

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

IN THE MATTER OF APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NO.)	
42J-30072589 BY GERALD H. AND MARY D.)	FINAL ORDER
ELLIS)	

Pursuant to the provisions of §§ 85-2-309 through 311, MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, a contested case hearing was held before the Department of Natural Resources and Conservation (Department) on March 23, 2016, in Billings, Montana. The purpose of the contested case hearing was to hear objections to Application for Beneficial Water Use Permit No. 42J-30072589 by Gerald H. and Mary D. Ellis (Applicants) for which h the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on August 31, 2015. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PD) which is hereby incorporated by reference.

BACKGROUND

On March 2, 2015 a pre-application meeting was held and attended by the Applicants, Kim Overcast (Billings Regional Manager), and Mark Elison (Billings Regional Hydrologist). The Application was filed with the Billings Water Resources Office of the Department of Natural Resources and Conservation (BRO) that same day. On April 13, 2015, the Department received additional information from the Applicants and subsequently sent a letter to the Applicants informing them that the Application was correct and complete. Attached to that letter was the technical report prepared for the Application by Mark Elison of the Billings Office for the Applicants to review. The BRO issued a Preliminary Determination to Grant Permit on August 31, 2015.

Public Notice of the Preliminary Determination to Grant Permit was sent to interested individuals in the notice area on September 8, 2015, and published in the Miles City Star on September 9, 2015. The notice area was determined by the Department to be from the proposed point of diversion downstream to a stream gage on the Powder River in Locate, Montana. The public notice provided that the deadline for objections to the Application was

October 23, 2015. One objection to the Application was filed by Cassandra and William Erickson. A contested case hearing on this objection was held on March 23, 2016.

APPEARANCES

Applicants Gerald H. and Mary D. Ellis appeared at the hearing by and through counsel Gage Hart Zobell and Renee L. Coppock. Testifying on behalf of the Applicants were: Gerald Ellis, Mark Ellis (local rancher) and Scot Robinson (local rancher).

Objectors Cassandra and William Erickson appeared at the hearing by and through counsel James T. Carr. Testifying on behalf of the Objectors was William Erickson, John Krutzfeldt (local rancher) and Dean Hanvold (local rancher).

EXHIBITS

Applicants offered the following exhibits at the hearing all of which were admitted:

Exhibits 1 – 1E are 6 photographs showing the Objectors pumpsite(s) and pipeline route.

Exhibit 2 is a photograph of one of the Objectors pumpsites.

Exhibit 3 – 3D are 5 photographs of the Objectors former pipeline from their pumpsite(s).

Exhibit 4 is a Google Maps image in the vicinity of the Objectors property with the locations of their pumpsites marked.

Exhibit 8 is a printout of streamflow data from the USGS gage near Locate, Montana showing monthly mean cfs for the years 1988 through 2015.

Exhibit 9 is a copy of the Department Technical Report and the Preliminary Determination to Grant Permit for the application. [part of the existing record]

Objectors prefiled the following exhibits which were stipulated to at the hearing, all of which were admitted:

Exhibit A is a printout of streamflow data from a former USGS gage located near Broadus, Montana showing monthly mean cfs for March through September in the years 1982 to 1992.

Exhibit B consists of 14 images from Google Earth showing Powder River conditions. Dates are unknown.

Exhibit C consists of 23 pages of various documents including field investigation forms and declaration of existing water rights from the Powder River Declaration 42J-4306.

Exhibit D consists of 14 pages of various documents from the Powder River Declaration 42J-4304.

Exhibit E is one page describing a pump used for site 42J-30006686.

Exhibit F consists of a two page letter from Custer County Conservation District to Bill and Cassandra Erickson informing them that their application for extension of time for a reserved water project was approved.

Exhibit G consists of three General Abstracts for water rights issued to the Erickson's, et. al., two from the Powder River Declaration and one from the Conservation District Record.

Exhibit H consists of 14 pages including maps and data from a Custer County Conservation District Reserved Water Use Authorization.

Exhibit I consists of 8 pages of Water Users Annual Status Report for the Custer County Conservation District with supplemental information.

Exhibit K is one page of pump information for site 42J-4301-01.

Exhibit L consists of a computer flash drive containing five video clips showing the Powder River and irrigation practices on the Erickson ranch. This exhibit was not used or discussed at hearing and was admitted as part of the package of all exhibits.

FINDINGS OF FACT/CONCLUSIONS OF LAW

General Findings of Fact

1. Application for Beneficial Water Use Permit No. 42J-30072589 in the name of Gerald H. and Mary D. Ellis was filed with the Department on March 2, 2015. (Department File)
2. The Environmental Assessment (EA) prepared by the BRO for this application was reviewed and is included in the record of this proceeding. (Department File)
3. Applicant proposes to divert water from the Powder River, by means of a pump, from April 15 to October 31 at 2780 GPM (6.2 CFS) up to 914 acre-feet (AF), from a point in the NWNWSW Section 10, T2N R54E, Custer County. The water will be used to operate two pivots irrigating 340 acres generally located in Section 10 and the S2SE Section 3, T2N R54E, Custer County. The place of use is approximately 13 miles northeast of Powderville, Montana. (Department File)

4. On August 31, 2015, the BRO issued a "Preliminary Determination to Grant Permit" (PDG) finding that all of the applicable criteria under § 85-2-311, MCA had been met. Notice of the PDG was published on September 9, 2015 in the *Miles City Star* and provided notice to interested individuals on September 8, 2015, as required by § 85-2-307, MCA. The public notice set an objection deadline of October 23, 2015.

5. On October 22, 2015, the Department received a valid objection from Cassandra and William Erickson, downstream water right holders. The Department determined that the objection was valid as relating to the criteria of legal availability and adverse effect (see Conclusion of Law 6). No further objections were received. (Department File)

General Conclusions of Law

6. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA. Those criteria state, in relevant part, that:

...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[.]

(Criteria relating to water quality are not implicated in the instant Application)

7. Under the Montana Water Use Act, the Department must make a preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit right § 85-2-307(2)(a)(ii), MCA. If the preliminary determination proposes to grant the application, the Department must prepare a public notice of the application, including a summary of the preliminary determination. The notice must state that by a date set by the Department, persons may file with the Department written objections to the application. §§ 85-2-307(2)(b) and 85-2-307(3), MCA. The Department followed this procedure and received one valid objection, from Cassandra and William Erickson, alleging that the legal availability and adverse effect criteria were not satisfied.

8. Because a valid objection was received on the Application, the Department was required to conduct a contested case hearing on the objection. Only those criteria that were at issue in the objection are subject to the hearing proceeding and the Hearing Examiner will summarily affirm the Department's determination on those criteria that were not objected to. § 85-2-309, MCA (“(1) If the department determines that an objection to an application . . . states a valid objection, it shall hold a contested case hearing . . . *on the objection* . . .” (emphasis provided)). Accordingly, the criteria of legal availability (85-2-311(1)(a)(ii), and adverse effect (85-2-311(1)(b) were the subject of the contested case proceeding. The following criteria were not at issue in this hearing – physical availability (85-2-311(1)(a)(i)), means of diversion (85-2-311(1)(c), beneficial use (85-2-311(1)(d), and possessory interest (85-2-311(1)(e). The findings and conclusions on those criteria from the PDG are hereby adopted. (FOF 5)

9. The applicant in a permit proceeding has the burden of proof, at all stages of the proceeding, to prove that the applicable criteria have been met. That being said, at the onset of a contested case proceeding in which a Preliminary Determination to Grant has already been issued by the Department, the Department has determined that the applicant has satisfied the applicable criteria for issuance of a permit or change in appropriation right. § 85-2-307(2)(ii), MCA. If valid objections are not received on an application and the Department preliminarily determined to grant the permit, the department shall grant the application as proposed in the preliminary determination. § 85-2-310(3), MCA. In the instant matter, the BRO issued its

Preliminary Determination to Grant finding and concluding that the Application satisfied the applicable legal availability and adverse effect criteria. Therefore, the burden of production shifted to the Objector to demonstrate that the Applicant failed to satisfy its burden in the contested case proceeding. Because the Applicant retains the burden of proof as to the criteria, Applicant may present evidence at the contested case hearing to rebut relevant evidence pertaining to the objection that the Objector proffers at the hearing.¹

Findings of Fact from the PD

10. The BRO prepared a Technical Report (TR) for the Application. The TR utilized data from the USGS gage “USGS Powder River near Locate, MT” with a period of record from 10/1/1938 through 9/30/2014. The entire period of record for this gage, which is located approximately 40 miles downriver from the proposed point of diversion and is the closest gage to the point of diversion, was used to determine the median of the mean monthly flows for the months April through October (the proposed period of diversion) *at the gage*. To determine the physical availability of water *at the point of diversion* (a component of the legal availability criteria) the BRO tallied all of the water rights between the proposed point of diversion and the gage (not including the Montana Department of Fish, Wildlife and Parks (DFWP) instream flow right since it is never diverted). Those amounts were then added to the amounts *at the gage*. The result is found in the following table:

Table 1. Physical Availability (CFS)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Median of monthly discharge at gage	579.5	991.8	1339.5	443.5	167.7	93.7	188.3
Legal demands* between gage and POD	385.6	426.5	430.9	430.9	420.7	382.8	279.6
Physically Available at POD (Median plus demands)	965.1	1418.3	1770.4	874.4	588.4	476.5	467.9

* Does not include DFWP instream flow, as it is never diverted.

(Department File, Technical Report)

¹ See generally, *Montana Environmental Info. C’tr v. Montana Department of Environmental Quality*, 2005 MT96, 112 P.3d 964 (2005) (MEIC contested the issuance of a permit by MDEQ which was upheld after a contested case hearing. Upon judicial review, the District Court found that MEIC, as the challenging party, bore the burden of proof in the contested case hearing to show that the permit was improperly issued. Citing §§ 26-1-401 and 401, MCA, the Supreme Court found that the “party asserting a claim for relief bears the burden of producing evidence in support of that claim.”; § 26-1-401, MCA (“[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence.”); § 26-1-402, MCA (“[e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.”)

11. The BRO then calculated a median of the mean monthly volume for the months April through October resulting in the following table:²

Table 2. Physical Availability (AF)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Median of monthly discharge at gage	34422.3	60876.7	79566.3	27222.0	10293.4	5562.8	11554.8
Legal demands* between gage and POD	1426.0	1936.4	1886.0	1948.8	1910.7	1611.4	1133.3
Physically Available at POD (Median plus demands)	35848.3	62813.0	81452.3	29170.9	12204.1	7174.2	12688.1

*Does not include DFWP instream flow, as it is never diverted.

(Department File, Technical Report)

12. In its comparison of physical availability and legal demands, the BRO used the 53 water rights plus the FWP instream flow in the area of effect. Monthly volumes for irrigation legal demand were calculated by “multiplying maximum acres by the standard of 45% efficiency in climate region 2 (3.58 AF/AC) and distributing that volume evenly across the number of days in the period of use. Stock water demands were calculated by using the Department standard of 0.017 AF/AU/YR and the number of AU’s claimed.

The following two tables show the result for both rate (CFS) and volume (AF):³

Table 3. Comparison of Physical Availability and Legal Demands (CFS)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Physical Availability	965.1	1418.3	1770.4	874.4	588.4	476.5	467.9
Legal Demands	732.6	850.5	614.9	500.9	435.2	391.7	289.1
Physical Availability minus Legal Demands	232.5	567.8	1155.5	373.5	153.2	84.8	178.8

Table 4. Comparison of Physical Availability and Legal Demands (AF)

Month	Apr	May	Jun	Jul	Aug	Sept	Oct
Physical Availability	35848.3	62813.0	81452.3	29170.9	12204.1	7174.2	12688.1
Legal Demands	22069.0	28000.4	12832.0	6251.8	2801.7	2138.4	1712.4
Physical Availability minus Legal Demands	13779.3	34812.6	68620.3	22919.1	9402.4	5035.8	10975.7

2. Neither the PD nor the TR document how the conversion from Table 1 to Table 2 was made. The PD only states that “[v]olume was calculated by multiplying the median monthly flow at the gage by 1.98 and by the number of days in the month.” While that statement appears to be true for the first row in each table, a cursory look at the numbers shows that it does not hold true for the middle row of each table. No explanation or discussion of this discrepancy is given in either document. In addition, the record does not disclose the individual water rights that were used in this tabulation – the record only states that “[t]here are 53 legal demands between the proposed point of diversion and the downstream gage.” Were those individual water rights included in the record, it may have shed light on the volumes used by the BRO.

3. Again, the dearth of details and documentation regarding the calculations, the water rights used in the calculations, and the methodology employed in determining legal availability makes meaningful review of the PD difficult at best.

The BRO concludes that the amount of water physically available exceeds the legal demands by a minimum of 84.8 CFS and 5035.8 AF in any month and the Applicant is requesting 2780 GPM (6.2 CFS) up to 914 AF/YR. (Department File, PD)

13. The BRO found that the Applicant's plan to not create adverse effect is to shut down their diversion if call is made. The pump can be turned off and/or removed from the river. The flow rate and volume physically available at the point of diversion exceed the legal demands throughout the proposed period of diversion. The BRO also looked specifically at the instream flow held by the DFWP to determine if there could be adverse effect to that right. DFWP has not made a call on the Powder River. The Department looked at all four gages on the Powder River, Moorhead, Locate, Mizpah and Broadus. Mizpah is 1928-1933 and Broadus is 1982-1992. The other two have continuous records back to the late twenties (Moorhead) or late thirties (Locate). The research found the following information: the Department determined DFWP water right will not be adversely affected in most months and a constant call will not have to be made by DFWP on the Powder River. The table below shows the actual months (not the median of the mean) for each gage on the Powder River in which the DFWP instream flow was not met. The table indicates that while there are some months that the DFWP may place a call for water, a constant call is not likely.

Gage Name	Months of Record	Months DFWP Water Right Not Met	Percentage of Months DFWP Not Met
Moorhead	996	75	7.53
Locate	912	62	6.80
Mizpah	54	2	3.70
Broadus	88	11	12.50

Findings of Fact for both Legal Availability and Adverse Effect⁴

14. Objectors presented the testimony of Bill Erickson, John Krutzfeldt and Dean Hanvold, all local landowners along or near the Powder River. Each of them is familiar with conditions on the Powder River. Mr. Erickson testified that he has been on the Powder River since 1988 and that at times water was prolific and other times when there is not enough water so they did not irrigate. There were years when there was ample water and other years when there was not enough water. The testimony was conflicting as to when (particular years or portions of years)

4. The testimony and evidence given by both the Objector and the Applicant did not distinguish what portion of that testimony and evidence related to legal availability vs. adverse effect. Therefore all relevant evidence and testimony is presented in a single section of this Order.

pumping occurred. Reasons for not pumping include lack of water, accommodation of neighbors, or lack of help.

15. Mr. Erickson was questioned about the gages on the Powder River and opined that the upstream (Broadus) gage showed that there was not enough water to fulfil the needs of all appropriators. He opined that the gage located downstream (at Locate, the gage used by the BRO) was not suitable due to the distance downstream and inflowing tributaries downstream of the proposed point of diversion. No data or calculations were used in support of this testimony. Mr. Erickson could not say if the Applicant's pumping contributes to a lack of water at his pumping site. Mr. Erickson states that the river is rarely completely dry at his pumping site. (Audio Tk. #03)

16. On cross examination, Mr. Erickson states that the gage at Broadus has a period of record from 1982 to 1992, that the Broadus gage is approximately 40 miles upstream from his pumping site, and that he has no other records of stream flow upstream from his pumping site. Mr. Erickson admits that he has no evidence that the BRO did not follow the Department's established methods and procedures in evaluating the Application. Mr. Erickson's testimony establishes that in some years his water rights can be used and in other years there is not enough water in the river to pump or water quality conditions make pumping infeasible. No call has ever been made on the Applicants to curtail their pumping even on an informal basis. Mr. Erickson admits that he is not a scientist and that his opinion is based on his observations, not scientific evidence. (Audio Tk. #03)

17. Mr. Krutzfeldt has land on the Powder River across from the Applicant's and upstream from the Erickson property. His pumping site is upstream from the Applicant's pumping site. Sometimes the Powder River goes dry but there are years when there is more than enough water for all appropriators and some years when there is not enough water for anyone. Mr. Krutzfeldt has never made a call on upstream appropriators when there is limited water. Mr. Krutzfeldt admits that his testimony is based on his lay opinion and is not based on scientific evidence. (Audio Tk. #04)

18. On cross examination Mr. Krutzfeldt admits that in some years he and the Applicants irrigated simultaneously without problems. Mr. Krutzfeldt stated that during the 1980's there were some years of severe drought. The inference being that the values presented by the gage at Broadus were influenced by drought. (Audio Tk. #04)

19. Mr. Hanvold assisted the Erickson's in preparing for the hearing but admits that he is not an expert. Mr. Hanvold presented Exhibit B, aerial photographs of the Powder River showing the Applicant's pivots and conditions along the Powder River. Many of the photographs show the river being essentially dry. Mr. Hanvold also helped the Erickson's irrigate in 2001 and 2002. He testified that either there was not enough water or the quality was too poor to irrigate with. The dates of the photographs presented by Mr. Hanvold are unknown. (Audio Tk. #05)

20. Applicant's presented testimony from Gerald Ellis, Mark Ellis and Scot Robinson. Mr. Ellis testified that the Powder River is reliable in some years for irrigation and in other years it is not. He has been ranching in the vicinity of the Powder River for approximately 25 years. In 2015 the river was "plumb full all year from bank to bank." Mr. Ellis has never been asked by a senior water user to shut down when he was pumping but he states that he would if he had been asked. Mr. Ellis has never pumped the river dry. Generally calls are not made on junior water users because everyone is "neighborly." (Audio Tk. #07)

21. Mark Ellis runs the sprinklers on the Applicants' ranch. He has never seen the river "bone dry" but in some years it is low and in other years there is plenty of water. The Applicants have never received a call to shut down but would if asked. Mr. Ellis states that the Powder River is a gaining stream particularly from artesian springs that flow directly into the river. There are many artesian springs all along the river some of which flow approximately 400 gpm. Considerable testimony and evidence was elicited regarding the condition of the Erickson's pumping operation. To the extent that this evidence tends to show abandonment of the water right, this Hearing Examiner clarified that the instant matter does not include the issue of abandonment and this Hearing Examiner has no jurisdiction to consider the issue of abandonment. (Audio Tk. #08 and #06)

22. Mr. Robinson is a rancher on Mizpah Creek, a tributary of the Powder River. He is somewhat familiar with the Powder River but has never seen it go "bone dry." His observation is that water flows past the Applicant's point of diversion even when the Applicants are pumping. (Audio Tk. #09)

23. While I find that all of the witnesses at hearing were credible, their conflicting testimony is of little probative value. Determinations related to hydrology, legal availability, and adverse effect involve technical, scientific and legal complexities. The lay witness testimony at the contested case hearing does little to inform these technical determinations. For example, it is not clear from reviewing the Technical Report that the BRO accounted for tributary water

between the Applicant's point of diversion and the USGS Powder River near Locate, MT, when determining legal availability. The failure to do so could impact the determination as to whether or not water is legally available. However, the anecdotal accounts that the Powder River between the Applicant's point of diversion and the USGS Powder River near Locate, MT, is a gaining reach provided no scientific evidence regarding how much tributary water contributes to flows in the impacted reach. Accordingly, I find the objector's evidence of no probative value with regard to legal availability.

24. Similarly, the lay witness testimony suggests: there are times when there is ample water to satisfy senior water users; there are times when there is insufficient water to satisfy senior water users; and there are times when water quality interferes with senior water users. However, this testimony is insufficient to establish any pattern or frequency with which water availability impacted senior water users versus water quality. Absent a more technical analysis by the Objector, I find the conflicting evidence of little probative value with regard to adverse effect.

Conclusions of Law (Legal Availability)

25. 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.

26. In the instant matter the BRO issued its PDG determining that the Applicant satisfied the legal availability criteria by a preponderance of the evidence. See PDG at ¶ 17 -20. Therefore, the burden of production shifted to the objector in the contested case proceeding. While the BRO conducted a poorly documented analysis of the legal availability of water for this Application, that analysis comports with the "bare bones" procedure and methodology provided

as guidance by the Department. While the BRO's analysis may not have been rigorous enough to survive a sophisticated technical challenge, that analysis was the only technical evidence related to legal availability contained in the record. No probative scientific evidence was submitted in the contested case hearing contradicting the legal availability analysis contained in the BRO's Technical Report and PDG. (FOF 8 – 20; FN 1 & 2)

27. The objector did not meet its burden of production or provide any probative evidence contradicting the legal availability determination in the PDG. Accordingly, there is no evidentiary basis for disturbing the PDG's conclusion that the Applicants proved by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicants seek to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 8 – 10, 12 – 20; PDG at ¶ 17 - 20)

Conclusions of Law (Adverse Effect)

28. Pursuant to § 85-2-311(1)(b), MCA, an applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

29. In the instant matter, the BRO issued its PDG determining that the Applicants satisfied the adverse effect criteria by a preponderance of the evidence. See PDG at ¶ 28 - 30. Therefore, the burden of production shifted to the Objectors in the contested case proceeding.

30. The Department has recognized that planning to turn off a pump when water is in short supply or when a call is made can be an adequate plan to prevent adverse effect on prior appropriators depending on the circumstances. *In the Matter of Application for Beneficial Water Use Permit No. 76D-30025038 by Marl Lake Inc.*, DNRC Final Order (2007) ("The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates,

permits, or stat reservations will not be adversely affected is to have a pump which can be shut off if a legitimate call is received.”) (Citing *In the Matter of Beneficial Water Use Permit Application No. 60194-76LJ by Leonard and Leroy Cobler*, Proposal For Decision (1988) adopted by Final Order).

31. There was conflicting testimony regarding water availability and the potential for adverse effect to senior water users on the impacted reach of the Powder River. FOF 14 - 24. While there may be times when the Applicant’s use could interfere with senior water users, this is not a case of constant call. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler* (DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen* (DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992)(applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company* (DNRC 2006).

32. Applicants stated in their Application and throughout their testimony at hearing that although no call has ever been made upon them (or for that matter by them) on any senior appropriator on the Powder River, their plan to prevent adverse effect is to shut down their pumps should such a call be made. This type of plan can be sufficient to prove lack of adverse effect for surface water diversions in an open basin. The Objector presented no evidence that the Applicants’ plan would be inadequate. (Department File, FOF 11, 17, 18)

33. The Objectors did not meet their burden of production or provide any probative evidence contradicting the adverse effect determination in the PDG. Accordingly, there is no evidentiary basis for disturbing the PDG’s conclusion that the Applicant proved by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. See PDG at ¶ 31 - 39.

CONCLUSION

Pursuant to the findings in the PD regarding the criteria of physical availability (85-2-311(1)(a)(i), MCA), means of diversion (85-2-311(1)(c), MCA), beneficial use (85-2-311(1)(d), MCA) and possessory interest (85-2-311(1)(e), MCA), which were not contested by the Objectors, and the evaluation of the analysis and testimony regarding legal availability (85-2-

311(1)(a)(ii), MCA) and adverse effect (85-2-311(1)(b), MCA) as found above, the Applicant has proven by a preponderance of the evidence that all applicable criteria have been met.

FINAL ORDER

Application for Beneficial Water Use Permit No. 42J 30072589 is **GRANTED**.

Applicant may divert water from the Powder River, by means of a pump, from April 15 through October 31 at 2780 GPM up to 914 AF, from a point in the NWNWSW Section 10 T2N R54E, Custer County, for irrigation on 340 acres from April 15 through October 31. The place of use is located in Section 10, S2 Section 3 and W2NWNW Section 11, all in T2N R54E, Custer County.

NOTICE

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

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 7th day of June 2016.

/Original signed by David A. Vogler/

David A. Vogler, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 7th day of June 2016 by first class United States mail and by electronic mail (e-mail) as designated.

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/Original signed by Jamie Price/

Jamie Price, Hearings Assistant
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