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- On November 8, 2023, the Applicant delivered to the Glasgow Regional Office pages of application form intended to replace the original application submitted on October 2, 2023. These pages documented that the requested volume has been revised to 600 AF.
- On November 16, 2023, the Applicant delivered to the Glasgow Regional Office a signed water purchase agreement dated November 15, 2023, between the Applicant and Hydra MT, LLC for up to 600 AF/year.

Information within the Department's Possession/Knowledge

- USGS gaging station records (Station # 06185500, Missouri River near Culbertson MT) from April 1958 to September 2023.
- 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).

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Missouri River, by means of a pump, from January 1 to December 31 at 3000 GPM (6.68 CFS) up to 600 AF, from a point in NENWNW Section 19, Township (T) 27N, Range (R) 57E, Roosevelt County, for water marketing purpose from January 1 to December 31. The Applicant proposes to market the water for oil field development. The place of use (meter location) is located in NENWNW Section 19, T27N, R57E, Roosevelt County. The general service area for oil field development is approximately from the Missouri River to the northern line of T28N, and between Culbertson and Montana/North Dakota border, all within the State of Montana. See Figure 1.

Waterway Resources 40S 30161904

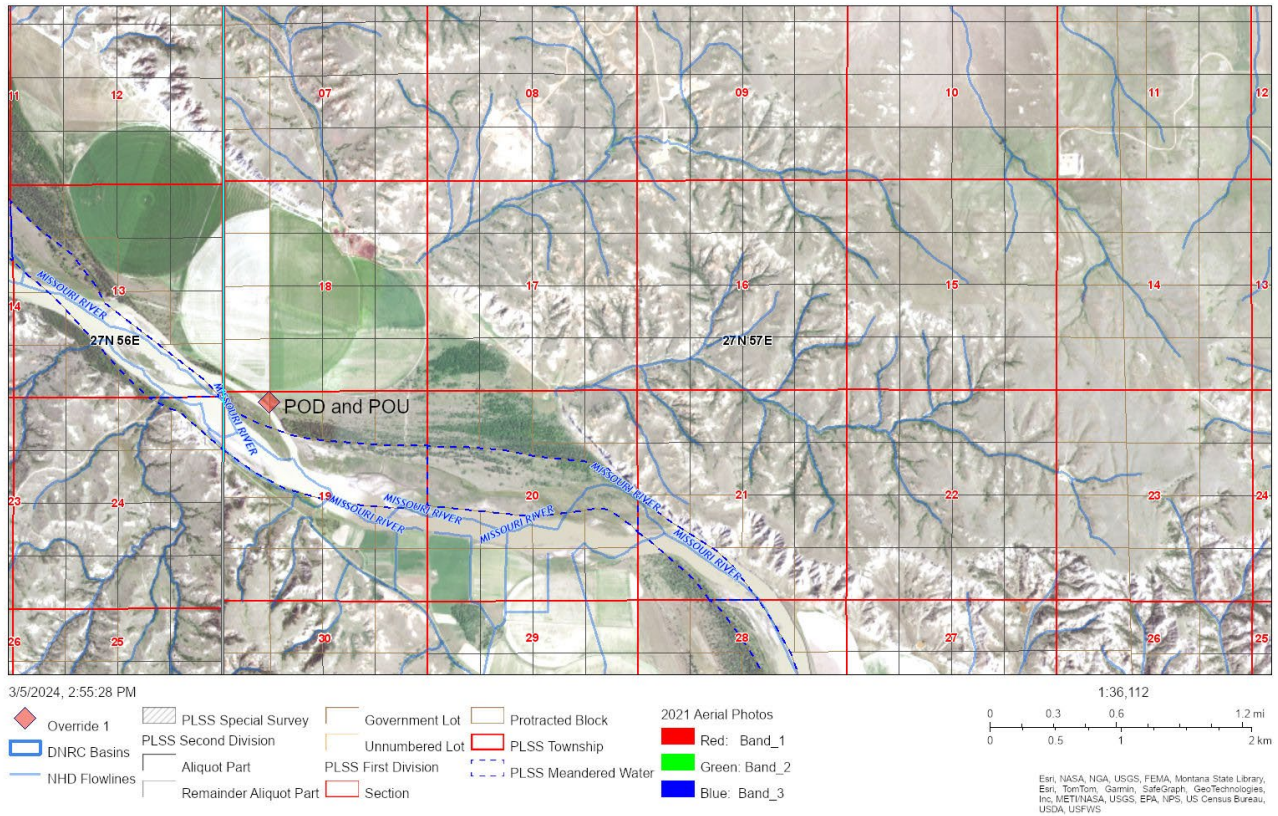


Figure 1: Proposed POD and POU of the project area.

2. Water will be pumped from the river and conveyed directly to the place of use by flexible 10-inch hose. The consumptive use of the proposed diversion is considered 100 percent consumptive.
3. Water sold under this Application will be used in the oil field industry. Water sales will be dependent on oil field activity during the year. In order to substantiate the beneficial use criteria and ensure that the requested flow rate and volume is not exceeded during years of high oil field activity, monitoring and flow rate reporting is necessary. The Applicant's design plans include the use of a totalizing flow meter installed at the diversion.
4. The Applicant provided a water purchase contract from Hydra MT, LLC water which included a condition stating that water purchased will be used in T27N, R57E, Roosevelt County, Montana. A condition which states that the water cannot be transported outside the

state will also be added to the permit to limit use of the water to within Montana. Depot access will be limited to valid contract holders through the landowner-controlled access.

5. This permit will not be supplemental to any other water rights nor share a place of use.

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

GENERAL CONCLUSIONS OF LAW

6. 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 . . .

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

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

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

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

(A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” Section 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181, ¶ 21. The Department is

required grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Id.* A preponderance of evidence is “more probably than not.” *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, 357 Mont. 438, 240 P.3d 628.

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

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

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

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

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

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

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

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

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

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

PHYSICAL AVAILABILITY

FINDINGS OF FACT

12. The Applicant is requesting a maximum flow rate of up to 3000 GPM (6.68 CFS) and a volume up to 600 AF annually from the Missouri River. The proposed point of diversion is located approximately 5 miles downstream from the USGS gaging station, Missouri River near Culbertson MT (USGS Station #06185500). The gaging station records provide the median of the mean monthly flow rates (CFS) for the Department to calculate physical availability. The median of mean monthly volumes are calculated by converting CFS to Acre-Feet (CFS X 1.98 x days per month).

13. Table 1 lists the existing water rights between the USGS gaging station #06185500 and the proposed point of diversion.

Table 1: Water rights between the USGS gaging station and the proposed POD.

Water Right Number	Flow Rate (CFS)	Volume (AF)	Twp, Rge & Sec	Period of Diversion
40S 30142623**	0.08	0.10	27N56E13	01/01 to 12/31
40S 301426244**	0.08	0.54	27N56E3	01/01 to 12/31
40S 186742 00*	2.89	300	27N56E13	04/15 to 10/19
40S 114654 00	2.7	451	27N56E13	04/01 to 10/15
40S 106990 00	4.2	636	27N56E11	04/15 to 10/15
40S 30142666**	0.08	0.07	27N56E3	01/01 to 12/31
40S 188167 00 ^a	0.13	--	27N56E14	01/01 to 12/31
40S 30123529**	0.10	13.44	27N56E13	01/01 to 12/31
40S 106915 00	3.9	520	27N56E13	04/15 to 10/15
40S 97742 00	2.67	542.7	27N56E13	05/01 to 09/30
40S 188166 00**, ^a	0.13	37.52	27N56E2	01/01 to 12/31
40S 1549 00	1.78	257.35	27N56E3	01/01 to 12/31
40S 188165 00 ^a	0.13	--	27N56E3	01/01 to 12/31
40S 137580 00**	0.08	0.54	27N56E13	01/01 to 12/31
40S 188168 00 ^a	0.13	--	27N57E18	01/01 to 12/31
40S 186739 00 ^a	0.13	--	27N56E11	01/01 to 12/31
40S 106914 00	5.1	804	27N56E13	04/15 to 10/15
40S 13498 00	2.22	324	27N56E13	05/01 to 10/01
40S 30071102	.02	1.25	27N56E13	04/01 to 10/31
40S 77646 00	0.08	365	27N56E13	01/01 to 12/31
Total	26.63	4253.51		

* Volume claimed in the statement of claim file

** Livestock-direct drinking flow rate is calculated as number of animal units at 30 gallons per day divided by 24 hours/day and 60 minutes/hour, plus 35 GPM, in accordance with DNRC permit manual. Volume is calculated as animal units drinking 30 gallons per day during the period of diversion. Flow rate and volume are carried to two decimal places to reflect quantities converted from gallons.

^a These water rights share the same animal units as 40S 188166-00. Volume is assigned to 40S 188166-00 only.

14. Since the requested point of diversion is downstream of the gaging station, the Department used Table 1 to determine the sum of monthly diversions by the existing water rights and subtracting these values from the median of mean flow values for the gaging station. The result is the median of mean monthly flow rate on the Missouri River physically available at the proposed point of diversion. Physical availability for January to December is displayed in Table 2 as the proposed period of diversion is year-round.

Table 2: Physical Availability Analysis of Missouri River from USGS Gage #06185500 to Proposed POD						
A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow Rate at Gage (CFS)	Median of the Mean Monthly Volume at Gage (AF)	Existing Water Rights from Gage to Proposed POD (CFS)	Existing Water Rights from Gage to Proposed POD (AF)	Physically Available Flow Rate at POD (CFS)	Physically Available Volume at POD (AF)
January	11,210	688,070	3	56	11,207	688,014
February	11,400	632,016	3	56	11,397	631,960
March	10,020	615,028	3	56	10,017	614,971
April	8,025	476,685	21	497	8,004	476,188
May	8,553	524,952	26	621	8,526	524,332
June	9,455	561,627	26	621	9,429	561,006
July	9,313	571,632	26	621	9,287	571,011
August	8,863	544,011	26	621	8,837	543,390
September	7,845	465,963	26	621	7,818	465,342
October	6,980	428,432	5	121	6,975	428,312
November	7,292	433,145	3	56	7,289	433,089
December	9,894	607,294	3	56	9,891	607,238

15. The Department finds that water is physically available in the amount requested (6.68 CFS and 600 AF) at the proposed point of diversion during the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

16. For this reach of the Missouri River from Fort Peck Dam to the Montana-North Dakota border, the Department has historically identified the area of potential impact as 5 or 6 miles downstream of the proposed point of diversion. This length is chosen because the River has substantial volume and tributaries do not contribute significant flow. This analysis for legal availability includes private water right users within 6 miles downstream of the proposed point of diversion, as well as Montana Fish, Wildlife & Park's instream flow reservation (40S 30017671).

17. There are 20 private water rights (legal demands) in the area of potential impact which may be affected by the proposed appropriation. Table 3 summarizes these legal demands. Monthly volumes for each water right were calculated by dividing the annual volume by the number of months in the period of diversion.

Table 3: Missouri River Downstream Users					
Water Right Number	Flow Rate (CFS)	Volume (AF)	Quarter Section	Twp, Rge & Sec	Period of Diversion
40S 186738 00**	0.14	42.56	N2SW	27N57E21	01/01 to 12/31
40S 137576 00**	0.08	1.28	NWSE	27N57E28	01/01 to 12/31
40S 30142622**	0.08	2.42	NE	27N57E33	01/01 to 12/31
40S 30142668**	0.08	0.07	NE	27N57E28	01/01 to 12/31
40S 30153305	1.50	210	NWNWSW	27N57E35	01/01 to 12/31
40S 186743 00	0.13	37.52	N2	27N57E19	01/01 to 12/31
40S 30132248**	0.08	16.80	NE	27N57E28	01/01 to 12/31
40S 30142629**	0.08	0.34	W2	27N57E19	01/01 to 12/31
40S 137592 00**	0.08	0.87	N2S2	27N57E20	01/01 to 12/31
40S 137594 00**	0.08	1.88	S2	27N57E34	01/01 to 12/31
40S 30073093	5.50	500.0	SESENE	27N57E28	01/01 to 12/31
40S 135792 00**	0.09	7.80	W2SWSW	27N57E27	01/01 to 12/31
40S 30113093	4.20	260	NWNWSW	27N57E35	01/01 to 12/31
40S 135791 00**	0.09	10.22	S2	27N57E34	01/01 to 12/31
40S 106914 00	5.10	804	NE	27N57E19	04/15 to 10/15
40S 171255 00*	15.59	1405	NESESE	27N57E20	04/15 to 10/19
40S 186742 00*	2.89	300	NE	27N57E19	04/15 to 10/19
40S 215560 00*	1.44	64	NENESW	27N57E19	04/01 to 11/04
40S 12708 00	8.02	1388	NWNWSW	27N57E35	04/15 to 11/15
40S 13498 00	2.22	324	NE	27N57E19	05/01 to 10/01

* Volume claimed in the statement of claim file.

**Livestock-direct drinking flow rate is calculated as number of animal units at 30 gallons per day divided by 24 hours/day and 60 minutes/hour, plus 35 GPM, in accordance with DNRC permit manual. Volume is calculated as animal units drinking 30 gallons per day during the period of diversion. Flow rate and volume are carried to two decimal places to reflect quantities converted from gallons.

18. Table 4 compares the physically available water with legal demands and shows the amount of water legally available for the proposed appropriation.

Table 4: Legal Availability Analysis of Missouri River in the Area of Potential Impact								
A	B	C	D	E	F	G		
Month	Physically Available Flow Rate (CFS)	Physically Available Volume (AF)	Existing Downstream Users (CFS)	Existing Downstream Users (AF)	FWP Instream Right (CFS)	FWP Instream Right (AF)	Legally Available Flow Rate (CFS)	Legally Available Volume (AF)
January	11,207	688,014	12	91	5,178	318,366	6,017	369,557

February	11,397	631,960	12	91	5,178	287,556	6,207	344,313
March	10,017	614,971	12	91	5,178	318,366	4,827	296,515
April	8,004	476,188	45	717	5,178	308,096	2,780	167,375
May	8,526	524,332	47	781	5,178	318,366	3,301	205,184
June	9,429	561,006	47	781	5,178	308,096	4,203	252,129
July	9,287	571,011	47	781	5,178	318,366	4,061	251,864
August	8,837	543,390	47	781	5,178	318,366	3,611	224,243
September	7,818	465,342	47	781	5,178	308,096	2,593	156,465
October	6,975	428,312	22	298	5,178	318,366	1,775	109,647
November	7,289	433,089	12	91	5,178	308,096	2,099	124,902
December	9,891	607,238	12	91	5,178	318,366	4,701	288,781

19. The Applicant is requesting a flow of 3000 GPM (6.68 CFS) up to 600 AF per year. Table 5 compares the legally available flow rate and volume with the requested amount. Table 5 shows that water is legally available for the requested amount throughout the proposed period of diversion at the proposed source of supply. Even though proposed water use will be variable as dictated by oil drilling schedule, for comparison purpose the monthly requested volumes are equal to the total requested volume divided by the period of use (600 AF divided by 12 months = 50 AF/month).

Table 5: Comparison of Legal Availability and Requested Appropriation						
A	B	C	D	E	F	G
Month	Legally Available Flow Rate (CFS)	Legally Available Volume (AF)	Requested Flow Rate (CFS)	Requested Volume (AF)	Flow Rate Remaining (CFS)	Volume Remaining (AF)
January	6,017	369,557	6.68	50	6,010	369,507
February	6,207	344,313	6.68	50	6,200	344,263
March	4,827	296,515	6.68	50	4,820	296,465
April	2,780	167,375	6.68	50	2,773	167,325
May	3,301	205,184	6.68	50	3,294	205,134
June	4,203	252,129	6.68	50	4,196	252,079
July	4,061	251,864	6.68	50	4,054	251,814
August	3,611	224,243	6.68	50	3,604	224,193
September	2,593	156,465	6.68	50	2,586	156,415
October	1,775	109,647	6.68	50	1,768	109,597
November	2,099	124,902	6.68	50	2,092	124,852
December	4,701	288,781	6.68	50	4,694	288,731

20. The Department finds the proposed appropriation of 6.68 CFS and up to 600 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

21. Water is both physically and legally available in the source. In the event of a water shortage, the Applicant will cease pumping to allow senior water right holders to fulfill their water uses.

22. The Applicant has proven that enough water remains in the Missouri River to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 6.68 CFS and 600 AF per year.

23. The Department finds that there will not be adverse effect because the amount of water requested is physically and legally available in the Missouri River at the point of diversion, and the Applicant's plan to curtail its appropriation during times of water shortage is adequate.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

24. The Applicant will divert water from the Missouri River using a portable diesel-powered Pioneer 10" x 8" pump end suction standard centrifugal pump (Cat. No. SC108S17L71). There will be a screened aluminum pipe at the intake point in the river. Flow measurement will be monitored by a Badger Meter M2000 10" electromagnetic flow meter. An identical backup pump will also be on hand if needed. The pump is sized to adequately deliver the requested flow rate of 3000 GPM (6.68 CFS).

25. From the screened intake, water will flow to the flow meter then into the pump. Water will pass through a filter pod then will be heated in a portable diesel-powered hot oiler truck before being conveyed to the place of use via a flexible 10-inch lay-flat pipeline. The pipeline will convey water into a portable onsite above-ground 50' x 200' RhinoKore storage tank with 20,000-barrel capacity. More inline pumps will be installed as necessary to maintain adequate pressure. The storage tank will allow a buffer for the 70-80 barrels per minute (2940 to 3360 GPM) downhole pumping required to hydraulically fracture these wells. A detailed pumping schedule for fracking was provided by the Applicant and can be found in the file.

26. The Department finds that the proposed means of diversion and operation are capable of diverting and delivering the proposed volume and flow rate for the proposed project.

BENEFICIAL USE

FINDINGS OF FACT

27. The purpose of the proposed appropriation is water marketing use for the oil and gas industry. The water will be used in the hydraulic fracturing of wells. Water marketing use is a recognized beneficial use (Section 85-2-102(5), MCA). The volume requested is up to 600 AF per year and the flow rate 3000 GPM (6.68 CFS). The volume is supported by a copy of a signed contract between Hydra MT, LLC (for which Kraken Oil and Gas, LLC is the guarantor) and Waterway Resources, LLC.

28. According to the pumping schedule provided by Kraken Oil and Gas, it requires nearly 90 stages to complete a 3-mile lateral, or 105-110 stages to complete a 4-mile lateral, at a rate of approximately 5000 barrels of water per stage. The requested beneficial use envisions as many as 10 wells (10 laterals) per year in T27N, R57E. Each well requires approximately 450,000 barrels (58 AF) of water. Therefore, up to 600 AF per year is the beneficial use of water.

29. The Department finds the proposed water use is beneficial, and that the requested flow rate of 3000 GPM and annual volume of 600 AF are reasonably justified per ARM 36.12.1801.

POSSESSORY INTEREST

FINDINGS OF FACT

30. The registered agent of Waterway Resources LLC is David Anderson. The parcel on which the proposed POD and POU are located is owned by Anderson Diamond Ranch Inc. Waterway Resources LLC is a water depot business entity of Anderson Diamond Ranch Inc.

31. The Applicant signed the application form affirming the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

32. Pursuant to § 85-2-311(1)(a)(i), MCA, an Applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate.”

33. It is the Applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987) (Applicant

produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

34. An Applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the Applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

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

36. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 12-15)

LEGAL AVAILABILITY

37. Pursuant to § 85-2-311(1)(a), MCA, an Applicant must prove by a preponderance of the evidence that:

- (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
 - (A) identification of physical water availability;
 - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
 - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; *Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

38. It is the Applicant's burden to present evidence to prove water can be reasonably considered legally available. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311,

MCA) and placed the burden of proof squarely on the Applicant. The Supreme Court has instructed that those burdens are exacting.); *see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston* (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on Applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the Applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007) (permit denied for failure to prove legal availability); *see also* ARM 36.12.1705.

39. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 16-20)

ADVERSE EFFECT

40. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an Applicant's plan for the exercise of the permit that demonstrates that the Applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. *See Montana Power Co.*, 211 Mont. 91, 685 P.2d 336 (1984) (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); *Bostwick Properties, Inc.*, ¶ 21.

41. An Applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an Applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(5).

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

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

44. It is the Applicant’s burden to produce the required evidence. *E.g., Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 7 (2011) (legislature has placed the burden of proof squarely on the Applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the Applicant by a preponderance of the evidence. *Bostwick Properties, Inc.*, ¶ 21.

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

46. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Section 85-2-311(1)(b), MCA. (FOF 21-23)

ADEQUATE DIVERSION

47. 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.

48. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

49. Water wells must be constructed according to the laws, rules and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

50. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 24-26).

BENEFICIAL USE

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

52. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. *E.g.*, *McDonald; Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. *E.g.*, *Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, *Dee Deaterly v. DNRC*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); *Worden v. Alexander* (1939), 108 Mont. 208, 90 P.2d 160; *Allen v. Petrick* (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

53. Amount of water to be diverted must be shown precisely. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3 (2011) (citing *BRPA v. 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).

54. Applicant seeks a permit to market water to others for beneficial use, which is a recognized beneficial use. Section 85-2-102(5), and -310(9)(c)(v), MCA; Mont. Const. Art. IX, § 3(2) (1972). The Montana Legislature enacted additional requirements upon Applicants seeking permits to market water to others for use, codified at § 85-2-310(9)(c)(v), MCA, which provides:

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

Failure to satisfy these criteria mandates that "the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. . .

.” Section 85-2-310(9), MCA. Thus, a proposed water marketing use is not a beneficial use for purposes of §§ 85-2-102(5), and -311(1)(d) MCA, unless it satisfies § 85-2-310(9)(c), MCA.

55. The legislative purpose of § 85-2-310(9)(v), MCA, was to prohibit the appropriations of water based upon a speculative intent. Chapter 399, Laws of Montana 1985. To that end § 85-2-310(9), MCA, includes express criteria for the DNRC to consider when evaluating an application for a permit to market water to others for use. See DNRC Written Testimony, HB No. 396 (Mar. 25, 1985). These criteria ensure that other water users are committed to the beneficial use of the full quantity of water requested by the Applicant. The terms of a “firm contractual agreement” must include sufficient certainty to ensure that a specific volume of water will actually be put to beneficial use by the contracting party in order to comply with the anti-speculation doctrine and satisfy the requirement of bona fide intent to put the water to beneficial use. See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co., 594 P.2d 566 (Colo. 1979) (Applicant failed to prove intent to appropriate water for beneficial use where it did not have firm contractual commitments or other evidence of privity between the Applicant and the actual beneficial user of the water).

56. It is the Applicant’s burden to produce the required evidence. Bostwick Properties, Inc. v. DNRC, 2013 MT 48, ¶ 22, 369 Mont. 150, 296 P.3d 1154 (“issuance of the water permit itself does not become a clear, legal duty until [the applicant] proves, by a preponderance of the evidence, that the required criteria have been satisfied”); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7; In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005); *see also Royston; Ciotti*.

57. Applicant proposes to use water for water marketing which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that water marketing is a beneficial use and that 600 AF of diverted volume, and 3000 GPM is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 27-29)

POSSESSORY INTEREST

58. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy,

use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

59. Pursuant to ARM 36.12.1802:

(1) An Applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the Applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the Applicant signs the application form affidavit, the representative shall state the relationship of the representative to the Applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

60. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Section 85-2-311(1)(e), MCA. (FOF 30-31)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30161904 should be GRANTED.

The Department determines the Applicant may divert water from the Missouri River, by means of a pump, from January 1 to December 31 at 3000 GPM (6.68 CFS) up to 600 AF, from a point in the NENWNW Section 19, Township 27N, Range 57E, Roosevelt County, for Water Marketing (oil field) use from January 1 to December 31. The place of use (meter location) is located in the NENWNW Section 19, Township 27N, Range 57E, Roosevelt County.

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

1. THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER AT A POINT IN THE DELIVERY LINE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. ON A FORM PROVIDED BY THE DEPARTMENT, THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY JANUARY 31ST OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE RECORDS MUST BE SENT TO THE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
2. ACCESS AT THE DEPOT SHALL BE CONTROLLED ENSURING ONLY THOSE USERS WITH CONTRACTS ARE ABLE TO ACQUIRE WATER.
3. WATER APPROPRIATED UNDER THIS PERMIT SHALL NOT BE TRANSPORTED OUTSIDE THE STATE OF MONTANA. CUSTOMERS SHALL BE INFORMED OF THIS CONDITION BY LANGUAGE INCLUDED IN THE CONTRACT AND BY SIGNS POSTED AT THE DEPOT.

NOTICE

The 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 a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, 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(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the

application with such conditions as the Department decides necessary to satisfy the applicable criteria. Sections 85-2-310, -312, MCA.

DATED this 6th day of March, 2024.

/Original Signed by Lih-An Yang/
Lih-An Yang, Acting Regional Manager
Glasgow Water Resources Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 6th day of March, 2024 by first class United States mail.

WATERWAY RESOURCES LLC
6219 RD 1017
CULBERTSON, MT 59218

GLASGOW Regional Office, (406) 228-2561