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

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41P-30117451 BY CITY OF SHELBY **IN THE MATTER OF CHANGE APPLICATION NO. 41P-30114262 BY CITY OF SHELBY** **IN THE MATTER OF CHANGE APPLICATION NO. 41P-30116656 BY CITY OF SHELBY**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL ORDER**

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On November 10, 2021, and November 16, 2021, I conducted hearings related to the above-captioned applications. For the reasons set forth below, I hereby overrule the valid objections filed by the Town of Kevin (Objector) to each of the three above-captioned applications and GRANT City of Shelby's (Applicant) applications on the terms and conditions set forth in the Department of Natural Resources and Conservation's (DNRC) Preliminary Determinations to Grant (PDG or PDGs) each application. This Order must be read in conjunction with the associated PDGs, which are incorporated herein by reference.

BACKGROUND AND PROCEDURAL HISTORY

On December 21, 2020, DNRC issued PDGs regarding the three above-captioned applications filed by Applicant. In application 41P 30117451 (Permit Application), Applicant sought the right to make a new appropriation for 205 gallons per minute (GPM) up to 331.6 acre-feet per year (AFY) for municipal use. Permit Application PDG at 1. The Permit Application is intended to complement Applicant's other two applications at issue in this case. Application 41P 30114262 seeks changes to Water Right Statements of Claim numbers 41P 192877 and 41P 192879, and Application 41P 30116656 seeks changes to Water Right Statements of Claim numbers 41P 192878, 41P 192880, 41P 192881, and 41P 192882, as well as to Beneficial Water Use Provisional Permit numbers 41P 4489, 41P 4490, and 41P 58129. Together, applications 41P

30114262 and 41P 30116656 (Change Applications) seek to change the use of up to 2.690 GPM for a total volume up to 1124.90 AFY. Change Applications PDG at 4. The PDGs were publicly noticed pursuant to §85-2-307, MCA, and Objector timely filed valid objections to all three applications. Specifically, DNRC determined that Objector was entitled to challenge the Permit Application PDG on the grounds of legal and physical availability of water, adverse effect, and possessory interest, and to challenge the Change Applications PDG on the grounds of adverse effect and possessory interest. DNRC Validity Determinations of May 11, 2021.

The contested case proceedings triggered by Objector's valid objections were assigned to Hearing Examiner David Vogler, who presided over various pre-hearing matters, including two pre-hearing motions filed by Objector. Specifically, in separate orders both dated November 3, 2021, Hearing Examiner Vogler denied Objector's contested motions to Compel and Exclude Certain Witnesses, and for Summary Judgment Regarding Place of Use. Shortly thereafter, this case was assigned to me for further proceedings in light of Hearing Examiner Vogler's impending retirement. On November 5, 2021, Objector filed an Emergency Motion to Certify to the Director and Stay Proceedings, which Applicant opposed. With hearings on the Permit Application and Change Applications already set for November 10, 2021, and November 16, 2021, respectively, I denied the motion to stay by Order of November 9, 2021, and in that same Order determined to hold the motion to certify in abeyance while I conducted the then-scheduled hearings. At the conclusion of the second hearing, I discussed the state of the record with the parties and incorporated by reference the application files maintained by DNRC and the evidence introduced in connection with each application into the record of the other applications.[1] I formalized this finding in a post-hearing Order I issued on December 7, 2021, in which I also denied Objector's Motion to Certify. The evidentiary record closed for all three of the above-captioned applications on January 7, 2022,[2] and as I indicated in that December 7 Order that I would, I now issue this

1. At both hearings, Objector moved to exclude portions of the DNRC application files from the record. I denied both objections. Trans. 1 at 6:6-11:2; Trans. 4 at 6:20-7:4. (Applicant had the recordings of the two hearings transcribed, served copies of the transcripts on Objector, and submitted copies to the Office of Administrative Hearings contemporaneously with filing its Proposed Findings of Fact and Conclusions of Law. I find the transcripts, which are broken into four volumes, three covering the hearing of November 10, 2021 (at which certain technical difficulties were experienced that caused the recordings to be broken up into multiple files), and the fourth of the hearing of November 16, 2021, to be accurate renditions of the recordings and will cite to them throughout this order instead of to the recordings.

2. On January 6, 2022, Objector filed an unopposed motion to supplement the record, seeking the inclusion of a letter and its enclosures that were referenced in an e-mail from James Slayton to Matt Miles, which e-mail is part of the file for Change Application 41P 30114262 at page 467. I had previously been under the impression that the letter and attachment were already included with the e-mail in that file, but since they apparently had been inadvertent omitted, I GRANT Objector's motion to supplement.

single Final Order, though where necessary I address aspects of the Permit Application and Change Applications separately.

LEGAL STANDARD

Under Montana law, an applicant for a new beneficial water use permit always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the applicant a new beneficial use permit. *Bostwick Properties v. DNRC*, 2013 MT 48, ¶ 18, 369 Mont. 150, 296 P.3d 1154 (2013).[3] Consequently, in connection with the Permit Application, Applicant must show that:

1) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;
2) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested;
3) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
4) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
5) the proposed use of water is a beneficial use; and
6) 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.

Section 85-2-311(1)(a)-(e), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's PDG of the Permit Application reflects DNRC's preliminary determination that Applicant has proven those criteria by the requisite standard.

As with a permit application, an applicant for a change in use authorization always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-402(2), MCA, are satisfied before DNRC may issue the applicant a change authorization. *In re Royston,* 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991).[4] Consequently, in connection with the Change Applications, Applicant must show that:

3. A permit applicant need only demonstrate that the criteria of § 85-2-311(1)(f)-(h), MCA, are satisfied if a valid objection raising those grounds is filed. § 85-2-311(2), MCA. No such valid objections were filed in connection with Applicant's Permit Application.
4. A change applicant need only demonstrate that the criteria of § 85-2-402(2)(f)-(g), MCA, are satisfied if a valid objection raising those grounds is filed. § 85-2-402(3), MCA. No such valid objections were filed in connection with Applicant's Change Applications.

1) the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued;
2) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
3) the proposed use of water is a beneficial use; and
4) 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.

Section 85-2-402(2)(a)-(d), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's PDG of the Change Applications reflects DNRC's preliminary determination that Applicant has proven those criteria by the requisite standard.

The issuance of DNRC's PDGs proposing to grant the three applications does not relieve Applicant of its obligation to prove that the applicable criteria are satisfied. It does, however, have the effect of shifting the burden of production to Objector to demonstrate that Applicant failed to satisfy its burden on the criteria at issue in the valid objections. Because Applicant retains the burden of proof as to the criteria, Applicant may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing. *See generally*, *Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (2005). In that case, MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *Id.* ¶ 2 (*see* § 26-1-401, MCA ("[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence."); § 26-1-402, MCA ("[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.")).

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UNCONTESTED CRITERIA

Because no valid objections were filed as to the adequacy of the means of diversion and the beneficial nature of the proposed use of water for the Permit Application, and because there is no evidence in the record that would cause me to revisit DNRC's PDG as to those two criteria, I find that Applicant has met its burden as to those two criteria for the reasons set forth in the Permit Application PDG, whose relevant terms are incorporated herein by reference. Permit Application PDG at ¶¶ 60-87.

Similarly, because no valid objections were filed as to the adequacy of the means of diversion and the beneficial nature of the proposed use of water for the Change Applications, and because there is no evidence in the record that would cause me to revisit DNRC's PDG as to those two criteria, I find that Applicant has met its burden in regard to those two criteria for the reasons set forth in the Change Applications PDG, whose relevant terms are incorporated herein by reference. Change Applications PDG at ¶¶ 21-37, 50-53.

APPEARANCES AND WITNESSES

At both the Permit Application hearing on November 10, 2021, and the Change Applications hearing on November 16, 2021, Applicant was represented by counsel Abigail St. Lawrence, and Objector was represented by counsel Jack Connors. At the Permit Application hearing, Objector called as witnesses Town of Kevin Mayor Bob Fagan, Town of Kevin Councilperson Rick Rice, City of Shelby Finance Officer Jade Goroski, and City of Shelby Mayor Gary McDermott. Applicant called no witnesses at that hearing. At the Change Applications hearing, Objector called as witnesses Town of Kevin Mayor Bob Fagan and Town of Kevin Councilperson Rick Rice, and Applicant called City of Shelby Finance Officer Jade Goroski. Both parties cross-examined the others' witnesses at both hearings.

EXHIBITS

In addition to the administrative records maintained by DNRC for the Permit Application and the Change Applications, the transcripts of the hearings commissioned by Applicant, the video and audio recordings of the hearings, and the document identified in footnote 2 above, the record in these cases include the following exhibits offered by Objector that I admitted at the hearings:

1) **Exhibit O-A**: Water Reservation File 41P 71891 and update to file as per the scanned documents available on the DNRC website and the Water Supply Study for the City of

Shelby, Montana dated May 1984 by Thomas, Dean & Hoskins, Inc., Engineering Consultants;

2) **Exhibit O-B**: the Final Order *In the Matter of the Application for Beneficial Water Use Permit 41P -105759 by Sunny Brook Colony* dated May 23, 2001;
3) **Exhibit O-C**: a one-page map from Application No. 41P 30117451 with markings by Mayor Fagan and Councilperson Rice placed on the map during hearing testimony; and
4) **Exhibit O-D**: the administrative records of Applications. No. 41P 30072725 and 30072726 as the same are maintained by DNRC.

I also admitted Objector's **Exhibit O-M** *sua sponte* by Order of January 7, 2022, after a diligent search of the record by Hearings Assistant Jamie Price revealed that the document (a six-page memo from KLJ Engineering called Shelby Wellfield Improvements, Supply and Treatment Capacity, January 2020, as well as a cover e-mail, dated February 4, 2020, transmitting that memo from Rick Duncan to Matt Miles) had been inadvertently omitted from the official versions of DNRC's Change Application files. Objector had referenced that exhibit at the hearing on November 16, 2021 but had declined to proffer it for admission as the parties and I were all at that time under the mistaken impression that the document was already included in the administrative records maintained by DNRC for the Permit Application and the Change Applications. The remainder of the exhibits Objector proffered at the hearings were either withdrawn in the face of Applicant's objections or rejected by me as duplicative of materials already in the record. Applicant did not proffer any exhibits of its own for introduction at the hearings.

CONTESTED CRITERIA

I. Physical Availability – Permit Application only.

Findings of Fact

1. In connection with the Permit Application, Applicant commissioned an aquifer test as well as drawdown and yield tests to assess the effects of the proposed new appropriation on the Marias River Alluvium Aquifer, which DNRC utilized as part of its analysis of the physical availability of water for the proposed new appropriation. Permit Application PDG at ¶¶ 12-24. DNRC determined that the aquifer interfaced with the Marias River and, consistent with DNRC practice as memorialized in an April 19, 2019, Technical Memorandum: Physical and Legal Availability of Groundwater, consequently expanded its physical availability analysis to include

water that could be induced to the proposed point of diversion due to the aquifer's hydraulic connection with the Marias River. *Id.* at ¶¶ 25-30. Based on its technical analysis, DNRC concluded that water was physically available for the proposed new appropriation. *Id.* at ¶ 31.

2. Objector has adduced no hydrologic data to countermand this conclusion. Rather, it points mainly to selective quotations from the record to justify its assertion that insufficient water is physically available to satisfy the proposed new appropriation in conjunction with existing water demands. *See* Objector's Proposed Findings of Fact and Conclusions of Law at 14-16, ¶¶ 63, 65-78. Yet a careful reading of Objector's citations in context illustrates that the physical availability limitations Objector posits in fact relate to issues with the capacity of the *wells* Applicant has had available at various points in time, not to shortfalls in the aquifer's ability to deliver water to the wellfield that serves as the Permit Application's proposed point of diversion. *See*, *e.g.*, Exhibit O-M at 3, 7; Exhibit O-A at 19-20, 38-39.[5]

3. In further support of its contention of a lack of physical availability, Objector points to Permit Application hearing testimony from Mayor Fagan regarding a water shortfall Applicant experienced in 2021. Objector's Proposed Findings of Fact and Conclusions of Law at 14, ¶ 64. But the testimony cannot bear the weight Objector would assign it, as it again relates to factors other than the physical availability of water:

> Q [Mr. Connors]: And is it your understanding of why [Applicant] ran out of water this year?
> A [Mayor Fagan]: Yes.
> Q: And how do you know [Applicant] ran out of water?
> A: Simple fact it was all over the news….
> Q: And did you ever talk to anyone who has personal knowledge of what occurred?
> A: Yes, I have.
> Q: And what did you learn?
> A: They said their software went bad. They checked and it showed there was water in the tank but there wasn't.

Fagan Testimony, November 16, 2021, Trans. 1 at 45:16-46:6.

4. Testimony adduced by both Objector and Applicant at the Permit Application hearing from Mr. Goroski and by Objector from Mayor McDermott, both of whom had personal knowledge of

5. Section 2-4-623(4), MCA, provides that when parties submit proposed findings of fact and conclusions of law, as that parties in this case have done at my request, my "decision must include a ruling upon each proposed finding." The Montana Supreme Court has held that this provision "does not require a separate, express ruling on each required finding as long as the agency's decision and order in such proposed findings are clear[.]" *State ex rel. Montana Wilderness Association v. Board of Natural Resources and Conservation*, 200 Mont. 11, 40, 638 P.2d 734, 749 (1982) (citing *Montana Consumer Counsel v. Public Service Commission and Montana Power Co.*, 168 Mont. 180, 541 P.2d 770 (1975)). Thus, while I explicitly address certain of Objector's specific proposed findings in this Order, there are others that I implicitly reject as being inconsistent with the findings I lay out and the conclusions I draw therefrom.

the situation, amplified on Mayor Fagan's testimony. Applicant's 2021 water supply issue related to a glitch in the telemetry equipment monitoring the water level in Applicant's water storage tanks. That error caused the booster pumps that normally move water through Applicant's system from the wellfield to the storage tanks to stay off in a manner that let the storage tanks drop low enough to cause water supply problems. Goroski Testimony, November 10, 2021, Trans. 1 at 154:6-155:14, and Trans. 2 at 4:23-17:22; McDermott Testimony, November 10, 2021, Trans. 3 at 24:19-31:13.

5. Nothing in the record supports a finding that Applicant's 2021 water delivery issues were due to the physical lack of available water.

Conclusions of Law

6. DNRC's practice in reviewing groundwater applications of evaluating both aquifer and surface sources in assessing the physical availability of water when there is evidence of hydraulic connection between the two sources is consistent with Montana Supreme Court precedent. *See Montana Trout Unlimited v. DNRC*, 2006 MT 72, ¶¶ 40-42, 331 Mont. 483, 133 P.3d 224.

7. Objector has failed to satisfy its burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that water is physically available at the proposed point of diversion. I have no basis to disturb the conclusion in the Permit Application PDG that Applicant has met its burden as to this criterion. *See* Permit Application PDG at ¶¶ 32-35.

II. Legal Availability – Permit Application Only

Finding of Fact

8. The Permit Application PDG spells out the process DNRC undertook to analyze the net depletion the proposed new use might have on hydraulically connected surface water. Permit Application PDG at ¶¶36-42.

9. Based on this analysis, DNRC found as a matter of fact that water is legally available for the proposed new use. Permit Application PDG at ¶43.

10. Objector adduced no evidence at hearing calling into question the legal availability of water for the new use proposed in the Permit Application. Nor has it, in its post-hearing briefing or at any other point in this case, identified any record evidence capable of doing so. Objector does suggest that DNRC erred in its legal availability analysis by failing to include Applicant's existing

water rights in its analysis of legal demands. Objector's Proposed Findings of Fact and Conclusions of Law at 30, ¶ 36. But this contention is predicated heavily on Objector's assertion that water is not physically available for the proposed new use, *id.*, and I have found to the contrary for the reasons set forth above.

Conclusions of Law

11. Montana law provides that DNRC's legal availability analysis must consider the following factors:

a. Identification of physical water availability;
b. Identification of existing legal demands of water rights 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 of water rights, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands of water rights on the supply of water.

Section 85-2-311(1)(a)(ii), MCA; *see also Clark Fork Coalition v. DNRC*, 2021 MT 44, ¶ 40, 403 Mont 225, 481 P.3d 198 (2021) ("the question of whether the quantum of water at issue is legally available is specifically a function of only two considerations—physical availability of that quantum of water at the point of proposed diversion, based on pertinent hydrological and geological evidence, and existing legal demands on the subject source of supply throughout the potentially impacted area") (internal quotations omitted).

12. Objector has failed to satisfy its burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that water is legally available at the proposed point of diversion. I have no basis to disturb the conclusion in the Permit Application PDG that Applicant has met its burden as to this criterion. *See* Permit Application PDG at ¶¶ 44-48.

III. Adverse Effect – All Applications

Finding of Fact

13. In the Permit Application PDG, DNRC explained that there are no water rights that would be adversely affected by Applicant's proposed new use and that, with the addition of two conditions imposed by DNRC in the Permit Application PDG, Applicant's plan for the proposed new use would be sufficient to avoid any adverse effects. Permit Application PDG at ¶¶ 50-52.

14. Based on this analysis, DNRC found as a matter of fact that, with the addition of the two conditions imposed by DNRC, the proposed new use would not cause any adverse effects. *Id.* at ¶ 52.

15. DNRC determined that Applicant demonstrated in the materials submitted in support of the Change Applications that its historical use of the water right statements of claim and provisional permits whose points of diversion and places of use Applicant seeks to change sums to a cumulative maximum amount of 2,895 GPM up to 1,124.90 AFY. Change Applications PDG at ¶¶ 3-8.

16. DNRC further determined that Applicant provided a plan demonstrating how water use as contemplated in the Change Applications would neither increase historical consumptive use nor cause adverse effect to other appropriators. *Id.* at ¶¶ 13-18.

17. Objector contends that the historical volume DNRC proposes to approve in the Change Applications PDG is overinflated because it "is based on a series of inaccurate and outdated estimates." Objector's Proposed Findings of Fact and Conclusions of Law at 17, ¶ 79. Objector introduced no evidence at the hearing in support of this proposition, but it points to record evidence indicating that the maximum use of 1,124.90 AFY was derived by using Applicant's 1960 population of 4,107 people and multiplying that head count by an estimated use rate of 250 gallons per person per day (GPCPD). *Id.* at 17, ¶ 81 (citing Change Applications PDG at ¶ 4). Objector takes issue with this methodology, in part on the ground that Applicant's population has decreased from that 1960 peak. *Id.* at ¶ 82 (citing the DNRC file for change application 41P 30072725 (Change File 41P 30072725), which is part of Exhibit O-D, at 205).[6] Objector also believes that 250 GPCPD overstates Applicant's actual intensity of water use. *Id.* at 17-18, ¶¶ 83-84 and 87-88 (record citations to Change File 41P 30072725 at 165, 205, and Exhibit O-M at 32 and 120).

18. While Objector may be correct about the decline in population within Applicant's city limits from its 1960 peak, Objector ignores the fact that the total population Applicant now works to serve has increased well beyond 4,017 people. Change File 41P 30072725 at 205-206. Indeed, a primary objective of the Change Applications is to add additional communities to Applicant's service area. *See* Change Applications PDG at 8-9, ¶ 10.

19. Objector's invocation of GPCPD figures from Exhibit O-M appear similarly selective. The

6. In 2017, in change applications 41P 30072725 and 41P 30072726, Applicant applied to permanently change the points of diversion and temporarily change the places of use of the nine water rights that are also at issue in the Change Applications. DNRC granted those applications, though they have not yet been perfected. *See* Change Applications PDG at ¶ 2.

water reservation application, filed in 1989, focused on water use within Applicant's city limits "in addition to a small number of people living on the fringes of the city and to the users of water hauled from the city standpipe." Exhibit O-M at 1. There is no evidence in the record that allows me to meaningfully assess the probative value of the GPCPD statistics referenced in the water reservation application in relation to the analysis DNRC conducted to arrive at the historical use volumes it used in granting Applicant's 2017 change applications – that 2017 analysis being what DNRC relies on to justify the historical use figures it includes in the Change Applications PDG. *See* Change Applications PDG at 7-8, ¶¶ 4, 8.

20. Objector also asserts that "the PDGs are based on flawed assumptions and must be disregarded." Objector's Proposed Findings of Fact and Conclusions of Law at 22, ¶ 101. According to Objector, these flawed assumptions are that Applicant's use of water was presumed to be 100% consumptive and to have a constant year-round rate of use when neither has historically been the case. *Id.* at 20-21, ¶¶ 93-100. This claim is not credible. DNRC deployed these assumptions in the Permit Application PDG as part of its legal availability analysis. Permit Application PDG at 19, ¶¶ 38-39. In the context of an application for a new use, these are conservative assumptions designed to ensure that DNRC does not underestimate the additional demand a proposed new appropriation for municipal use might put on a source.[7] They provide no basis for setting aside the Permit Application PDG. DNRC made no similar rate-of-use assumption in the Change Applications PDG, instead explaining that, pursuant to Applicant's plan, "[t]here is no change in the historic[al] timing of diversion…." Change Applications PDG at ¶ 16. Indeed, a primary reason that Applicant filed the two separate change applications DNRC granted in 2017 – a practice it has carried forward into the instant Change Applications – is because most but not all its water rights have year-round periods of use, so it divided the ones that did from the ones that didn't into separate change applications. *See* Change File 41P 30072725 at 262.

21. The only evidence Objector identifies to support its contention that DNRC erred in determining "that the diverted historic[al] volume for the diverted municipal use is 100% consumed[,]" Change Applications PDG at ¶ 16, is a reference at page 165 of the claim file for Change Application 41P 30116656 to information Applicant submitted as part of its water reservation application (in the record as Exhibit O-A) about a sewage lagoon system that discharged water to a tributary of the Marias River. Objector's Proposed Findings of Fact and

7. Determination of historical consumptive use is of course entirely inapposite to a new permit since there is no history of use with such an application.

Conclusions of Law at 21, ¶ 96.[8] Yet the very paragraph of the claim file for Change Application 41P 30116656 from which Objector cherry picks this reference goes on to say that "most flow is depleted by evaporation in the lagoons or by evapo-transpiration [sic] by vegetation in Medicine Rock Coulee and that discharges generally do not reach the Marias River." Change Application 41P 30116656 at 165. Given that the hydraulic connection between the wellfield from which Applicant diverts its water and a surface source is to the Marias River itself, Permit Application PDG at ¶¶ 26-28, and that the only witness who testified about return flows from Applicant's sewage lagoon system conceded that his knowledge was based only on reading the same document to which Objector now cites,[9] I find Objector's assertion of error to be wholly unsupported by the evidence in the record.

22. The gravamen of Objector's adverse effect objection, however, is that the granting of the above-captioned applications will lead to Objector being priced out of the water supply business, put at risk of having to abandon its water rights for protracted non-use, or both. Objector's Proposed Findings of Fact and Conclusions of Law at 23, ¶¶ 110-111. That is, Objector asserts, the grant of the above-captioned applications will cause a chain reaction beginning with Applicant capturing the business of bulk water purchasers who might otherwise buy water from Objector, which will lead to a decline in Objector's revenues, which will compromise Objector's ability to utilize and maintain its water system, which will either require significant water rate hikes or could lead to Objector's abandonment of its water rights. *Id.* at 22-23, ¶¶ 105-111 (citing generally to Mayor Fagan testimony from the hearing of November 10, 2021). "In summary," Objector asserts, its "interests would be adversely affected if the [a]pplications were granted." *Id.* at 24, ¶ 113.

23. Mayor Fagan was Objector's primary witness to testify to this theory. *See* Fagan testimony, November 10, 2021, Trans. 1 at 69:18-77:2. This testimony was replete with words of conditionality - "maybe", "if", "would probably", "might", "good chance", "time will tell", "could happen." *Id.* at 70:2-4; 72:19-21; 73:18; 74:8; 74:12; 75:16.

24. I am not persuaded that Objector's interest in preserving its bulk water sale customer base is the sort of interest protected by the adverse effect criterion of § 85-2-311(1)(b) or § 85-2-402(2)(a), MCA. And even if I assume *arguendo* that it is, I find the connections Objector seeks to draw between the granting of the above-captioned applications and constraints on its ability to exercise its existing water rights to be overly speculative and attenuated.

8. Objector in fact claims that this is "the only evidence in the record on this point[.]" Objector's Proposed Findings of Fact and Conclusions of Law at 21, ¶ 96.

9. Fagan testimony, November 16, 2021, Trans. 4, at 73:7-22.

Conclusions of Law

A. Permit Application PDG

25. Section 85-2-311, MCA, requires (among other things) an applicant for a new use permit to prove by a preponderance of the evidence that the proposed new use will not adversely affect a prior appropriator's water right(s). That subsection specifically explains that "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*." *Id.* at § 85-2-311(1)(b), MCA (emphasis added). The term "adverse effect" is not defined in the Montana Water Use Act, but DNRC has promulgated a rule guiding the discharge of its duties in administering the statutory language. ARM 36.12.1706. This rule requires a permit applicant to show that the "diversion and use of water and operation of the proposed project can be implemented and properly regulated *during times of water shortage* so that the water rights of prior appropriators will be satisfied." *Id.* at 36.12.1706(1) (emphasis added). The plain text of both the statute and the rule demonstrates that the primary, if not exclusive intent, of the adverse effects analysis is to ensure that a newly permitted use will not impair the ability of a senior appropriator to obtain the water necessary to satisfy its pre-existing right(s).

26. In the Permit Application PDG, DNRC determined that Applicant had satisfied its burden to prove by a preponderance of the evidence that none of the applications would cause adverse effects. Permit Application PDG at ¶¶ 50-59.

27. Objector's only argument against the Permit Application PDG on adverse effect grounds is that the development of that water in conjunction with a grant of the Change Applications will cause the parade of horribles identified in ¶ 20 above. This is not an allegation that approval of the Permit Application could deprive Objector of access to any water necessary to satisfy its more senior water rights. Moreover, even were the adverse effect criterion set forth in § 85-2-311(1)(b), MCA, construed to sweep more broadly than the risk of direct limitation of access to water, I do not see – and Objector has pointed me to no authority illustrating – how the sort of pecuniary impact it asserts as its basis for injury constitutes the sort of adverse effect capable of preventing an applicant from satisfying its burden of proof as to that criterion. Essentially, Objector would have me find that any new water development that might put a new user in competition with an existing user – to grow hay (as Applicant points out in its Proposed Findings of Fact and Conclusions of Law at 8-29, ¶ 34); to mine (since the development of new mineral resources might impact the prices for the commodities the prior user mines); to engage in commercial or

industrial uses that might introduce competing products into the marketplace; the litany could be endless – is sufficient to block an applicant from obtaining a new use permit. I decline this invitation.

28. Objector has failed to satisfy its burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that the water rights of a prior appropriator will not be adversely affected by a grant of the Permit Application. I have no basis to disturb the conclusion in the Permit Application PDG that Applicant has met its burden as to this criterion. *See* Permit Application PDG at ¶¶ 53-59.

B. Change Applications PDG

29. Section 85-2-402, MCA, requires (among other things) an applicant for a new change in use authorization to prove by a preponderance of the evidence that the proposed change will not adversely affect "the *use* of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3 [of Title 85, Chapter 2]." § 85-2-402(2)(a), MCA (emphasis added). DNRC has also promulgated a rule to guide its administration of that statute. ARM § 36.12.1903. That rule explains that "[l]ack of adverse effect for change applications is generally based on the applicant's plan showing the diversion and use of water and operation of the proposed project will not exceed historic[al] use, and can be implemented and properly regulated." *Id.* at § 36.12.1903(1).

30. In the Change Applications PDG, DNRC determined that Applicant had satisfied its burden to prove by a preponderance of the evidence that none of the applications would cause adverse effects. Change Applications PDG at ¶¶ 9-20, 39-49

31. To the extent that the zone of interests susceptible to adverse effects analysis is identical in the permit criteria and the change criteria (§ 85-2-311(1)(b) and § 85-2-402(2)(a). MCA), Objector has similarly failed to satisfy its burden of production to provide credible evidence that Applicant has failed to prove by a preponderance of the evidence that there will be no adverse effect to "use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued" by a grant of the Change Applications.

32. There may be enough differences between the language of § 85-2-311(1)(b) and § 85-2-402(2)(a), MCA, however, to give rise to the possibility that the latter statute contemplates a category of adverse effects on use broader than the inability of the non-applicant appropriator to

take water in priority in the same manner as they were entitled to prior to the grant of a change authorization. *See*, *e.g.*, *City of Bozeman v. DNRC*, 2020 MT 214 at ¶ 15, 401 Mont. 135, 471 P.3d 46 (2020). Appellant in that case made an argument essentially similar in kind if not degree to the one advanced by Objector here. There, the adverse effect question arose regarding a change application filed by a private water provider that would have potentially put that private provider in competition with the City to serve a given customer base. *See id.* at ¶¶ 4-5. The Montana Supreme Court found that Bozeman lacked in the disputed service area a cognizable interest in water of the sort protected by § 85-2-402(2)(a), MCA, and resolved the case on that ground without reaching a conclusion on whether Bozeman having to contend with a competing water provider could be an adverse effect within the meaning of the statute. *Id.* at ¶ 15. But the opinion included a footnote which could be read to imply that the Court did not find the possibility of adverse effect based on competing service areas wholly beyond the pale. *Id.* at ¶ 15 n.2.

33. Although not directly controlling (not least because it was interpreting Montana's pre-1973 corpus of water law), *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972), is instructive here. In that case, one of the grounds on which an appropriator opposed another appropriator's change in use was that the change would increase the first appropriator's share of water commissioner costs. The Montana Supreme Court made quick work of this argument because "the expense of employing a water commissioner does not constitute the burden or detriment required to be proven by plaintiffs in order to prevail." *Id.* at 82, 495 P.2d at 192. If the expense of a water commissioner to distribute water among appropriators is not a credible ground on which to base an objection to a change, then what boils down to a complaint about the financial effects of competition seems even further afield. Thus, so long as I am correct that this principle is an accurate interpretation of Montana law, I may again conclude that Objector has failed to bear its burden of production.

34. But I do not need to ground my conclusion here on a holding that no sort of financial impact could ever qualify as an adverse effect under § 85-2-402(2)(a), MCA. This is so because Objector's theory in this case is so speculative, and relies on such an attenuated chain of hypothesized future occurrences, that I do not find the testimony adduced to support it remotely capable of satisfying Objector's burden of production as to the adverse effect criterion of the Change Applications. I have no basis to disturb the conclusion in the Change Applications PDG that Applicant has met its burden as to this criterion. *See* Change Applications PDG at ¶¶ 39-49.

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IV. Possessory Interest – All Applications

Finding of Fact

35. In the Permit Application PDG and the Change Applications PDG, DNRC provides the same three-sentence recitation regarding Applicant's satisfaction of the possessory interest requirement of the applicable statutes (§ 85-2-311(1)(e) and § 85-2-402(2)(d), MCA, respectively):

> This application[10] is for supply of water to the City of Shelby including Shelby South, Prison, Humic facility along with the communities of Devon, Dunkirk, Ethridge, and Big Rose Colony, City of Cut Bank, Oilmont, Galata and the Nine Mile system. The Applicant has established water service agreements through contracts and have provided copies to the Department. It is clear that the ultimate user will not accept the supply without consenting to the use of water. ARM 36.12.1802.

Permit Application PDG at ¶ 88; Change Applications PDG at ¶ 38.

36. This language does not state (though it certainly implies) that the water service agreements that Applicant has established through contracts are at least with Devon, Dunkirk, Ethridge, Big Rose Colony, City of Cut Bank, Oilmont, Galata, and the Nine Mile system. Yet copies of such agreements do not appear to be in the DNRC claim files specifically denominated for either the Permit Application or the Change Applications.

37. Versions of contracts between Shelby and at least Devon, Etheridge, and Big Rose are in the file for Change Application 41P 30072725. Exhibit O-D at 140-163. Mayor McDermott testified that Shelby also has contracts with the North Central Montana Regional Water Authority (NCMRWA), the City of Cut Bank, and Oilmont, though not with Galata. Trans. 3 at 7:10-8:2. Mayor McDermott's testimony also indicates that NCMRWA has agreements with both Shelby and Nine Mile such that at least some of the water Shelby might provide to NCMRWA ultimately goes to Nine Mile for delivery to end users. *Id.* at 7:16-23. Mr. Goroski testified similarly. Trans. 1 at 143:9-17 and 144:11-145:13.

38. DNRC's analysis of the possessory interest criterion in the Permit Application PDG and the Change Applications PDG is extremely cursory and its findings on this point in both PDGs are not substantiated by specific references to application materials or other information in the possession of the Department.

39. Objector contends that Applicant cannot satisfy the possessory use criteria of either § 85-2-311(1)(e) or § 85-2-402(2)(d), MCA, because there is no evidence in the record that Applicant

10. The Change Applications PDG begins (appropriately) with the words "These applications". Otherwise, the two paragraphs are entirely identical.

itself has a possessory interest in at least the places of use in Galata, Oilmont, and Nine Mile identified in the Permit Application and the Change Applications or that it has the written consent of the owners of those places of use. Objector's Proposed Findings of Fact and Conclusions of Law at 12-14, ¶¶ 50-61.

40. Applicant concedes that it does not have a possessory interest in all of the places of use identified in the Permit Application and the Change Applications or the written consent of all such owners. Applicant's Proposed Findings of Fact and Conclusions of Law at 21, ¶ 14. It asserts, however, that the totality of the evidence is that it will only provide water to willing end users. *Id.*

41. The water contract documents in the record and the testimony of Mayor McDermott and Mr. Goroski speak to the willingness of water providers to purchase water from Applicant to provide to their end users. There is no evidence in the record to indicate that Applicant will or can force delivery of water on the unwilling. Indeed, Objector's primary adverse effect theory is grounded on its concern that water customers will *voluntarily* turn to Applicant in preference to Objector to obtain water. *See* ¶ 22, *supra*.

Conclusions of Law

42. Objector is correct that there is no exception for municipalities to the possessory interest requirement set forth in §§ 85-2-311(1)(e) and 85-2-402(2)(d), MCA. *See* Objector's Proposed Findings of Fact and Conclusions of Law at 29, ¶ 28. Objector is wrong, however, that ARM 36.12.1802(1)(b) purports to provide one. Objector's Proposed Findings of Fact and Conclusions of Law at 29, ¶ 28. Rather, ARM 36.12.1802(1)(b) explains that a municipality may demonstrate compliance with the statutory possessory interest requirements if "it is clear that the ultimate user will not accept the supply [provided by the municipality] without consenting to the use of water on the user's place of use…." *Id.*

43. ARM 36.12.1802(1)(b) reflects a reasonable interpretation of the possessory use criterion on the facts of an application related to the provision of municipal water. The issuance of a rule of this sort is a proper exercise of DNRC's authority to promulgate rules to implement the provisions of §§ 85-2-311 and 85-2-402, MCA. *See* § 85-2-311(7); § 85-2-402(14), MCA. ARM 36.12.1802 was promulgated and adopted in 2004 as part of an extensive rulemaking effort regarding "correct and complete applications, department actions, and standards regarding water rights." 2004 MAR 24-12/16/04, p. 3036.

44. I am not satisfied that the analysis conducted in the Permit Application and Change Applications PDGs is sufficient to demonstrate that Applicant has satisfied its burden to prove by

a preponderance of the evidence that it has a possessory interest in all of the places of use identified in the above-captioned applications. But I do conclude that the evidence in the record, particularly as described in ¶¶ 36 and 40, *supra*, is sufficient for me to conclude that Applicant has indeed satisfied its burden as to this criterion.

CONCLUSION

Objector has failed to bear its burden of production as to any of the valid objections it filed in connection with the Permit Application and the Change Applications. Applicant has met its burden of proof to show by a preponderance of the evidence that it has satisfied all of the applicable criteria necessary to warrant a grant of the Permit Application and the Change Applications.

FINAL ORDER

Application for Beneficial Water Use Permit No. 41P 30117451 is GRANTED as proposed in the Permit Application PDG.

Change Application No. 41P 30114262 is GRANTED as proposed in the Change Application PDG.

Change Application No. 41P 30116656 is GRANTED as proposed in the Change Application PDG.

NOTICE

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

DATED this 30th day of March 2022.

/Original signed by Jay D. Weiner/
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER was served upon all parties listed below on this 30th day of March 2022 by first class United States mail and/or by electronic mail (e-mail).

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