

THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

DNRC Water Resources
Billings Regional Office
1371 Rimtop Dr.
Billings, MT 59105-1978

February 23, 2026

Scott M. & Pamela K. Griswold
33 Sand Creek Road
Bridger, MT, 59014-9581

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 43D 30171860

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has completed a preliminary review of your application. This review consists of an evaluation of the criteria for issuance of a permit authorization found in §85-2-311, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the Draft Preliminary Determination to Grant your application is attached.

You have the opportunity to request an extension of time to submit additional information for the Department to consider in the decision, within 15 business days of the date of this letter. If no written request for an extension is received by **March 16, 2026**, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "C. Strebeck". The signature is written in a cursive, flowing style.

Cassey Strebeck
Water Resource Specialist
Billings Regional Office, Montana DNRC
Cassey.Strebeck@mt.gov
406-247-4422



DNRC.MT.GOV

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

APPLICATION FOR BENEFICIAL WATER)
USE PERMIT NO. 43D 30171860 BY SCOTT) DRAFT PRELIMINARY DETERMINATION
M. GRISWOLD & PAMELA K. GRISWOLD) TO GRANT PERMIT

On December 4, 2025, Scott M. Griswold & Pamela K. Griswold (Applicant) submitted Application for Beneficial Water Use Permit No. 43D 30171860 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for a flow rate of 4.1 CFS, up to 89.8 AF in volume for the irrigation of 23.8 AC. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on September 22, 2025, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Meeting Form 600P-B on September 29, 2025. The Department delivered the Department-completed Technical Analyses on November 19, 2025. The application was determined to be correct and complete as of December 26, 2025. An Environmental Assessment for this Application was completed on February 17, 2026.

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
- Attachments:
 - Montana Sage Grouse Habitat Conservation Program Letter for project no. 7175, dated September 29, 2025
 - Estimated Pump Design, by Big Sky Irrigation
 - Image of proposed portable pump and floating river screen
- Maps:
 - Map 1, titled: *Griswold – Permit – Proposed POD & POU*, overlaying 2023 aerial imagery, with the Applicant's parcel boundary

- Map 2, titled: *Griswold, Scott M & Pamela K: Griswold – Permit – Proposed POD & POU*, over 2025 aerial imagery, with Applicant’s preliminary designs of the point of diversion (POD), place of use (POU), and conveyance via ditch and proposed pipelines
- Map 3, titled: *43D 30171860 – Griswold – Proposed*, over 2021 aerial imagery, with proposed POU, transitory POD, and conveyance via ditch and pipelines
- Map 4, titled: *Griswold Proposed POU & POD*, over aerial imagery with proposed transitory POD; proposed initial pipeline; proposed pipelines 1, 2, and 3; proposed POU, including flood irrigated acres
- Department-completed technical analyses, dated November 19, 2025, based on information provided in the Preapplication Meeting Form

Information within the Department’s Possession/Knowledge

- Float Area Method measurements, provided by the Applicant, received by email on September 4, 2025
- Float Area Method measurement calculations, calculated by Billings Regional Office Water Resource Staff and approved by WSB Groundwater Hydrologist, Jack Landers, via email on September 26, 2025
- Surface Water Technical Analyses Report – Notice of Errata, dated February 23, 2026
- DNRC Water Right Information System (WRIS)
- DNRC Water Calculation Guide
- 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 Billings Regional Office at 406-247-4415 to request copies of the following documents.
 - Department Permit Application Manual, February 2025
 - Department Change Application Manual, February 2025

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; AF means acre-feet; AF/YR means acre-feet per year; AOPI means area of potential impact; AU means animal unit; CFS means cubic feet per second; GPD means gallons per day; GPM means gallons per minute; POD means point of diversion; POU means place of use; and STOC means Statement of Claim.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Sand Creek, from May 1 to September 30, by means of a pump, from a transitory point of diversion, approximately 86 feet long, along the southwest of the Applicant’s property boundary. The entire range of the proposed transitory point of diversion, from the upstream extent to the downstream extent, is located in the SWSWSW Section 4, Township 6 South, Range 23 East, Carbon County. The proposed use includes diverting at a flow rate of 4.1 CFS and up to 89.8 AF in volume per year, for irrigation from May 1 to September 30. The Applicant proposes to irrigate 23.8 acres, located in the SESW and SWSW Sec. 4, T6S, R23E, Carbon County, with 1.2 acres in Government Lot 10 (SESW), and 22.6 acres in the SWSW. Of the 23.8 acres, 4.5 acres will be flood irrigated from the Applicant’s ditch, and the remaining 19.3 acres will be irrigated by a gated pipe system. A summary of this Application is in Tables 1 and 2.

Table 1: Summary of the Proposed Use for Application for Beneficial Use Permit 43D 30171860

Source	Flow Rate	Diverted Volume	Purpose	Period of Use	Place of Use	Point of Diversion	Period of Diversion
Sand Creek	4.1 CFS	89.8 AF	Irrigation	05/01 to 09/30	1.2 acres in Government Lot 10 (SESW) and 22.6 acres in the SWSW, Sec. 4, T6S, R23E, Carbon County	Table 2	05/01 to 09/30

Table 2: Proposed Transitory Point of Diversion

Upstream Extent	Downstream Extent
SWSWSW Sec. 4, T6S, R23E, Carbon County	SWSWSW Sec. 4, T6S, R23E, Carbon County

2. The requested volume of 89.8 AF and the requested 19.3 acres to be irrigated via a gated pipe system differ from that in the Technical Analysis, due to typographical errors made by the Department during the preapplication meeting that occurred on September 22, 2025. The volume of 89.8 AF is the correct volume for this Application, and the 19.3 acres are the correct acres to be irrigated under this Application. These are discussed in the Surface Water Technical Analyses Report – Notice of Errata, dated February 23, 2026.
3. The proposed appropriation is supplemental to the Applicant's Sand Creek Canal Co. ditch shares under Statement of Claim 43D 199996-00.

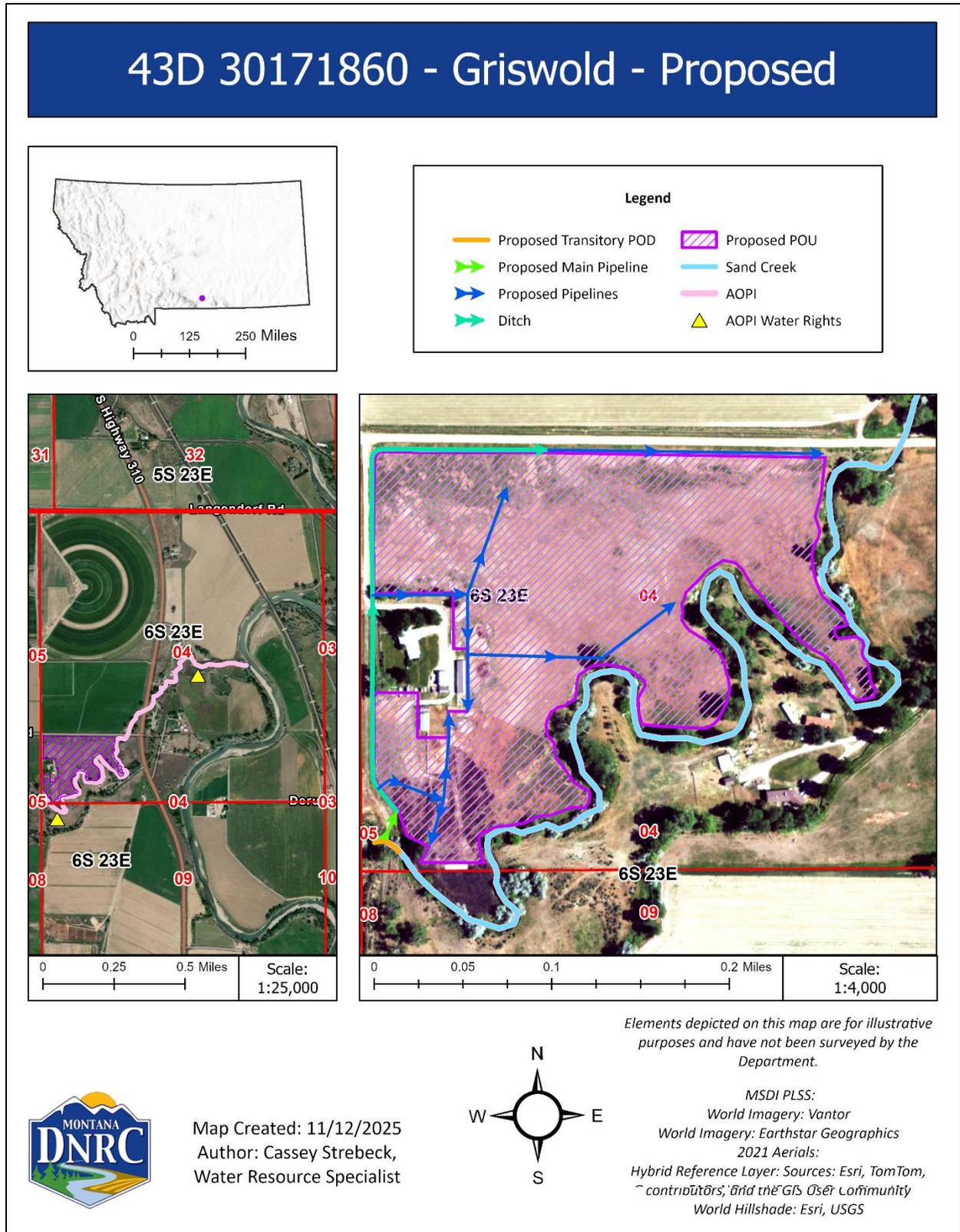


Figure 1. Proposed Place of Use, Conveyance, and AOPI for Application 43D 30171860

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

GENERAL CONCLUSIONS OF LAW

4. 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 . . .

5. 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.

6. 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.

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

8. 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.

9. 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

10. The Applicant proposes to divert water from Sand Creek using a pump from a transitory POD, approximately 86 feet long, along the Applicant's property located in the SWSWSW Sec. 4, T6S, R23E, Carbon County, at a flow rate of 4.1 CFS, up to 89.8 AF in volume per year, to be conveyed via a ditch and pipeline system to irrigate 23.8 acres.

11. Sand Creek is considered to be naturally intermittent. However, upon site visit, the Department determined that no water was available in Sand Creek above Sand Creek Canal. The Department internally determined that Sand Creek was of source type: other.

12. For all other source types, physical availability of water will be determined based on monthly flow rate and volume. The Applicant is required to collect measurements for these sources once monthly at Department-approved intervals during the period of diversion (ARM 36.12.1702 (4)).

13. The Department and the Applicant collected surface water measurements on Sand Creek, at the Applicant's proposed POD. Use of the DNRC and Applicant-collected flow measurements are appropriate because the source does not follow a natural hydrograph, as determined by Department Hydrologist Christine Schweigert, and therefore, the estimation techniques available to the Department cannot be applied and would not accurately estimate the physically available flow rate and volume. This method was determined to be the best estimation technique available.

14. The Department collected initial measurements in May using a FlowTracker 2 velocity meter and the float area method. The Applicant collected measurements in June, July, August, and September using the float area method. The measurements were found to be acceptable by Department Groundwater Hydrologist, Jack Landers, via email on September 26, 2025, and were taken as the physical availability of water at the proposed point of diversion.

15. The discharge measured in May using the float area method was approximately 8.26 CFS less than the discharge measured with the velocity meter. For consistency, only the data from the float area measurements were used to evaluate physical availability. This provided more representative measurements since the Applicant’s only available method of measurement was the float area method. Moreover, the Department used the lower number for the evaluation of physical availability to be conservative. Table 3 shows the physical availability by month.

Table 3: Physical availability at the Point of Diversion

Measurement Number:	Collection Date:	Collected By:	Method:	Flow Rate (CFS):
1	05/28/2025	DNRC	Velocity Meter	24.23
1	05/28/2025	DNRC	Float Method	15.97
2	06/26/2025	Applicant	Float Method	15.62
3	07/31/2025	Applicant	Float Method	19.36
4	08/19/2025	Applicant	Float Method	31.72
5	09/04/2025	Applicant	Float Method	12.33

16. Table 4 summarizes the estimated mean monthly flow and volume of Sand Creek based on the float area method measurements. Monthly volume in AF is calculated by multiplying the flow rate in CFS by 1.98 (the number of AF per day per CFS) and the number of days in the respective month.

Table 4: Measured Monthly Flow Rate and Volume

Month	May	June	July	August	September
Flow Rate (CFS)	15.97	15.62	19.36	31.72	12.33
Volume (AF)	980.24	927.83	1,188.32	1,946.97	732.40*

*Differs from the November 19, 2025 Technical Analysis; see February 23, 2026 Surface Water Permit Technical Analysis Report – Notice of Errata

17. The volume for September in Table 4 has been corrected and does not match the values in the Technical Analyses. This correction is reflected in the Surface Water Permit Technical Analyses Report – Notice of Errata dated February 23, 2026.

18. The Department finds that water is physically available in excess of the proposed flow rate, during the proposed period of diversion, May 1 to September 30.

19. The Department finds that water is physically available in excess of the proposed volume, during the proposed period of diversion, May 1 to September 30.

LEGAL AVAILABILITY

FINDINGS OF FACT

20. To determine the amount of water legally available at the Applicant’s proposed POD, the Department identified an AOPI. The AOPI spans a reach of Sand Creek extending from the upstream extent of the proposed transitory POD located in the SWSWSW Sec. 4, T6S, R23E, Carbon County, downstream, approximately 1.5 river miles, to the confluence of Sand Creek and the Clarks Fork Yellowstone River located in the Government Lot 9 (NENWSE) Sec. 4, T6S, R23E, Carbon County. This is an acceptable area of the potential adverse effect as the reach includes the remaining 1.5 river miles of Sand Creek, includes a drainage basin of 45.2 square miles, and the Clarks Fork Yellowstone River is a significant hydrological boundary.

21. There are two (2) active water rights on Sand Creek within the AOPI: one (1) Statement of Claim is for stock direct from source, and one (1) Statement of Claim is for irrigation. Table 5.

Table 5: Water Rights located in the AOPI

Water Right Owner	WR Type	Owners	Purposes	Flow Rate (CFS)	Acres	AU	Volume (AF)	Period of Diversion	Period of Use
43D 43402-00	STOC	Robin A Schalla, Tammy S Schalla	Irrigation	1	40	N/A	122.8	04/15 to 10/01	04/15 to 10/01
43D 30134926	STOC	Heidema Ranch LP	Stock	0.033*	N/A	700	23.8	01/01 to 12/31	01/01 to 12/31
Stock Direct Standard		-	-	0.078	-	-	-	-	-

*Calculated by DNRC

22. Statement of Claim 43D 30134926 had its flow rate and volume quantified by the Department, by Department standard practice. The volume was determined using the adjudication standard of 30 GPD per AU (0.34 AF/YR). The flow rate in GPM was back-

calculated using the following equation: volume in AF x 325,851 gallons / 365 days / 1,440 minutes per day = GPM. The flow rate in GPM was converted to the flow rate in CFS, using the following equation: GPM / 448.8 GPM/CFS = CFS. To provide a conservative estimate with stock direct from the source, the Department adds 35 GPM (0.078 CFS) to the calculated flow rate.

23. The Department calculated the volume for Statement of Claim 43D 43402-00, located in climatic area 1, based on 3.07 AF/AC, which is the lower end of the higher range at 60% efficiency flood irrigation (ARM 36.12.115).

24. The flow rate of existing legal demands is calculated by combining the flow rate of all water rights within the AOPI, for each month of the proposed period of diversion.

25. The volume of existing legal demands is calculated by combining the volume of all water rights within the AOPI for each month of the proposed period of diversion. To find the volume for a specific month of a water right, the volume is divided by the number of days in the period of diversion, giving the volume per day, then multiplying the volume per day by the number of days in the respective month.

26. The comparison between the physically and legally available flow rate in Sand Creek at the proposed upstream extent of the proposed transitory POD located in the SWSWSW Sec. 4, T6S, R23E, Carbon County is shown in Table 4.

27. The comparison between the physically and legally available volume in Sand Creek at the proposed upstream extent of the proposed transitory POD located in the SWSWSW Sec. 4, T6S, R23E, Carbon County is shown in Table 5.

Table 4: Legal Availability Analysis of Flow Rate at the Proposed Point of Diversion on Sand Creek

Month	May	June	July	Aug	Sept
Physically Available Flow Rate (CFS)	15.97	15.62	19.36	31.72	12.33
Existing Legal Demands in AOPI (CFS)	1.11	1.11	1.11	1.11	1.11
Legally Available Water (CFS)	14.86	14.51	18.25	30.61	11.22

All values were rounded to the hundredths place after calculations/conversions

Table 5: Legal Availability Analysis of Volume at the Proposed Point of Diversion on Sand Creek

Month	May	June	July	Aug	Sept
Physically Available Volume (AF)	980.24	927.83	1,188.32	1,946.97	732.40*
Existing Legal Demands in AOPI (AF)	24.41	23.63	24.41	24.41	23.63
Legally Available Water (AF)	955.83	904.20	1,163.91	1,922.56	708.77

All values were rounded to the hundredths place after calculations/conversions. *Differs from the November 19, 2025 Technical Analysis; see February 23, 2026 Surface Water Permit Technical Analysis Report – Notice of Errata

28. The Department finds that the physically available flow rate exceeds the existing legal demand during the Applicant’s proposed period of diversion. The Department finds that the requested flow rate of 4.1 CFS is legally available to the Applicant during the proposed period of diversion, May 1 to September 30.

29. The Department finds that the physically available volume exceeds the existing legal demand during the Applicant’s proposed period of diversion. The Department finds that the requested volume of 89.8 AF is legally available to the Applicant during the proposed period of diversion, May 1 to September 30.

ADVERSE EFFECT

FINDINGS OF FACT

30. There are two senior water rights downstream of the proposed POD, which may be adversely affected: Statements of Claim 43D 434302-00 and 43D 30134926. These two STOC are located in the AOPI that extends 1.5 river miles from the upstream extent of the proposed transitory POD to the confluence of Sand Creek and the Clarks Fork Yellowstone River. The Applicant’s plan to prevent adverse effect is to shut down the pump and cease diversion, if a valid call is made by a senior water user. The Department finds that the Applicant’s adverse effect plan is reasonable.

31. The Applicant has proven that enough water remains in Sand Creek to meet both the existing legal demands within the AOPI and the proposed appropriation of 4.1 CFS and 89.8 AF in volume.

32. The Department finds the proposed flow rate of 4.1 CFS and up to 89.8 AF in volume to irrigate 23.8 acres will not have adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

33. The Applicant proposes to use a transitory point of diversion, approximately 86 feet long, along the southwest side of the Applicant's property boundary. The entire range of the proposed transitory point of diversion, from the upstream extent to the downstream extent, is located on Sand Creek in the SWSWSW Section 4, Township 6 South, Range 23 East, Carbon County.

34. The Applicant proposes to pump water from Sand Creek using a Cornell 6RB-20, with a 20 HP engine, and a floating screen apparatus. The pump is configured with a 10-inch suction and a 6-inch discharge. The water will be conveyed from the pump via a 12-inch #80 plastic irrigation pipe (PIP), approximately 120-feet long, to a contour ditch that runs from the southwest side of the Applicant's property northward along the west side of the place of use, rounding the northwest corner and ending along the north side. From the contour ditch, ditch cutouts, and siphon tubes will flood irrigate 4.5 acres; three headgates on the contour ditch with gated pipe will irrigate the remaining 19.3 acres, for a total of 23.8 acres of irrigated lands.

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

BENEFICIAL USE

FINDINGS OF FACT

36. The Applicant proposes to divert up to 89.8 AF in volume, at a flow rate of 4.1 CFS, to irrigate 23.8 acres. Irrigation is a recognized beneficial use under the Montana Water Use Act § 85-2-102(5), MCA. While this proposed appropriation is supplemental to the Applicant's Sand Creek Canal Co. ditch shares, this Application has become necessary as the ditch shares are not always available. The Applicant proposes to use the ditch shares when available and utilize this proposed appropriation when shares are not available (FOF 3).

37. The flow rate is based on the size of the pump, and the volume requested is calculated using Department standard for flood irrigation of 4.5 acres at 45% efficiency in climatic area 1, and gated pipe irrigation of 19.3 acres at 60% efficiency in climatic area 1.

38. The Applicant requests a period of diversion and period of use from May 1 to September 30, which is within the standard period of diversion for irrigation, March 15 to November 15, for climatic area 1.

39. The Department finds that the beneficial use criterion for this application is met, and that the requested flow rate of 4.1 CFS and up to 89.8 in volume, during the proposed period of diversion, are reasonably justified per 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

PHYSICAL AVAILABILITY

41. 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.”

42. 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).

43. 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).

44. The Applicant has proven that water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate. Section 85-2-311(1)(a)(i), MCA. (FOF 10-19)

LEGAL AVAILABILITY

45. 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).

46. 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.

47. The 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 20-29)

ADVERSE EFFECT

48. 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.

49. 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).

50. 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).

51. 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).

52. 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.

53. 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).

54. 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 30-32)

ADEQUATE DIVERSION

55. 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.

56. 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.

57. Collection of snowmelt and rain in lined ponds considered adequate means of diversion. *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989).

58. The 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 33-35)

BENEFICIAL USE

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

60. 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).

61. 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).

62. 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.*

63. The Applicant proposes to use water for irrigation, which is a recognized beneficial use. Section 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 89.8 AF of diverted volume and 4.1 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 36-39)

POSSESSORY INTEREST

64. 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.

65. 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.

66. 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 40)

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. 43D 30171860 should be GRANTED.

The Department determines the Applicant may divert water from Sand Creek, by means of a pump, from May 1 to September 30, at a flow rate of 4.1 CFS and up to 89.8 AF in volume, from a transitory point of diversion, approximately 86 feet in length, located in the SWSWSW Section 4, Township 6S, Range 23E, Carbon County. The Applicant may use water for crop irrigation from May 1 to September 30, to irrigate 23.8 acres, located in the SESW and SWSW Sec. 4, T6S, R23E, Carbon County, with 1.2 acres in Government Lot 10 (SESW), and 22.6 acres in the SWSW.

NOTICE

The Department will provide a notice of opportunity for public comment on this application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this application pursuant to §§ 85-2-307, and -308, MCA. If this application receives public comment pursuant to § 85-2-307(4), the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

Dated this 23rd day of February 2025.



Heidi Christison
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 23rd day of February, 2025, by first class United States mail.

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