutory exception to the Upper Missouri River Basin closure defines “nonconsumptive use” similarly to the definition provided for administrative rule basin closures adopted by the DNRC pursuant to §85-2-319, MCA. Rule 36.12.1010(5) ARM, defined a nonconsumptive use as “a beneficial use of water which does not cause a reduction in the source of supply, and where substantially all of the diverted water returns to the source of supply with little or no delay . . .” In order to qualify for the nonconsumptive use exception to an administrative rule closure an applicant must prove: “there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse effect to prior appropriators within the reach of stream between the point of diversion and the point of return.” E.g 36.12.1011(3), ARM. The definition of “nonconsumptive use” in 36.12.1010(5), ARM, and many of the administrative rule closures for which there is a “nonconsumptive use” exception were in place prior to creation of the Upper Missouri River Basin Closure by the Legislature. Compare §§ 85-2-342 and 343, MCA (En. Sec. 1, Ch. 355, L. 1993) to 36.12.1010(5) ARM (eff. 1/26/90) and 36.12.1011(3), ARM(eff. 1/26/90). The DNRC concludes that the nonconsumptive use exception to the administrative rule closures contained in Title 36, Chapt. 12, Subchapt. 10 of the Department’s administrative rules are instructive in interpreting and analyzing the non-consumptive use exception provided for by §85-2-342(2), MCA.

8. In order to qualify for the exception under §85-2-342(2), MCA, an applicant must prove that the proposed use: 1) will not reduce the source of supply below the point of return; 2) will return water to the source of supply without delay or disruption to stream conditions; 3) and will not adversely affect prior appropriators within the reach of stream between the point of diversion and the point of return. The failure to prove any of the three prongs prohibits the application from qualifying for the nonconsumptive use exception. I conclude that the Applicant has proven by a preponderance of the evidence that the proposed use does not cause a reduction in supply, will cause little or no disruption in stream conditions below the point where water is returned to the Missouri River, and will not adversely effect existing water users in the reach between the point of diversion and point of return. Qualification for a basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA, criteria, it only allows the Department to accept an application for processing. The Applicant must still prove the requisite permit criteria pursuant to §85-2-311, MCA, which are analyzed below. See Montana Trout Unlimited, ¶¶ 28-29; Rule 36.12.120(1), ARM; E.g., E.g., In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee (DNRC Final Order 2011); In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen, (DNRC Final Order 2011).

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

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

9. 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 . . .

10. 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; <sup>1</sup>

....

(3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the following: (i) the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life; (ii) the benefits to the applicant and the state; (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply; (iv) the availability and feasibility of using low-quality water for the purpose for which application has been made; (v) the effects on private property rights by any creation of or contribution to saline seep; and (vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

11. While the standard of proof in a permit proceeding generally requires proof of the criteria by a preponderance of the evidence, this Application proposes to appropriate more than 5.5 CFS and 4,000 AF per year. Therefore, pursuant to § 85-2-311(3), MCA, the Applicant must prove by clear and convincing evidence that the criteria in § 85-2-311(1), MCA as well as reasonable use criteria set forth in § 85-2-311(3), MCA, are met. "Clear and convincing evidence" means evidence in which "there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than

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<sup>1</sup> An applicant may be required to prove additional criteria regarding water quality if a valid objection is filed. See 85-2-311(1)(f-h) and (2), MCA.

beyond a reasonable doubt.” Czajkowski v. Meyers, 2007 MT 292, ¶43, 339 Mont. 503, ¶43, 172 P.3d 94, ¶43; Seltzer v. Morton, 2007 MT 62, ¶159, 336 Mont. 225, ¶159, 154 P.3d 561, ¶159.

The determination of whether an application satisfies 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, 351 Mont. 26, 208 P.3d 868; Bostwick Properties Inc. v. DNRC (Bostwick II), 2013 MT 48, ¶ 41, 369 Mont. 150, 296 P.3d 1154

12. 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 , 211 Mont. 91, 96, 685 P.2d 336, 339(1984)(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.

13. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier , 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).

14. 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.

### **Physical Availability**

#### **FINDINGS OF FACT**

15. The physical availability of water was calculated using daily data from October 1958 to December 2014. The data set represents water going through the existing Helena Valley Irrigation District (HVID) diversion and Canyon Ferry Dam, including the spillway, outlets and turbines. The data comes from the United States Bureau of Reclamation's (BOR) Hydromet System for Canyon Ferry Lake (<http://www.usbr.gov/gp/hydromet/cfr.html>). The data range that was analyzed was the full period of record available at the time the Applicant completed the Application. Table 1 below identifies water going through Canyon Ferry Dam, as calculated

from the data set in monthly values, for the median of the mean monthly flow rate and mean monthly volume. (Technical Report)

**TABLE 1: MEDIAN OF THE MEAN MONTHLY FLOW AND MEAN MONTHLY VOLUMES AT CANYON FERRY DAM DURING THE REQUESTED PERIOD OF DIVERSION (TOTAL)**

Month	Physical Availability (CFS)	Physical Availability (AF)
January	4,978	291,026
February	4,700	262,861
March	4,634	298,197
April	5,063	311,822
May	5,799	382,708
June	8,132	501,874
July	5,436	385,843
August	4,199	267,481
September	3,955	237,856
October	4,048	257,259
November	4,278	267,736
December	4,905	292,579

16. Using the historic daily measurement records that are available for Canyon Ferry Dam and associated diversions, the Applicant calculated the amount of water that could have been utilized by the proposed project during the previous 20 year period. The Applicant used daily data to determine the amount of water that was released through the low level river outlet and/or the spillway. Releases below 150 CFS were excluded because 150 CFS is the minimum flow rate at which the proposed project can effectively operate. Flow rates above 1,026 CFS were assumed to be limited to 1,026 CFS because this is the maximum flow rate at which the project can operate. Table 2, below, indicates that in some years during the recent period of record, a sufficient flow rate was not available at all. Conversely, in 1997, 440,814 AF could have potentially been utilized by the proposed project. The Applicant is requesting a maximum diverted volume of 440,814 AF based on the maximum physical availability of water that could potentially have been utilized in one year during the 20-year analysis period.

**TABLE 2: VOLUME OF WATER APPLICANT CALCULATED THAT COULD BE UTILIZED BY PROPOSED PROJECT**

	Estimated Diversions [ac-ft]												Annual Total
	January	February	March	April	May	June	July	August	September	October	November	December	
1994	-	-	-	-	-	-	-	-	-	-	-	-	-
1995	-	23,180	5,861	38,160	46,676	36,215	37,716	-	-	-	-	24,079	211,887
1996	60,428	27,434	59,973	48,786	33,022	35,742	5,602	3,554	-	-	-	-	274,541
1997	47,447	53,929	58,331	24,400	38,947	41,735	38,938	4,518	3,302	57,597	57,004	14,665	440,814
1998	1,790	-	2,690	46,989	15,349	26,820	31,693	-	1,221	14,580	-	-	141,132
1999	-	32,802	60,340	26,178	8,148	37,490	11,475	30,358	13,749	29,196	35,478	30,266	315,480
2000	933	-	33,628	86	-	-	-	1,142	4,386	-	-	-	40,176
2001	-	-	-	-	-	-	-	-	-	-	-	-	-
2002	-	-	-	2,870	-	-	-	-	-	-	-	160	3,030
2003	-	-	-	-	4,821	7,395	-	-	-	-	-	-	12,216
2004	-	-	-	-	-	-	-	-	-	-	-	-	-
2005	-	-	-	-	-	10,749	17,899	380	-	-	-	-	29,028
2006	-	2,601	3,857	153	-	-	-	-	-	-	-	-	6,610
2007	-	-	-	-	-	-	-	-	-	-	-	-	-
2008	-	-	-	-	6,278	39,217	16,124	-	-	-	-	2,160	63,779
2009	-	3,370	16,242	-	35,962	22,003	21,176	-	-	-	12,939	-	111,693
2010	-	-	-	82	-	32,909	23,794	-	-	17,675	21,171	-	95,631
2011	-	1,937	27,106	7,401	45,093	45,392	27,498	73	25,093	38,087	32,856	29,074	279,609
2012	4,029	1,230	40,396	55,913	34,215	34,139	26,869	4,218	-	-	-	-	201,009
2013	-	7,360	56,519	14,300	-	-	-	-	-	-	-	-	78,180
2014	-	-	40,769	47,852	37,918	4,093	16,274	448	-	14,470	-	-	161,823

17. The Department reviewed the Applicant’s analysis in Table 2 and found it to be an accurate calculation of the physical amount of water that could have been utilized by the proposed project.

**CONCLUSIONS OF LAW**

18. Pursuant to § 85-2-311(1)(a) and (3), MCA, an applicant must prove by clear and convincing evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

19. 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. 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); *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).

20. The data provided by the Applicant proves by clear and convincing evidence that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(3), MCA. (Finding of Fact No.s 15-17)

**Legal Availability:**

**FINDINGS OF FACT**

21. The source of water for the proposed appropriation is the Missouri River. The proposed diversion is the existing HVID penstock, located on the left abutment of Canyon Ferry Dam. The Applicant proposes to divert a flow of 1,026 CFS into the existing HVID penstock, through the turbines and return the water back to the Missouri River approximately 375 feet downstream of Canyon Ferry Dam. Canyon Ferry Dam is owned and operated by the United States Bureau of Reclamation (BOR). Table 3 below is the existing legal demands at Canyon Ferry Dam. The legal demands in Table 3 do not include storage water rights for Canyon Ferry Lake, also, the HVID water rights for 380 CFS were assumed to be multiple uses of a single appropriation. The Department did not look at storage rights because the Applicant is proposing to only utilize run of the river flows that are not being utilized by the BOR. The Permit will be conditioned to ensure stored water is not being appropriated for the proposed project, see condition no. 3 at the end of this document. (Technical Report)

**TABLE 3: WATER RIGHTS OF RECORD AT CANYON FERRY DAM OUT OF THE MISSOURI RIVER**

<b>Water Right</b>	<b>Owner</b>	<b>Purpose</b>	<b>Period of diversion</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>
4II 40819	HVID & BOR	Power Generation	3/20 to 12/9	420	103,359
4II 40820	HVID & BOR	Irrigation*	3/20 to 12/9	380	NA**
4II 40821	HVID & BOR	Stock*	1/1 to 12/31	380	NA**
4II 40822	HVID & BOR	Domestic*	4/1 to 10/19	380	445.5
4II 40824	HVID & BOR	Fish & Wildlife*	1/1 to 12/31	380	10,451
4II 40825	HVID & BOR	Recreation *	1/1 to 12/31	380	10,451
4II 40915	BOR	Power Generation	1/1 to 12/31	5,100	3,692,229
4II 40916	BOR	Power Generation	1/1 to 12/31	1,290	334,831
4II 40925	BOR	Institutional	1/1 to 12/31	1.56	50

\*Appear to be multiple uses of the same appropriation.

\*\*Limited to the amount historically put to beneficial use.

22. Table 4 (flow rate) and Table 5 (volume) below are a comparison of the calculated physical availability in Table 1 above minus the legal demands in Table 3. For water rights that were not decreed a volume, a volume was calculated using the claimed flow rate over the period of diversion. (Technical Report)

**TABLE 4: WATER ESTIMATED TO BE PHYSICALLY AVAILABLE AT CANYON FERRY DAM MINUS LEGAL DEMANDS AT THE DAM (FLOW RATE)**

Month	Physical Availability (CFS)	Existing Legal Demands (CFS)	Physical – Legal (CFS)
January	4,978	6,772	-1,794
February	4,700	6,772	-2,072
March	4,634	7,192	-2,558
April	5,063	7,192	-2,129
May	5,799	7,192	-1,393
June	8,132	7,192	940
July	5,436	7,192	-1,756
August	4,199	7,192	-2,993
September	3,955	7,192	-3,237
October	4,048	7,192	-3,144
November	4,278	7,192	-2,914
December	4,905	7,192	-2,287

**TABLE 5: WATER ESTIMATED TO BE PHYSICALLY AVAILABLE AT CANYON FERRY DAM MINUS LEGAL DEMANDS IN EFFECTED REACH (VOLUME)**

Month	Physical Availability (AF)	Existing Legal Demands (AF)	Physically Available Water – Existing Legal Demands (AF)
January	291,026	335,593	-44,567
February	262,861	335,593	-72,732
March	298,197	343,869	-45,672
April	311,822	371,084	-59,262
May	382,708	371,837	10,871
June	501,874	371,084	130,790
July	385,843	371,837	14,006
August	267,481	371,837	-104,356
September	237,856	371,084	-133,228
October	257,259	371,837	-114,578
November	267,736	371,084	-103,348
December	292,579	335,593	-4,3014

23. The Department's standard legal availability analysis indicates water is not legally available in the amount the Applicant is requesting for the proposed project throughout the entire period of diversion. However, the Applicant provided an alternate analysis of legal availability based upon site-specific details associated with water use at Canyon Ferry Dam and the existence of 56.3 years of daily measurement data from the BOR's Hydromet system. This data establishes that BOR does not exercise the full extent of the legal demand reflected by Statement of Claim Nos. 41I 40915 and 41I 40916 at all times. The plan for operation of this permit provides that water will only be diverted through the Applicant's facilities if BOR does not need the water and would otherwise be discharging the excess water through its spillway or outlet gate. Because the Applicant's facilities are constructed on Canyon Ferry Dam, they cannot interfere with BOR's senior water rights. The Applicant can only appropriate water after BOR's actual demand at any given time is satisfied.

24. Considering the extensive evidence and data available, along with the unique nature of the Applicant's proposed appropriation, it is reasonable to consider the Applicant's analysis (Table 2) of the water that has not been utilized by BOR's existing legal demands and, therefore, could reasonably be considered available for appropriation by the proposed project in this case.

25. The Applicant's analysis in Table 2 uses daily flow rate data from the low-level river outlet and spillway from January 1994 to December 2014 in conjunction with flow rate data from the HVID turbine from the same time period, in addition to the 150 CFS and 1,026 CFS minimum and maximum flow rate limitations, to determine flow rates that were physically available which were not being utilized by the BOR pursuant to Statement of Claims Nos. 41I 40915 and 41I 40916. The project proposes to only appropriate the natural river flows (i.e. non-storage water) not utilized by the existing legal demands. This amount of water is assumed to be equal to the amount of water released through the low level river outlet or over the spillway.

26. The maximum volume of water that was not utilized by the existing demands, which could have been utilized by proposed appropriation during the 20-year analysis period, is 440,814 AF.

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## CONCLUSIONS OF LAW

27. The Applicant was required to prove by clear and convincing evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. Legal availability is determined using a comparative analysis of physical water availability and the existing legal demands. *E.g.*, ARM 36.12.1702 through 1705; §85-2-311(1) and (3), MCA; 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).
28. 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*, Pg. 7(2011)(the legislature set out the permit criteria and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); *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.
29. The Department's standard evaluation of legal availability (median of the mean monthly flow rate and volume minus the existing legal demands), showed water is not legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department. However, the evidence provided in support of the Application includes 56.3 years of daily data from Canyon Ferry Dam. This evidence establishes that there are times when BOR does not exercise the full extent of its legal demand during which water is available for appropriation due to the unique nature and location of the proposed power generation project in this Application as it relates to the nature and location of BOR's senior water right. Findings of fact 16, 17, 23, 24 and 25 above. Considering this extensive evidence, the Applicant has proven by clear and convincing 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) and (3), MCA. (Finding of Fact No's 21-26)

## **Adverse Effect**

### **FINDINGS OF FACT**

30. The proposed project is to generate power at the existing HVID pumping plant by appropriating flows not currently utilized and by equipping the existing turbines with generators and associated infrastructure. Water will flow through the HVID plant and will be released approximately 375 feet below the dam. The water will be completely enclosed in the system so there will be no evaporation or other consumptive losses associated with the proposed appropriation. The proposed project will only appropriate water that the BOR would have otherwise released through the outlet gates and or spillway. Due to the fact that the additional flow would have been released through the outlet gates and or spillway, the proposed appropriation will not impact the timing, volume, or flow rate of water below Canyon Ferry Dam.

31. The Applicant's plan of operation is to only divert water for power generation purposes when water is being released over the spillway or through the outlet gates. This plan concurs with Agreement No. 15AG670045 between the Applicant and the BOR as well as Condition No. 4 to this Preliminary Determination. As illustrated in Table 3, Finding of Fact 21 above, HVID and the BOR are the only owners of record for the water rights at Canyon Ferry Dam. To prevent impairment of BOR water operations, power generation using the HVID system is effectively at the discretion of the BOR. The Applicant will operate the proposed power generation project in a run-of-river mode and will not be utilizing stored water from Canyon Ferry Lake at any time. The Applicant will be required to measure and report all water diverted for the purpose of power generation.

### **CONCLUSIONS OF LAW**

32. The Applicant bears the affirmative burden of proving by clear and convincing 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. § 85-2-311(1)(b) and (3), MCA; ARM 36.12.1706; 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 I, ¶ 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). An applicant must also 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.

34. The Applicant has proven by clear and convincing 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(3) , MCA. (Finding of Fact No's 30-31)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

35. The HVID pumping intake pipe, on the left abutment of the dam, is 13-feet or 156-inches in diameter (BOR). The hydraulic head available to the turbines ranges from approximately 120 ft. to 150 ft. Based on the size of the penstock and the hydraulic head available, the inlet portion of the system could convey considerably more water than the requested flow rate of 1,026 CFS. However, the flow rate through the system is limited to the capacity of the turbines, which corresponds to the requested flow rate of 1,026 CFS. The minimum flow rate of 150 CFS is needed to initiate the generation of electricity. The Applicant plans to use the existing wicket gates to control the flow into the turbines. (Engineering Assessment Memorandum dated January 8, 2016, by John Connors, P.E., Civil Engineering Specialist)

#### **CONCLUSIONS OF LAW**

36. 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. ARM, 36.12.1707.

37. 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. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(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); § 85-2-312(1)(a), MCA.

38. Applicant has proven by clear and convincing 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 (Finding of Fact No. 35).

### **Beneficial Use**

#### **FINDINGS OF FACT**

39. The Applicant is proposing to use a flow rate of 1,026 CFS, up to a volume of 440,814 AF, for the purpose of power generation. The Applicant provided an analysis (Table 2) indicating that a maximum of 440,814 AF could have been utilized by the proposed project at least once in the past 20 years. Daily data from the BOR Hydromet system indicates the requested flow rate of 1,026 CFS is often released from the spillway and or the low level river outlet. The BOR's Finding of No Significant Impact, dated December 2015, states that the BOR will execute a Lease of Power Privilege (LOPP) with HVID, which authorizes the use of federal lands and facilities to construct, operate, and maintain a 9.4 megawatt hydropower plant facility.

#### **CONCLUSIONS OF LAW**

40. The Applicant must prove by clear and convincing evidence the proposed use is a beneficial use. §§85-2-311(1)(d) and (3), MCA.

41. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and -310, MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. McDonald, 220 Mont. at 532, 722 P.2d at 606. 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 (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

42. Applicant proposes to use water for power generation which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by clear and convincing evidence power generation is a beneficial use and that 1,026 CFS up to 440,814 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(3), MCA, (Finding of Fact No. 39)

### **Possessory Interest**

#### **FINDINGS OF FACT**

43. The Applicant signed and notarized the application form affidavit, affirming that 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. The Applicant also submitted a copy of the Preliminary Lease and Funding Agreement (15AG670045) between the BOR and the Applicant pertaining to the proposed project.

#### **CONCLUSIONS OF LAW**

44. 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. See also ARM 36.12.1802.

45. The Applicant has proven by clear and convincing evidence that it has 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(3), MCA. (Finding of Fact No. 43)

### **REASONABLE USE CRITERIA**

46. The Department may not issue a water use permit for an appropriation of 4,000 AF or more of water a year, or 5.5 CFS, unless the appropriator proves by clear and convincing evidence that the proposed appropriation is a reasonable use. § 85-2-311(3)(b), MCA. A finding of reasonable use must be based on a consideration of the following criteria found in § 85-2-311(3)(b)(i-vi), MCA.

### **FINDINGS OF FACT**

#### *Section 85-2-311(3)(b)(i), MCA - Existing and Projected Demands on the State Water Supply*

47. Pursuant to § 85-2-311(3)(b)(i), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum stream flows for the protection of existing water rights and aquatic life.

48. The Upper Missouri River basin, which includes the proposed project area, was temporarily closed to new water appropriations, by legislative authority on April 16, 1993, due to water availability problems, water contamination problems, and a concern for protecting existing water rights. § 85-2-342 and 343, MCA. The Upper Missouri River basin closure provides limited exceptions for new uses, including the non-consumptive use of surface water. § 85-2-343(2)(b), MCA. The proposed appropriation is a non-consumptive, “run-of-the-river” hydropower facility. BOR will manage water stored in Canyon Ferry Lake and prescribe the releases available for appropriation by the Applicant.

49. The Department analyzed existing demands on the Missouri River at Canyon Ferry Dam and found water was not legally available in the amount the Applicant is requesting. However, the Applicant analyzed the amount of water that has not been utilized in the past 20 years by the existing legal demands. The analysis showed the amount of water that was physically available and not being legally utilized is equal to the amount of water the BOR releases via the spillway and or outlet gate. The Applicant further analyzed the data to demonstrate the amount that could have been appropriated by the proposed project, given the minimum and maximum flow necessary to generate power. Since the Applicant proposes to only appropriate water BOR is releasing through the spillway and or outlet gate, the proposed project will not affect the existing demands on the state water supply, as well as projected demands, such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum stream flows for the protection of existing water rights and aquatic life. (Findings of Fact 21-26, 30-31 and Conclusions of Law 27-29, 32-34)

50. The Department finds that, as proposed in the Application and conditioned in this Preliminary Determination, the appropriation will have no effect on the existing or projected demands on the state water supply and will not further deplete surface water flows on the Missouri River or downstream.

Section 85-2-311(3)(b)(ii), MCA - Benefits to the Applicant and the State of Montana

51. Pursuant to § 85-2-311(3)(b)(ii), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the benefits to the Applicant and the State of Montana.

52. The proposed power generation project will provide the Applicant with a long term, reliable source of revenue. The State of Montana will benefit by neutralizing carbon dioxide emissions due to the energy created by the Applicant's clean, renewable resource.

53. The proposed project will retrofit the two existing turbines each with a 4.7 MW Permanent Magnet Generators and associated infrastructure to produce power. By utilizing the existing HVID infrastructure, the proposed project maximizes the beneficial use of Montana's water resource, maximizes the benefits of existing infrastructure and reduces the need for the

equivalent amount of fossil fuel-fired power generation, thereby conserving nonrenewable energy resources.

54. It is projected that the construction of the proposed power plant will require six to ten short term jobs. After construction there will be one full time position created for the operation and minor maintenance at the facility.

55. Based on the foregoing analysis, the Department finds that the proposed project will be a benefit to the Applicant and the State of Montana.

Section 85-2-311(3)(b)(iii), MCA - Effects on Quantity and Quality of Water for Existing Beneficial Uses in the Source of Supply

56. Pursuant to § 85-2-311(3)(b)(iii), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the effects on the quantity and quality of water for existing beneficial uses in the source of supply.

57. The proposed project will function as a non-consumptive “run-of-river” power facility with no storage water being utilized for power generation. The only waters to be appropriated are the regulated releases that would occur under BOR’s discretion. As such, the proposed project will not affect the timing, temperature, or quantity of available water for other uses, including the protection of aquatic life, on the Missouri River and downstream.

58. As conditioned by the Department and in agreement with BOR, the Department finds that the proposed appropriation will not affect the quantity of water for existing beneficial uses in the source of supply because the proposed new use is non-consumptive and is limited to the releases determined by BOR.

59. HVID pumping plant, located on the left abutment of Canyon Ferry Dam, is where the proposed project is to be located. Discharges will occur approximately 375 feet downstream into the Missouri River. The proposed development will not alter the flow pattern or location of discharges from Canyon Ferry Dam and, therefore, will not change existing patterns of channel erosion, sediment load, or chemical or thermal qualities of the water below Canyon Ferry Dam.

60. The Department finds there will be no effects on the quantity or quality of water for existing beneficial uses in the source of supply.

Section 85-2-311 (3)(b)(iv), MCA - Availability and Feasibility of Using Low-Quality Water

61. Pursuant to § 85-2-311(3)(b)(iv), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the availability and feasibility of using low-quality water for the purpose for which application has been made.

62. The project could use low-quality water if it were present at Canyon Ferry Dam. The proposed project's operations do not depend on the water quality, only on the amount of water BOR chooses to release.

63. The Department finds the existing source of water to be the only alternative for the proposed use, and the quality of water has no effect on the proposed project.

Section 85-2-311 (3)(b)(v), MCA - Effects on Private Property Rights by any Creation of or Contribution to Saline Seep

64. Pursuant to § 85-2-311(3)(b)(v), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the effects on private property rights by any creation of or contribution to saline seep.

65. The water source will be the Missouri River at Canyon Ferry Dam. A portion of the water that has historically been released from the low level river outlet or the spillway will instead be diverted through the HVID penstock and turbine system in order to generate power. This is a non-consumptive use and will not create or contribute to saline seep. The infrastructure of the power plant and associated penstock, gates, and controls will be constructed entirely on land owned by BOR.

66. The Department finds that proposed power generation project will not affect private property rights, nor will it contribute to the creation of saline seeps.

Section 85-2-311(3)(b)(vi) Probable Significant Adverse Environmental Impacts of the Proposed Use of Water

67. Pursuant to § 85-2-311(3)(b)(vi), MCA, the Applicant must prove the appropriation is a reasonable use based on a consideration of the probable significant adverse environmental impacts of the proposed use of water as determined by the Department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

68. The United States Department of Interior, Bureau of Reclamation (BOR) completed an Environmental Assessment (EA) in October 2015 and made a Finding of No Significant Impact (FONSI) in December 2015 for the Helena Valley Irrigation District (HVID) Lease of Power Privilege (LOPP) agreement associated with the proposed project. The EA completed by the BOR was prepared pursuant to the requirements of the National Environmental Policy Act (NEPA). BOR's EA has been incorporated and adopted by the Department into this permitting process. The BOR's EA and FONSI can be found on BOR's website at [http://www.usbr.gov/gp/mtao/nepa/helena\\_valley.html](http://www.usbr.gov/gp/mtao/nepa/helena_valley.html).

69. The Department finds that there are no significant adverse environmental impacts associated with the proposed hydropower project as identified in the BOR's EA and FONSI. The Applicant is subject to the conditions in this decision document and the Applicant's LOPP agreement with the BOR.

#### CONCLUSIONS OF LAW

70. Based upon Findings of Fact Nos. 48-50, 52-55, 57-60, 62-63, 65-66 and 68-69, the Department concludes that the Applicant has proven by clear and convincing evidence that the proposed appropriation is a reasonable use based on consideration of the factors set forth in § 85-2-311(3)(b)(i-vi), MCA.

#### 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. 41I 30104062 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a Dam, from January 1 to December 31 at 1,026 CFS up to 440,814 AF, from a point in the NWSESE of Section 4, T10N, R1W, for Power Generation use from January 1 to December 31. The place of use is located NWSESE of Section 4, T10N, R1W, Lewis and Clark County.

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

CONDITION 1: THE APPROPRIATOR SHALL SUBMIT DOCUMENTION INDICATING THE TYPE OF EACH MEASURING/MONITORING DEVICE, A MAP OF THE SPECIFIC LOCATION OF EACH DEVICE, AND A PLAN DETAILING HOW THE DEVICES WILL BE MONITORED. THE PLAN AND DEVICE LOCATION MUST BE APPROVED BY THE DEPARTMENT BEFORE WATER IS DIVERTED UNDER THIS PERMIT. REVIEW OF THE PLAN AND DEVICE LOCATIONS BY THE DEPARTMENT SHALL BE WITHIN 60 DAYS OF SUBMISSION OF THE PLAN AND DEVICE LOCATIONS. WATER MUST NOT BE DIVERTED UNTIL THE MEASURING/MONITORING DEVICES ARE IN PLACE AND OPERATIONAL. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING/MONITORING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE FLOW RATE AND VOLUME ACCURATLY DURING PERIODS OF APPROPRIATION UNDER THIS PERMIT. ANY CHANGES TO THE MEASURING/MONITORING DEVICES OR CHANGES TO THE METHOD USED TO MONITOR AND RECORD INFORMATION FROM THE DEVICES SHOULD BE REPORTED TO THE DEPARTMENT WITHIN 30 DAYS OF ANY SUCH CHANGE.

CONDITION 2: THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD, ON A FORM PROVIDED BY THE DEPARTMENT, OF THE MAXIMUM FLOW RATE AND TOTAL MONTHLY VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME DURING WHICH WATER WAS APPROPRIATED. THE RECORD SHALL INDICATE HOW AN APPROPRIATE EQUATION WAS UTILIZED TO DETERMINE THE FLOW RATE AND VOLUME THAT WAS USED FOR POWER GENERATION. RECORDS SHALL BE SUBMITTED BY JANUARY 31 OF EACH YEAR AND WITHIN 30 DAYS OF REQUEST BY THE DEPARTMENT 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 HELENA WATER RESOURCES REGIONAL OFFICE.

CONDITION 3: THE APPROPRIATOR SHALL MONITOR THE INFLOW TO CANYON FERRY LAKE. THE APPROPRIATOR SHALL ONLY GENERATE POWER WHEN THE INFLOW IS GREATER THAN THE FLOW THAT CAN BE UTILIZED BY THE PROPOSED APPROPRIATION, IN ORDER TO ENSURE STORED WATER IS NOT BEING APPROPRIATED UNDER THIS PERMIT. THE MAXIMUM MONTHLY INFLOW INTO CANYON FERRY LAKE SHALL BE RECORDED UPON A FORM PROVIDED BY THE DEPARTMENT AND SUBMITTED TO THE DEPARTMENT BY JANUARY 31 OF EACH YEAR AND WITHIN 30 DAYS OF REQUEST BY THE DEPARTMENT AT OTHER TIMES DURING THE YEAR.

CONDITION 4: OPERATION OF THIS PERMIT IS SUBJECT TO THE EXISTING OPERATIONS OF CANYON FERRY DAM, AT THE DISCRETION AND UNDER THE AUTHORITY OF THE UNITED STATES BUREAU OF RECLAMATION (BOR), IN ORDER TO ENSURE THAT THE EFFICIENCY OF BOR-GENERATED POWER OR WATER OPERATIONS WILL NOT BE IMPAIRED.

**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 9<sup>th</sup> day of May, 2016.

/Original signed by Bryan Gartland/  
Bryan Gartland, Deputy Manager  
Helena Regional Office  
Department of Natural Resources and Conservation