

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40S 30163921 BY HYDRA MT, LLC) PRELIMINARY DETERMINATION TO GRANT

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On October 9, 2024, Hydra MT, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 40S 3016921 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4,000 GPM (8.9 CFS) and 500 AF for industrial use. The Department published receipt of the application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated October 22, 2024. The Applicant responded with information dated October 31, 2024. A preapplication meeting was held between the Department and the Applicant on June 25, 2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Checklist on August 26, 2024. The Department delivered the completed technical analyses on October 1, 2024. The application was determined to be correct and complete as of November 6, 2024. An Environmental Assessment for this application was completed on December 31, 2024. The Department provided notice of opportunity to provide public comments to this application per § 85-2-307(4), MCA on February 8, 2025. The Department received seven public comments. This updated Preliminary Determination incorporated the Department's response to these comments.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600 and attachments
- Attachments:
 - Agreement between landowner and Hydra MT, LLC for access to land
 - Photos showing conveyance and storage equipment

- Maps: Undated aerial imagery depicting the place of use and point of diversion
- Department- completed technical analyses based on information provided in the Preapplication Checklist, dated October 1, 2024

Information Received after Application Filed

- Deficiency response received October 24 and 31, 2024

Information within the Department's Possession/Knowledge

- Flow Records for USGS Gage #06185500
- DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data, dated November 1, 2019
- DNRC Notice of Errata, Dated April 2, 2025, by Ashley Kemmis, New Appropriations Specialist, regarding errors in the Department-completed Technical Analysis
- DNRC Missouri River Oxbow Water Surface Area Analysis Memo, dated March 28, 2025, by Jack Landers, Water Sciences Bureau, supporting the use of USGS Gage No. #06185500 for the physical availability analysis
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents.
 - DNRC Water Right Database Records
 - DNRC ArcGIS web application, Converge

Public Comments Received

The Department received and considered the following public comments for the Preliminary Determination. The Department has considered the public comments and has updated criteria analysis for physical availability and legal availability. The preliminary determination decision is to Grant. The comments are addressed in the respective criteria section. The public comments received can be found in the administrative file.

- Seven public comments were received regarding the physical availability analysis, and two issues were raised among these comments. These issues generally questioned the usage of the USGS Gage #06185500, Missouri River near Culbertson, MT to determine the flow rate of water available at the point of diversion. (Commentors: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

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- Seven public comments were received regarding the legal availability analysis, and two issues were raised among these comments. These issues generally questioned the area of potential impact and the identification of physical availability for legal availability. (Commentors: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)
- Seven public comments were received regarding the adverse effect analysis, and two issues were raised among these comments. These issues center around the proposed application's impact on the commenters' ability to exercise their irrigation and stock water rights, and biological impact on aquatic habitat. (Commentors: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)
- Water quality comments are accepted during the public comment period and enable objections regarding water quality during the public notice period. Seven public comments were submitted regarding water quality. Pursuant to § 85-2-311(2), MCA, "the applicant is required to prove that the [water quality criterion has] been met only if a valid objection has been filed". The public comments received regarding the water quality criterion have enabled the public to object to the water quality criterion during the public notice for objections period. (Commentors: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

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 or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; FWP means Fish Wildlife and Parks; POD means point of diversion; POU means place of use; AC means acres; BBL means barrel; 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 through December 31 at 8.9 CFS up to 500 AF, from a point in the NWNENE Section 26, T27N, R58E, Roosevelt County, for industrial use from January 1 through December 31. The

Applicant proposes to use water for oil field development. The place of use is the following locations:

Table 1: Place of Use Descriptions						
ID	Section	Township	Range	Quarter Quarter	Lots	County
1	20	28N	59E	NENE		Roosevelt
2	27	28N	58E	NENW		Roosevelt
3	28	28N	58E	NENE		Roosevelt
4	13	28N	58E	NWNW		Roosevelt
5	4	28N	59E	NWNW	8	Roosevelt
6	12	28N	58E	SWSE		Roosevelt

2. There will be no supplemental water rights associated with the proposed appropriation, or the place of use.
3. This is a temporary permit, the appropriations will cease by December 31, 2030.
4. The application will be subject to the following conditions:
 - 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 GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
 - 2) DIVERSIONS SHALL ONLY OCCUR WHEN THERE IS A VISIBLE CONNECTION OF FLOWING WATER IN THE SMALL CHANNEL ON THE EAST SIDE OF THE OXBOW CONNECTING THE OXBOW AND THE MISSOURI RIVER.

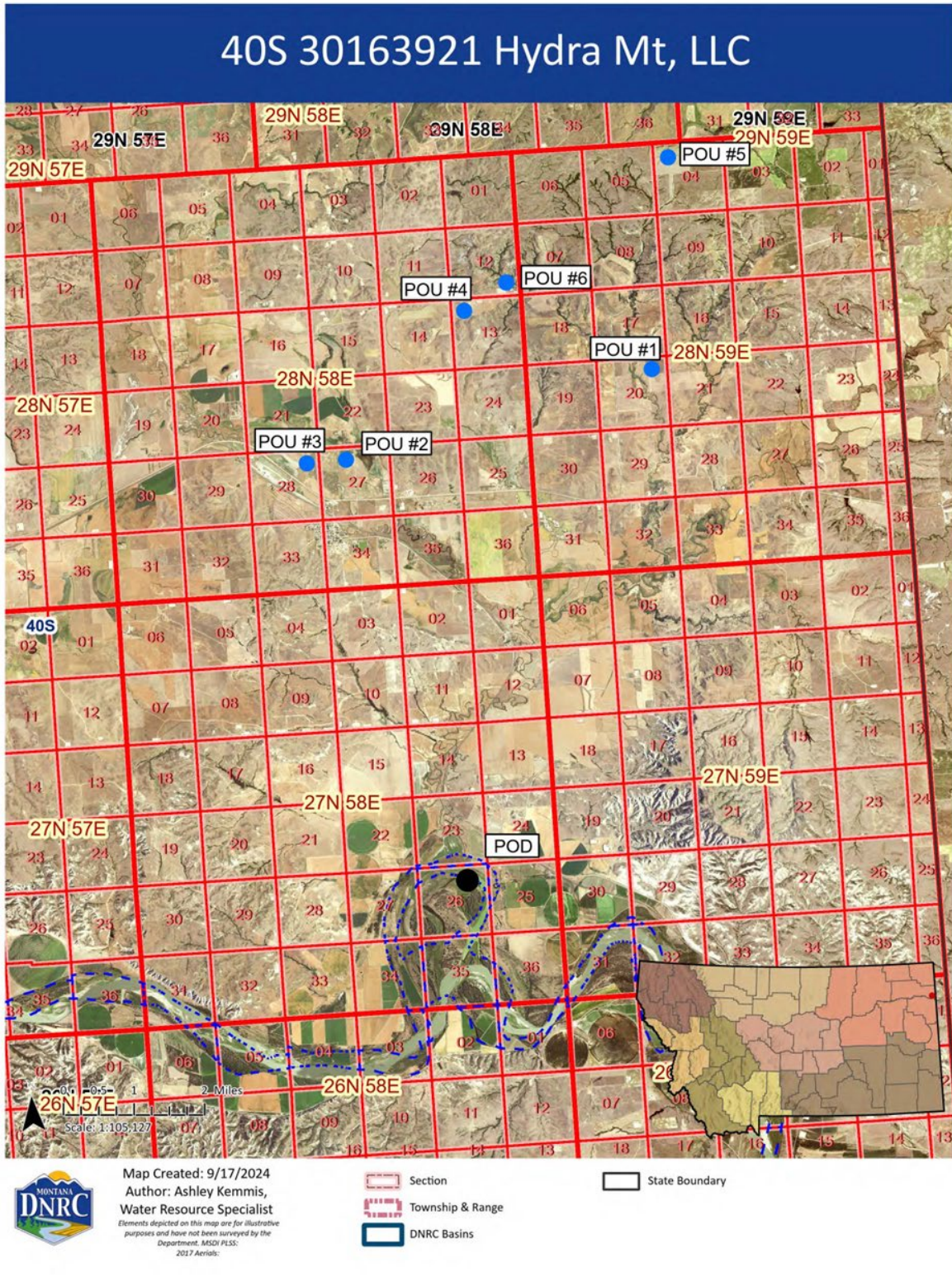


Figure 1. Map of the Applicant's proposed POD on the source and proposed POU

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

GENERAL CONCLUSIONS OF LAW

5. The Montana Constitution expressly recognizes in relevant part that:

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

Mont. Const. Art. IX, § 3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

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

- ... the department shall issue a permit if the Applicant proves by a preponderance of evidence that the following criteria are met:
 - (a) (i) there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate; and
 - (ii) water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
 - (A) identification of physical water availability;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. The Montana Supreme Court further recognized in *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, 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 also Mont. Const. art. IX §3(1).

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

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

PHYSICAL AVAILABILITY

FINDINGS OF FACT

11. The Applicant is requesting to divert water January 1 through December 31 for industrial use from the Missouri River at a rate of 8.9 CFS up to 500 AF per year. This is a temporary permit and the appropriation will cease by December 31, 2030.

12. Pursuant to ARM 36.12.1702, available stream gage data are used to quantify physical availability during the proposed months of diversion.

- a. USGS Gage #06185500, Missouri River near Culbertson, is approximately 19 river miles upstream of the proposed POD. The period of record for the gage was April 1958 through March 2024.
- b. The Department calculated median of the mean monthly flow rates for the Missouri River using USGS Gage #06185500 for each month of the proposed period of diversion (Table 2, Column B). These flows were converted to monthly volumes (AF)(Table 2, Column C) using the following equation found on DNRC Water Calculation Guide: median of the mean monthly flow (CFS) x 1.98 (AF/day/1CFS) x days per month = AF/month. In response to the public comments, the Department reexamined the physical availability analysis presented in the October 1, 2024 Department-completed technical analyses report. An error was identified in the determination of median of the mean monthly volume at USGS Gage #06185500. When converting flow rate to volume, all months were assigned 31 days, instead of the corresponding days of the month. Volumes have been

recalculated for February, April, June, September, and November. The correct values are shown in Table 2.

Table 2: Median of the Mean Monthly Gage Data (USGS Gage 06185500)		
A	B	C
Month	Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)
January	11,210	688,070
February	11,340	628,690*
March	9,986	612,910
April	8,025	476,685*
May	8,553	524,952
June	9,455	561,627*
July	9,313	571,632
August	8,863	544,011
September	7,845	465,963*
October	6,976	428,156
November	7,280	432,432*
December	9,870	605,790

*Recalculated with the correct days per month

13. Table 3 is a list of existing water rights between the requested PODs and the specified USGS gaging station.

14. The Department calculated the monthly flows (Table 3, column B) and volumes (Table 3, column C) following procedure outlined in the Department permit manual:

- a. Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
- b. Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
- c. Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.43 AF/Acre per Department water use standards for a moderate consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

15. An additional water right was identified between the gage and the POD during the comment review period. Statement of Claim 40S 30142615 (priority date of March 16, 1938) originally listed Little Muddy Creek as the source. The Master's Report adopted on December 3, 2024 corrected the source to the Missouri River. Although this correction was made after the date of the Department-completed Technical Analysis, Claim 40S 30142615 is incorporated into the physical availability analysis for this Preliminary Determination to accurately reflect availability.

16. In response to public comment, two water rights were removed from existing rights between the gage and the point of diversion in the physical availability analysis. Water rights 40S 30043999 and 40S 30030363 are downstream of the point of diversion and are more accurately classified as a legal demand. This correction is reflected in Table 3 and Table 6.

Table 3: Water Rights Between USGS Gage 06185500 and the Proposed POD			
A	B	C	D
Water Right Number	Flow Rate (CFS)	Volume (AF)	Period of Diversion
40S 30161904	6.68	600.00	01/01 to 12/31
40S 77646 00	0.68	365.00	01/01 to 12/31
40S 30113093	4.20	243.00	01/01 to 12/31
40S 30153305	1.50	210.00	01/01 to 12/31
40S 30063074	4.50	140.00	01/01 to 12/31
40S 186739 00 ¹	0.13	38.03	01/01 to 12/31
40S 188166 00 ¹	0.13	38.03	01/01 to 12/31
40S 188165 00 ¹	0.13	38.03	01/01 to 12/31
40S 30142666 ¹	0.08	0.07	01/01 to 12/31
40S 30142624 ¹	0.08	0.54	01/01 to 12/31
40S 30132248 ¹	0.10	17.00	01/01 to 12/31
40S 186743 00 ¹	0.13	38.03	01/01 to 12/31
40S 186744 00 ¹	0.13	38.03	01/01 to 12/31
40S 188168 00 ¹	0.13	38.03	01/01 to 12/31
40S 137592 00 ¹	0.08	0.88	01/01 to 12/31
40S 137593 00 ¹	0.08	1.29	01/01 to 12/31
40S 186738 00 ¹	0.13	38.03	01/01 to 12/31
40S 30142668 ¹	0.08	0.07	01/01 to 12/31
40S 30142629 ¹	0.08	0.34	01/01 to 12/31
40S 135791 00 ¹	0.09	10.34	01/01 to 12/31
40S 137594 00 ¹	0.08	1.90	01/01 to 12/31
40S 135792 00 ¹	0.09	7.89	01/01 to 12/31
40S 137576 00 ¹	0.08	1.29	01/01 to 12/31

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40S 30142622 ¹	0.08	2.45	01/01 to 12/31
40S 172341 00 ¹	0.13	34.00	01/01 to 12/31
40S 30142670 ¹	0.08	0.48	01/01 to 12/31
40S 30142625 ¹	0.08	0.20	01/01 to 12/31
40S 135782 00 ¹	0.08	0.27	01/01 to 12/31
40S 135783 00 ¹	0.08	0.48	01/01 to 12/31
40S 74618 00	2.23	540.00	04/01 to 09/15
40S 77506 00	11.14	416.00	04/01 to 10/01
40S 7832 00	4.46	2,125.00	04/01 to 10/15
40S 111449 00	10.00	408.00	04/01 to 10/15
40S 30004263	3.01	330.00	04/01 to 10/15
40S 109530 00	21.40	282.00	04/01 to 10/15
40S 109529 00 ²	10.67	2,620.06	04/01 to 10/15
40S 84851 00	21.83	1,451.00	04/01 to 11/01
40S 215560 00 ²	1.44	102.22	04/01 to 11/04
40S 106914 00	5.10	804.00	04/15 to 10/15
40S 30072269	4.01	396.40	04/15 to 10/15
40S 7826 00	5.56	380.00	04/15 to 10/15
40S 171255 00 ²	15.60	2,022.88	04/15 to 10/19
40S 186742 00	2.90	1,930.00*	04/15 to 10/19
40S 12708 00	8.02	1,388.00	04/15 to 11/15
40S 66293 00	8.91	408.00	04/20 to 10/01
40S 66294 00	8.91	165.00	04/20 to 10/01
40S 41349 00	9.00	491.4*	05/01 to 09/19
40S 99060 00	2.23	309.70	05/01 to 09/30
40S 4010 00	13.37	1,440.00	05/01 to 10/01
40S 13498 00	2.23	324.00	05/01 to 10/01
40S 17852 00	8.91	200.00	05/01 to 10/01
40S 106990 00 ³	4.20	636.00	4/01 to 10/31
40S 30142615 ^{1,4}	0.08	0.48	01/01-12/31
40S 30030363 ^{2,5}	-	-	-
40S 30043999 ⁵	-	-	-

*Volume as claimed

¹Livestock direct from source – volume and flow rate determined by animal units per Department standards

²Irrigation volume Determined from climatic area per Department standards

³Period of use assigned per Department standards

⁴Added in the comment response time frame – Statement of Claim with corrected source to the Missouri River

⁵Removed from Physical Availability analysis and incorporated as a legal demand in response to public comment (See FOF 29).

17. Department practice for physical availability analyses where the gage used is upstream of the POD is to subtract the monthly flow rates and volumes of existing water rights between the gage and the POD from the median of the mean monthly flows at the gage. See Table 4.

Table 4: Physical Availability at the Point of Diversion on the Missouri River						
A	B	C	D	E	F	G
Month	Median of the Mean Monthly Flow Rate at Gage 06185500 (CFS)	Median of the Mean Monthly Volume at Gage 06185500 (AF)	Existing Rights from the POD to Gage 06185500 (CFS)²	Existing Rights from the POD to Gage 06185500 (AF)²	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
Jan	11,210	688,070	20	159	11,190	687,911
Feb	11,340	628,690 ¹	20	159	11,320	628,531
March	9,986	612,910	20	159	9,966	612,751
April	8,025	476,685 ¹	169	2498	7,856	474,187
May	8,553	524,952	205	3051	8,347	521,901
June	9,455	561,627 ¹	205	3051	9,250	558,576
July	9,313	571,632	205	3051	9,108	568,581
Aug	8,863	544,011	205	3051	8,658	540,960
Sep	7,845	465,963 ¹	205	3051	7,639	462,912
Oct	6,976	428,156	156	2339	6,819	425,817
Nov	7,280	432,432 ¹	28	332	7,252	432,100
Dec	9,870	605,790	20	159	9,850	605,631

¹Recalculated with the correct days per month

²Corrected to include 40S 30142615 and exclude water rights 40S 30043999 and 40S 30030363

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

18. Issue 1: Seven comments stated that the draft PD did not accurately identify physical water availability at the proposed point of diversion. They maintain that the proposed point of diversion is located in an oxbow that has been separated from the main channel of the Missouri River. They disputed the Department's use of USGS Gage #0618550, Missouri River near Culbertson, to determine physical availability at the POD. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

19. Response 1 (Part 1): Evidence available to the Department shows that the oxbow is directly connected to the main channel of the Missouri River by a small channel on the east side of the oxbow, visible in aerial imagery. Water level in the oxbow is correlated with streamflow in the Missouri River channel, as described in detail in the DNRC Missouri River Oxbow Water Surface Area Analysis memo by DNRC Water Sciences Bureau dated March 28, 2025. This information shows that water availability of the oxbow is dependent on streamflow in the Missouri River and can be estimated with the USGS Gage #0618550. This is based on the concept that as streamflow decreases, less water will flow into the oxbow and reduce the volume of water available for appropriation.

20. Response 1 (Part 2): There are nine irrigation water rights appropriated from the oxbow. Two are statements of claim (40S 3227-00 and 40S 30030363), two used Roosevelt County Conservation District water reservation (40S 30004263 and 40S 30043999), and five are provisional permits (40S 7826-00, 40S 74095-00, 40S 77506-00, 40S 84851-00, and 40S 30031187). With the exception for 40S 7826-00, the provisional permits were required to prove physical availability criteria with either substantial credible evidence or a preponderance of evidence. These four permits have used the USGS Gage #0618550 and met the physical availability criterion. Furthermore, in 1993, two commenters used the USGS Gage #0618550 to prove physical availability for their irrigation permit 40S 84851-00. Referencing the USGS gage data, the commenters found high availability of flow rate and volume of Missouri River water for their requested 29 CFS and 1,700 AF per year in the backflow area of the oxbow.

21. Issue 2: The commenters characterized the oxbow as an isolated water body with negligible flow rate: “The oxbow only gets forward flow when the main channel of the Missouri River is high. Most of the water in the oxbow backflows in from the point where it meets back up with the main channel, essentially giving the oxbow a flow rate of 0.” They described limited availability during late irrigation season or when the river does not adequately fill the oxbow. They pointed out that, because physical availability was assessed with data from the river gage, the draft PD has not proven that water is physically available in the oxbow area. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

22. Response 2 (Part 1): The DNRC Missouri River Oxbow Water Surface Area Analysis Memo, dated March 28, 2025, shows a correlation between the Missouri River streamflow and available water in the oxbow. This supports the use of streamflow data from USGS gage #06185500 for determining physical availability in the oxbow.

23. Response 2 (Part 2): There are 14 existing water rights with points of diversion from the oxbow area, including nine irrigation rights, some of which are appropriated with substantial flow rates. Aerial photos from 1967 to 2023 show extensive flood and pivot irrigation around the oxbow area, demonstrating that irrigation water has been available in the oxbow. Irrigation permits which were required to prove physical availability have successfully proven this criterion with data from the USGS Gage #0618550. Therefore, the finding in the draft PD that the application has met physical availability with a preponderance of evidence is valid. Table 5 lists the 14 rights appropriated in the oxbow:

Table 5: Water Rights with Diversions Within the Oxbow				
Water Right No.	Purpose	Flow Rate (CFS)	Volume (AF)	Water Right Type
40S 3227 00	Irrigation	20.1	1693*	Statement of Claim
40S 30030363	Irrigation	20.1	498*	Statement of Claim
40S 74095 00	Irrigation	8.9	130	Provisional Permit
40S 30031187	Irrigation	2.67	168	Provisional Permit
40S 30043999	Irrigation	8.9	160	Conservation District Record
40S 77506 00	Irrigation	11.1	416	Provisional Permit
40S 7826 00	Irrigation	5.56	380	Provisional Permit
40S 84851 00	Irrigation	21.8	1451	Provisional Permit
40S 30004263	Irrigation	3	330	Conservation District Record
40S 172341 00	Livestock Direct	0.13	34*	Statement of Claim
40S 135783 00	Livestock Direct	0.08	0.48*	Statement of Claim
40S 135784 00	Livestock Direct	0.08	0.54*	Statement of Claim
40S 30142670	Livestock Direct	0.08	0.48*	Statement of Claim
40S 30142615	Livestock Direct	0.08	0.48*	Statement of Claim

*Volume calculated using Department standards.

24. The public comments regarding the physical availability criterion have been addressed in FOF 17-23. The Department has updated the amount of water considered physically available by correcting the volume of water at the USGS Gage #0618550, updating the list of water rights between the gage and POD, recalculated the amount of water considered physically available at the POD. Considering the public comments and the updated analyses, the Department finds surface water is physically available during the proposed period of diversion at the proposed point of diversion in the amount the Applicant seeks to appropriate. Because our physical availability analysis is based on the connectivity between the Missouri River streamflow and water level in the oxbow, the following condition will apply:

DIVERSIONS SHALL ONLY OCCUR WHEN THERE IS A VISIBLE CONNECTION OF FLOWING WATER IN THE SMALL CHANNEL ON THE EAST SIDE OF THE OXBOW CONNECTING THE OXBOW AND THE MISSOURI RIVER.

LEGAL AVAILABILITY

FINDINGS OF FACT

25. The Department determined the area of potential impact is 13.5 miles downstream from the proposed point of diversion to the Montana/North Dakota border. There are 43 legal demands within this reach, including water rights downstream of the proposed POD in the oxbow area.

26. The Missouri River is a major surface water source compared to other streams in the area. Because there are no significant tributaries or confluences between the POD and the exit of the Missouri River into North Dakota, the Department will designate the said reach as the area of potential impact.

27. A list of surface water rights that divert from the Missouri River in the location between the POD (NWNENE Section 26, T27N, R58E, Roosevelt County) and the Montana/North Dakota state border (Section 24, T26N, R59E, Richland County) were compiled using the DNRC GIS web application Converge. A flow rate and volume were assigned to any unquantified water rights following Department standards per DNRC permit manual by:

- a. Calculating a flow rate for all livestock direct from source rights without a designated flow rate by assigning either 30 GPD/AU for Statements of Claim or 15 GPD/AU, multiplying by the number of Animal Units (AU), and adding that to 35 GPM.
- b. Calculating a volume for all livestock direct from source rights without a designated volume by multiplying the number of AU by 30 GPD/AU for Statements of Claim or 15 GPD/AU.
- c. Calculating a volume for all irrigation rights without a designated volume by multiplying the number of acres by 2.43 AF/Acre per Department water use standards for a moderate consumptive use climatic area.
- d. Evenly distributing each water right's volume by months within the period of diversion.

These downstream legal demands are summarized in Table 6.

28. In response to public comments, the Department re-examined the area of potential impact and identified twelve water rights which were previously omitted in the draft PD. The corrections are outlined in the DNRC Notice of Errata, Dated April 2, 2025. Ten of the twelve water rights are located in the last 3.5 miles of the area of potential impact. Two of the twelve water rights (40S 30043999 and 40S 30030363) were removed from physical availability analysis and incorporated as a legal demand because they are downstream of the POD. Water right 40S 30142625 was incorrectly included in both physical and legal availability analyses and has been removed from the legal demands. Additionally, water right 40S 30142669 has been dismissed as of December 3, 2024, per Water Court proceedings so was removed from the list of legal demands in the area of potential impact. These corrections are reflected in Table 6.

Table 6: Water Rights on Missouri River in the Area of Potential Impact			
A	B	D	E
Water Right #	Period of Diversion	Flow Rate (CFS)	Volume (AF)
40S 187284 00	01/01 to 12/31	0.01	3.00
40S 9852 00	01/01 to 12/31	1.67	60.00
40S 130567 00 ¹	01/01 to 12/31	-	172.00
40S 30048277	01/01 to 12/31	4.50	522.10
40S 30017671	01/01 to 12/31	5,178.00	3,748,500.00
40S 135784 00 ²	01/01 to 12/31	0.08	0.54
40S 135793 00 ²	01/01 to 12/31	0.10	13.60
40S 187283 00 ²	01/01 to 12/31	0.08	2.04
40S 30142667 ²	01/01 to 12/31	0.08	0.20
40S 142799 00 ³	01/01 to 12/31	0.89	225.00
40S 130516 00 ³	03/01 to 11/30	1.67	60.00
40S 30015443	04/01 to 10/15	0.33	20.00
40S 30069082	04/01 to 10/15	1.56	60.00
40S 103653 00	04/01 to 10/15	1.30	147.00
40S 114723 00	04/01 to 10/15	2.20	340.00
40S 30010979	04/01 to 10/15	6.70	536.00
40S 171828 00 ³	04/01 to 10/31	1.78	285.00
40S 130566 00 ⁴	04/01 to 10/31	10.53	675.54
40S 46536 00 ⁴	04/01 to 10/31	2.50	267.30
40S 172261 00 ⁴	04/01 to 11/30	41.10	2,636.55
40S 104510 00	04/15 to 10/15	2.60	145.00
40S 106912 00	04/15 to 10/15	5.60	150.00
40S 30031187	04/15 to 10/15	2.67	168.70
40S 30003106 ⁵	04/01 to 10/15	1.67	24.00
40S 11818 00 ⁵	04/15 to 10/15	-	184.00
40S 114722 00	04/15 to 10/15	3.40	203.00
40S 111301 00	04/15 to 10/15	5.10	302.00
40S 7775 00	04/15 to 10/15	6.68	1,500.00
40S 5477 00 ³	05/01 to 08/31	10.03	600.00
40S 74095 00	04/01 to 10/31*	8.91	130.00
40S 3227 00 ³	04/01 to 10/32*	20.05	1,693.00
40S 30030363 ^{4,6}	04/15 to 10/19	20.05	498.15
40S 30043999 ⁶	04/01 to 10/15	8.91	159.60
40S 135790 00 ⁶	01/01 to 12/31	0.08	0.88
40S 30142626 ⁶	01/01 to 12/31	0.08	0.31
40S 30152855 ⁶	01/01 to 12/31	5.71	925.00

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40S 137598 00 ⁶	01/01 to 12/31	0.09	7.75
40S 12810 00 ⁶	03/01 to 11/01	13.37	540.00
40S 171290 00 ⁶	04/15 to 11/04	4.46	170.10
40S 19231 00 ⁶	05/01 to 06/30	25.06	3,340.00
40S 5479 00 ⁶	05/01 to 08/31	2.67	60.75
40S 4213 00 ⁶	05/01 to 09/30	8.91	176.00
40S 30 00 ⁶	07/01 to 09/30	25.06	3,340.00

*Period of Diversion assigned per Department standards

¹No assigned flow rate for water spreading purpose

²Livestock direct from source – volume and flow rate determined by animal units per Department standards

³Assigned volume as claimed

⁴Volume calculated using Department standard water use for irrigation in climatic area 2

⁵Combined flow rate of 1.67 CFS

⁶Added to legal demands in response to public comment

29. Table 7 shows the legally available water for appropriation during the period of diversion requested. The monthly volume of downstream water rights was calculated by dividing the appropriated volumes by the number of months in the period of use.

Table 7: Legal Availability Analysis of the Missouri River from the Proposed POD to the Montana Border						
A	B	C	D	E	F	G
Month	Physically Available Water (CFS)¹	Physically Available Water (AF)¹	Existing Legal Demands Downstream of the Proposed POD (CFS)¹	Existing Legal Demands Downstream of the Proposed POD (AF)¹	Legally Available Water (CFS)¹	Legally Available Water (AF)¹
January	11,190	687,911	5,191	312,536	5,999	375,375
February	11,320	628,531	5,191	312,536	6,129	315,995
March	9,966	612,751	5,206	312,610	4,759	300,141
April	7,856	474,187	5,365	314,034	2,491	160,153
May	8,347	521,901	5,411	315,904	2,936	205,997
June	9,250	558,576	5,411	315,904	3,839	242,671
July	9,108	568,581	5,411	315,348	3,697	253,233
August	8,658	540,960	5,411	315,348	3,247	225,612
September	7,639	462,912	5,399	315,182	2,241	147,730
October	6,819	425,817	5,365	314,034	1,455	111,783
November	7,252	432,100	5,234	312,872	2,018	119,228
December	9,850	605,631	5,191	312,536	4,658	293,095

¹Updated in response to public comment

30. Table 8 compares the legally available flow rate and volume with the requested amount. Table 8 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

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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 (500AF/12months = 41.67 AF/month)

Table 8: Legal Availability Comparison Flow Rate and Volume						
A	B	C	D	E	F	G
Month	Legally Available Water (CFS)¹	Legally Available Water (AF)¹	Applicant Requested Flow Rate (CFS)	Applicant Requested Volume (AF)	Remaining Legally Available Water (CFS)¹	Remaining Legally Available Water (AF)¹
Jan.	5,999	375,375	8.9	41.7	5,990	375,333
Feb.	6,129	315,995	8.9	41.7	6,120	315,953
March	4,759	300,141	8.9	41.7	4,750	300,099
April	2,491	160,153	8.9	41.7	2,482	160,111
May	2,936	205,997	8.9	41.7	2,927	205,955
June	3,839	242,671	8.9	41.7	3,830	242,630
July	3,697	253,233	8.9	41.7	3,688	253,191
August	3,247	225,612	8.9	41.7	3,238	225,570
Sept.	2,241	147,730	8.9	41.7	2,232	147,688
Oct.	1,455	111,783	8.9	41.7	1,446	111,742
Nov.	2,018	119,228	8.9	41.7	2,009	119,186
Dec.	4,658	293,095	8.9	41.7	4,649	293,053

¹Updated in response to public comments

31. The Assiniboine and Sioux tribes of the Fort Peck Indian reservation (Tribes) possess a Tribal Water Right, as defined in Article III the Fort Peck-Montana Compact, §85-20-201, MCA. The tribes are entitled to divert up to 950,000 AF per year from the Missouri River on Fort Peck Reservoir. Art. III.F. In the legal availability analysis for this application, the Department did not include the Tribal Right as an existing legal demand. Art. III.I. states water may be diverted from the mainstem of the Missouri River within or adjacent to the Reservation. The proposed appropriation in this application is approximately 30 river miles downstream of the Fort Peck Reservation boundary and is not considered adjacent to the reservation.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

32. Issue 1: Seven comments suggested the Applicant has not proven physical availability by a preponderance of evidence and thus the finding of legal availability is incorrect. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

33. Response 1: The Department has addressed the physical availability criterion in the previous section. No information was provided by the commenters to disprove the legal availability assessment. Without information to show how the criterion was not met, the Department is not

able to update the decision document. The commenters may file an objection to legal availability with facts indicating how the legal availability criterion has not been met. Physical availability has been addressed in FOF 11-22.

34. Issue 2: Six comments disputed the Department's identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use per MCA 85-2-311(a)(ii)(B). They suggested that the area of potential impact is the oxbow and not the main channel of the Missouri River. Accordingly, they contend that the existing legal demands should only include senior water rights that divert water from the oxbow, and not water rights in the main channel downstream of the oxbow. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills)

35. Response 2: The Department construed the comments to mean that the Department overlooked the oxbow in physical and legal availability analyses, and that the analyses should have included the oxbow area. As shown in Tables 3 and 6, the Department did include water rights in the oxbow in both analyses. Per memo from Water Sciences Bureau, dated March 28, 2025, water from the main channel of the Missouri River is correlated to water supply in the oxbow. Therefore, water rights downstream of the oxbow would be impacted by this proposed diversion and are included in the legal analysis.

36. The public comments regarding the legal availability criterion have been addressed in FOF 32-35. The Department has recalculated the amount of water legally available based on the updated legal demands in the area of potential impact and the corrected physical availability analysis. The Department finds the proposed appropriation of 8.9 CFS and up to 500 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

37. Water is both physically and legally available in the source. In the event of a water shortage, the Applicant will cease diversion if a valid call is made.

38. 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 8.9 CFS and 500 AF.

ISSUES RAISED BY PUBLIC COMMENTS AND DEPARTMENT'S RESPONSES

39. Issue 1: Seven comments remarked that the proposed project will negatively impact their irrigation and livestock operations. They stated that the diversion of too much backflow will

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prevent water from reaching their irrigation pumps and cattle. They contend that increased mud and sediment in low water could cause pump complications and make accessibility hazardous to cattle. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills, Panasuk)

40. Response 1: The commenters' irrigation rights have priority dates of 1961, 1973, 1976, 1985 and 1993, which are senior to the proposed application. The commenters' stock right has a 1931 priority date. Senior water users may make call on junior water users. Hydra would be the most junior user on the oxbow. Per MCA 85-2-311, "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." In the application's Adverse Effect section, Hydra stated that during times of water shortage it will cease appropriation as to not negatively impact existing water rights, and there are no factors that would limit Hydra's ability to turn off appropriation in response to a call.

41. Issue 2: Six comments discussed the potential adverse effect from the proposed year-round diversion in the oxbow. They provided photos which were intended to show the oxbow receives zero back flow in the winter months. They believe that the combination of reduced back flow and industrial withdrawal will kill the fish and plant life that provide important filtration for the oxbow's still water. (Commenters: River Oxbow LLC, Trapper Creek Land LLC, Harmon, Grass Rock Hills)

42. Response 2: As stated in FOF 40, adverse effect refers to the Department's consideration of the Applicant's plan to control the use of water to satisfy the rights of senior appropriators. The ability of the water to support aquatic habitat is outside of the scope of our criteria assessment. As stated in FOF 24, diversion will be conditional upon the connectivity with the Missouri River.

43. The public comments regarding the adverse effect criterion have been addressed in FOF 39-42. The Department finds the proposed use of 8.9 CFS and 500 AF year-round will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

44. The Applicant plans to divert water at a rate of 8.9 CFS and 500 AF from the Missouri River from a diversion point in NWNENE Section 26, T27N, R58E, Roosevelt County, using a portable 10"x8" diesel-powered Pioneer standard centrifugal pump (Cat. No SC108S17L71).

45. Water will flow from a screened aluminum pipe at the intake into a portable filter trailer and a hot oiler truck, which will heat water when necessary during freezing conditions. Water then flows through a ModMAG Electromagnetic Flow Meter, which is capable of taking continuous measurements, before being conveyed via 10" layflat line to the POUs. Easements will be secured for any railway, county road, state highway, or private land crossings where lay flat line will be laid.

46. The Applicant has submitted pump curves showing that the diesel powered pump will be capable of pumping 8.9 CFS depending upon elevation and overall distance from the source to POUs. The diesel engine is a John Deere Powertech PWL 13.6L (model 6136HI440) and meets Tier 4 EPA standards. It is rated at 451 HP at 2100 RPM and 484 HP at 1800 RPM. The diesel engine and pump will only be in place while being used. More inline pumps can be installed if necessary in order to maintain adequate pressure and volume.

47. Once the water reaches the place of use, it is delivered into a portable, 50' x 200', RhinoKore above-ground frac tank with 20,000-barrel capacity, which will be installed at the pad during the completion phase of operations. Because of the high rate necessary for completions, the RhinoKore is able to act as a median between the transfer of water from the source to the downhole fracturing process.

48. The Department finds that the proposed means of diversion and operation are capable of diverting and conveying the proposed flow rate and volume.

BENEFICIAL USE

FINDINGS OF FACT

49. The Applicant requests to divert up to 500 AF of water at a rate of 8.9 CFS annually, for industrial use by the oil and gas industry. No Department standard exists for industrial use; the Applicant has explained how the proposed flow rate and volume meet the beneficial use as required in ARM 36.12.1801.

50. Water will be used to drill and complete wells in Roosevelt County, MT with an average lateral length of 15,000-ft. A typical 3-mile lateral (15,000-ft) requires approximately 450,000 barrels (58 AF) of fresh water as shown on the typical pump schedule provided by the Applicant in the Application. As much as 515,000 barrels (66 AF) of fresh water will be required to complete a longer lateral.

51. The drilling and subsequent completion plan includes up to four oil and gas wells to be completed by Quarter 1 of 2025 (approximately 232 AF), and up to an additional eight wells per

year following that. Four out of eight wells are expected to have extended laterals, requiring up to 266 AF. The total of the eight wells (four average-length laterals and four longer laterals) equates to 498 AF per year (rounded to 500 AF for variability). No more than 500 AF of water will be used annually. The proposed appropriation is to expire on December 31, 2030. Because of the unpredictable nature of oil field development, and to ensure no more than the requested amount is diverted, the following condition applies:

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 GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

52. The Department finds the proposed water use is beneficial, and that the requested flow rate of 8.9 CFS and annual volume of 500 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

53. 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

54. 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.”

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

56. 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).

57. 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 11-24)

LEGAL AVAILABILITY

58. 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).

59. 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 60. 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. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

61. 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 25-36)

ADVERSE EFFECT

62. 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.

63. 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).

64. 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).

65. 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).

66. 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.

67. 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).

68. 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 37-43)

ADEQUATE DIVERSION

69. 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.

70. 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.

71. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

72. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed

engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

73. 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. Section 85-2-311(1)(c), MCA (FOF 44-48).

BENEFICIAL USE

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

75. 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).

76. 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).

77. 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*.

78. Applicant proposes to use water for Industrial use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence industrial use is a beneficial use and that 500 AF of diverted volume and 8.9 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 49-52).

POSSESSORY INTEREST

79. 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.

80. 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.

81. 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 53)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40S 30163921 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 8.9 CFS up to 500 AF, from a point in NWNENE Section 26, T27N, R58E, Roosevelt County, for industrial use from January 1 to December 31. The place of use is in the following locations:

Table 9: Place of Use Descriptions						
ID	Section	Township	Range	Quarter Quarter	Lots	County
1	20	28N	59E	NENE		Roosevelt
2	27	28N	58E	NENW		Roosevelt
3	28	28N	58E	NENE		Roosevelt
4	13	28N	58E	NWNW		Roosevelt
5	4	28N	59E	NWNW	8	Roosevelt
6	12	28N	58E	SWSE		Roosevelt

The proposed appropriation is a temporary permit and is to expire on December 31, 2030.

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 GLASGOW WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE, SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.
- 2) DIVERSIONS SHALL ONLY OCCUR WHEN THERE IS A VISIBLE CONNECTION OF FLOWING WATER IN THE SMALL CHANNEL ON THE EAST SIDE OF THE OXBOW CONNECTING THE OXBOW AND THE MISSOURI RIVER.

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 9th day of April, 2025

/Original signed by Lih-An Yang/

Lih-An Yang, Regional Manager
Glasgow Water Resources Regional Office
Montana 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 9th day of April, 2025, by first class United States mail.

HYDRA MT LLC
C/O KANE FONTENOT
945 BUNKER HILL RD STE 1200
HOUSTON, TX 77024-1593

GLASGOW Regional Office, (406) 228-2561