

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

June 19, 2026

R Bar N Ranch, LLC
89 Sand Creek Rd
Bridger, MT 59014

Subject: Draft Preliminary Determination to Grant Beneficial Water Use Permit Application No. 43D 30171861

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 July 13, 2026, the Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA.

Please note that if you are granted an extension of time to submit additional information to the Department, additional information may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Cassey 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

CC:
Scott M. Griswold
33 Sand Creek Road
Bridger, MT, 59014



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

* * * * *

APPLICATION FOR BENEFICIAL WATER USE)	
PERMIT NO. 43D 30171861)	DRAFT PRELIMINARY DETERMINATION
BY R BAR N RANCH, LLC)	TO GRANT PERMIT

* * * * *

On April 10, 2026, R Bar N Ranch, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 43D 30171861 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for a flow rate of 1.0 CFS, up to 17.09 AF in volume for the irrigation of 6.85 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 February 9, 2026. The Department delivered the Department-completed Technical Analyses on March 30, 2026. The application was determined to be correct and complete as of April 20, 2026. An Environmental Assessment for this application was completed on April 20, 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. 7184, dated October 15, 2025
 - Pump Data Sheet provided by Agri Industries for a Cornell pump 3RB, dated October 10, 2025

- Maps:
 - Map 1, titled: Cadastral Records provided by the Montana State Library; no date of aerial or map
 - Map 2, titled: R Bar N Ranch LLC – DNRC Form 600; on Google Earth imagery; no date of aerial or map
 - Map 3, titled: R Bar N Ranch LLC – DNRC Form 600P-B; on Google Earth imagery; no date of aerial or map
 - Map 4, titled: 43D 30171861 – R Bar N Ranch LLC – Proposed; map created by the Department for the Technical Analyses Report created March 26, 2026, with ESRI World Imagery basemap layer
 - Map 5, titled: 43D 30171861 – R Bar N Ranch LLC – Proposed – Overlapping Water Rights; map created by the Department for the Technical Analyses Report created March 26, 2026, with ESRI World Imagery basemap layer with hand-drawn overlay of overlapping water right area
- Department-completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated March 30, 2026

Information within the Department’s Possession/Knowledge

- Float Area Method Measurements, provided by the Applicant
- Emails from Water Sciences Bureau Department Groundwater Hydrologist Jack Landers dated September 23, 2025, and October 23, 2025
- Department site visit on May 28, 2025
- 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/AC means acre-feet per acre; 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; R means range; Sec. means section; STOC means Statement of Claim; and T means township.

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. The proposed point of diversion is located in the SWNWNE Section 8, Township 6 South, Range 23 East, Carbon County. The proposed use includes diverting at a flow rate of 1.0 CFS, up to 17.09 AF in volume per year, for irrigation from May 1 to September 30. The Applicant proposes to use a portable sprinkler and pipeline system to irrigate 6.85 acres, consisting of 2.2 AC in the NWNWNE, 0.15 AC in the NENWNE, 1.7 AC in the SWNWNE, and 2.8 AC in the SENWNE, all in Sec. 8, T6S, R23E, Carbon County. A summary of this application is in Tables 1 and 2.

Table 1: Summary of Proposed Use

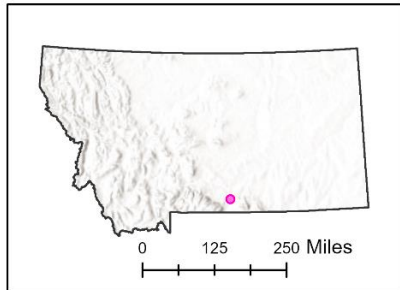
Source	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
Sand Creek	1.0 CFS	17.09 AF	Irrigation	5/1 – 9/30	See Table 2	SWNWNE Sec. 8, T6S, R23E, Carbon County	5/1 – 9/30

Table 2. Proposed place of use

POU	Legal Land Description	Acres
1	NWNWNE Sec. 8, T6S, R23, Carbon County	2.2
2	NENWNE Sec. 8, T6S, R23, Carbon County	0.15
3	SWNWNE Sec. 8, T6S, R23, Carbon County	1.7
4	SENWNE Sec. 8, T6S, R23, Carbon County	2.8

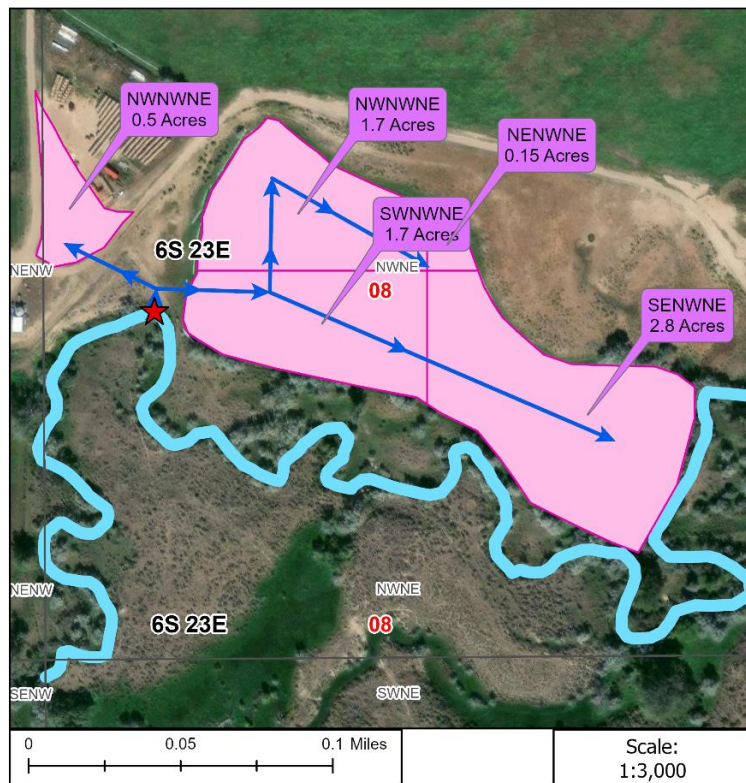
2. The proposed appropriation is supplemental to the Applicant's Sand Creek Canal Co. ditch shares under Statement of Claim 43D 199996-00. This Application has become necessary as the ditch shares are not always available. The Applicant proposes to use the ditch shares when available and utilize this proposed appropriation when shares are not available.

43D 30171861 - R Bar N Ranch, LLC - Proposed



Legend

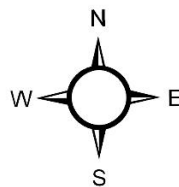
- ★ Proposed Point of Diversion - Pump Site
- ➡ Proposed Pipeline System
- Proposed Place of Use
- Sand Creek
- AOPI
- ▲ Water Rights in AOPI



Elements depicted on this map are for illustrative purposes and have not been surveyed by the Department.



Map Created: 2/6/2026
Author: Cassey Strebeck,
Water Resource Specialist



MSDI PLSS:
World Imagery: Vantor
World Imagery: Earthstar Geographics
Hybrid Reference Layer: Sources: Esri, TomTom,
Garmin, FAO, NOAA, USGS, © OpenStreetMap
contributors, and the GIS User Community
World Hillshade: Esri, USGS

Figure 1. Proposed Place of Use, Conveyance, and AOPI for Application 43D 30171861

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

GENERAL CONCLUSIONS OF LAW

3. 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 . . .

4. 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.

5. 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.

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

7. 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.

8. 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

9. The Applicant proposes to divert water from Sand Creek using a pump from a POD located in the SWNWNE Sec. 8, T6S, R23E, Carbon County, at a flow rate of 1.0 CFS, up to

17.09 AF in volume per year, to be conveyed via a pipeline system to irrigate 6.85 acres generally within the NWNE Sec. 8, T6S, R23E, Carbon County.

10. Sand Creek is considered to be a naturally intermittent surface water source. During a site visit by Department staff on May 28, 2025, the Applicant stated that much of the water in Sand Creek at the proposed POD originated as spillage from the Sand Creek Canal crossing upstream. Department staff observed the flow in Sand Creek above and below the Sand Creek Canal crossing. Above the canal crossing, the stream was boggy and not well channelized. Below the crossing, the stream had a well-defined channel. The Department determined that the source should be classified as "other" under ARM 36.12.1702(4) because the source receives water from the Sand Creek Canal and therefore does not follow a natural hydrograph. Department Groundwater Hydrologist Jack Landers (Landers) stated that, according to USGS PROSPER, the canal has a low probability of affecting upstream streamflow and a moderate (0.5) probability of affecting downstream streamflow; additionally, no hydric conditions or shallow wells exist near Sand Creek that would indicate Sand Creek is a naturally occurring perennial source, agreeing with the Applicant's statement of water coming from the canal (email dated October 23, 2025).

11. During the Department site visit on May 28, 2025, staff assisted the Applicant by taking surface water measurements at the proposed POD using a FlowTracker 2 velocity meter and demonstrating how to use the float area method for Applicant-collected streamflow measurements. The Applicant collected measurements in June, July, August, and September using the float area method.

12. Landers found the measurements acceptable, stating that they were consistent on each date and that those collected in August and September showed similar channel conditions and yielded similar discharge measurements, increasing confidence that the Applicant's measurement methods were repeatable (email dated September 23, 2025). Pursuant to ARM 36.12.1702(4), the Applicant-provided measurements were used to evaluate physical availability. Discharge measured in May using the velocity meter was approximately 2.38 CFS less than the discharge measured with the float area method and was excluded. Use of the Applicant-collected flow measurements is appropriate because the source does not follow a

natural hydrograph, as determined by the Department; therefore, the estimation techniques available to the Department cannot be applied and would not accurately estimate the physically available flow rate and volume. No gage or other measurements exist on Sand Creek. Table 3 shows the physically available flow rate by month.

Table 3: Physical availability at the proposed POD

Measurement Number:	Date:	Collected By:	Method	Flow Rate (CFS):
1	5/28/2025	DNRC	Velocity Meter	19.39
1	5/28/2025	DNRC	Float Method	21.77
2	06/26/2025	Applicant	Float Method	3.86
3	07/31/2025	Applicant	Float Method	6.02
4	08/19/2025	Applicant	Float Method	5.03
5	09/04/2025	Applicant	Float Method	5.05

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

13. Table 4 summarizes the estimated 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)	21.77	3.86	6.02	5.03	5.05
Volume (AF)	1,336.24	229.28	369.51	308.74	299.97

14. The Department finds that water is physically available in excess of the proposed flow rate, 1.0 CFS, during the proposed period of diversion, May 1 to September 30.

15. The Department finds that water is physically available in excess of the proposed volume, 17.09 AF, during the proposed period of diversion, May 1 to September 30.

LEGAL AVAILABILITY

FINDINGS OF FACT

16. To determine the amount of water legally available at the Applicant's proposed POD, the Department identified an area of potential impact (AOPI). The AOPI spans a reach of Sand

Creek extending from the proposed POD located in the SWNWNE Sec. 8, T6S, R23E, Carbon County, downstream, approximately 2.9 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 2.9 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.

17. There are two active water rights on Sand Creek within the AOPI: one Statement of Claim is for stock direct from source, and one 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	1.0	40	N/A	122.8*	04/15 - 10/01	04/15 - 10/01
43D 30134926	STOC	Heidema Ranch LP	Stock	0.11 ¹	N/A	700	23.8*	01/01 - 12/31	01/01 - 12/31

*Calculated by DNRC

¹ Calculated flow rate and Department standard for stock direct from source (0.033 CFS + 35 GPM (0.078 CFS) = 0.11 CFS)
All values were rounded to the hundredths place after calculations/conversions

18. The Department calculated the volume (122.8 AF) 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).

19. Statement of Claim 43D 30134926 had its flow rate (0.033 CFS) and volume (23.8 AF) quantified by Department standard practice. The volume was determined using the adjudication standard of 30 GPD per AU (0.034 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, giving the total flow rate of 0.11 (0.033 CFS + 0.078 CFS = 0.111 CFS).

20. 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. The comparison between the physically and legally available flow rate in Sand Creek at the proposed POD located in the SWNWNE Sec. 8, T6S, R23E, Carbon County is shown in Table 6.

Table 6: Legal Availability Analysis of Flow Rate at the Proposed POD on Sand Creek

Month	May	June	July	Aug	Sept
Physically Available Flow Rate (CFS)	21.77	3.86	6.02	5.03	5.05
Existing Legal Demands in AOPI (CFS)	1.11	1.11	1.11	1.11	1.11
Legally Available Water (CFS)	20.66	2.75	4.91	3.92	3.94
Applicant's Requested Flow Rate (CFS)	1.0	1.0	1.0	1.0	1.0
Legal Availability Minus Applicant's Requested Flow Rate (CFS)	19.66	1.75	3.91	2.92	2.94

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

21. 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. The comparison between the physically and legally available volume in Sand Creek at the proposed POD located in SWNWNE Sec. 8, T6S, R23E, Carbon County is shown in Table 7.

Table 7: Legal Availability Analysis of Volume at the Proposed POD on Sand Creek

Month	May	June	July	Aug	Sept
Physically Available Volume (AF)	1,336.24	229.28	369.51	308.74	299.97
Existing Legal Demands in AOPI (AF)	24.41	23.63	24.41	24.41	23.63
Legally Available Water (AF)	1,311.83	205.65	345.10	284.33	276.34
Applicant's Requested Volume (AF)	3.46	3.35	3.46	3.46	3.35
Legal Availability Minus Applicant's Requested Volume (AF)	1,308.37	202.30	341.63	280.87	273.0

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

22. 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 1.0 CFS is legally available to the Applicant during the proposed period of diversion, May 1 to September 30.

23. 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 17.09 AF is legally available to the Applicant during the proposed period of diversion, May 1 to September 30.

ADVERSE EFFECT

FINDINGS OF FACT

24. There are two senior water rights downstream of the proposed POD, which were considered for adverse effects: Statements of Claim 43D 43402-00 and 43D 30134926. These two STOC are located in the AOPI that extends 2.9 river miles from the proposed 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.

25. 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 1.0 CFS and 17.09 AF in volume. The Department finds that the proposed flow rate and volume to irrigate 6.85 acres will not have adverse effect on existing water users, and that the Applicant's plan to prevent adverse effect is sufficient.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

26. The Applicant proposes to use a POD located on Sand Creek in the SWNWNE Sec. 8, T6S, R23E, Carbon County, to irrigate the proposed place of use with a portable sprinkler and pipeline system.

27. The Applicant proposes to pump water from Sand Creek using a Cornell model 3RB pump, with a 20 HP engine, and a suction apparatus. The proposed pump is configured with a 5-inch suction and a 3-inch discharge with a pumping capacity up to 510 GPM (1.13 CFS),

which is sufficient to supply the requested flow rate of 1.0 CFS. The Applicant proposes to convey water from the pump via a main pipeline to auxiliary pipelines throughout the proposed place of use. From the pump, the main pipeline will travel northward for approximately 40 feet to the first split. From split one, a pipeline will travel approximately 180 feet northwestward to the acres located in the NWNWNE. From split one, a pipeline will travel approximately 200 feet eastward to the second split located in the SWNWNE. From split two, a pipeline will travel approximately 655 feet southeastward into the SENWNE. From split two, a pipeline will travel approximately 200 feet northward into the NWNWNE to the third split. From split three, a pipeline will travel approximately 315 feet southeastward into the NENWNE, as indicated in Figure 1 (following FOF 2). This project design was prepared by Agri Industries and consists of a performance evaluation for analysis and estimation purposes.

28. 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

29. The Applicant proposes to divert up to 17.09 AF in volume, at a flow rate of 1.0 CFS, to irrigate 6.85 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, the ditch water is not always available. The Applicant proposes to use water from the ditch when available and utilize this proposed appropriation when Sand Creek Canal water is not available (FOF 2).

30. The Applicant specified that the volume be calculated using the mean acre-feet per acre for sprinkler irrigation for climatic area 2, as 2.495 AF/AC. The Department's standard for sprinkler irrigation in climatic area 2 ranges from 2.30 AF/AC to 2.69 AF/AC. A mean is found by taking the sum of all numbers in a set and dividing by the total count; to find the mean for this application, the Applicant used the following equation: $2.30 \text{ AF/AC} + 2.69 \text{ AF/AC} = 4.99 \text{ AF/AC}$; then, $4.99 \text{ AF/AC} \text{ divided by } 2 \text{ numbers} = 2.495 \text{ AF/AC}$, which is within the

Department's standard (ARM 36.12.115(2)(e)). Thus, the volume requested is 17.09 AF (2.495 AF/AC x 6.85 AC = 17.09 AF).

31. 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, April 1 to October 15, for climatic area 2 (ARM 36.12.112 (1)(c)).

32. The Department finds that the proposed water use is beneficial and that the flow rate of 1.0 CFS, up to 17.09 AF in volume, during the proposed period of diversion, is reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

33. 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

34. 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.”

35. 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).

36. 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).

37. 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 9-15)

LEGAL AVAILABILITY

38. 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).

39. 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.

40. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Section 85-2-311(1)(a)(ii), MCA. (FOF 16-23)

ADVERSE EFFECT

41. 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.

42. 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).

43. 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).

44. 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).

45. 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.

46. 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).

47. 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 24-25)

ADEQUATE DIVERSION

48. 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.

49. 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.

50. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. Section 85-2-311(1)(c), MCA (FOF 26-28).

BENEFICIAL USE

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

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

53. Amount of water to be diverted must be shown precisely. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, 3 (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

54. 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*.

55. Applicant proposes to use water for irrigation, which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that

irrigation is a beneficial use and that 17.09 AF of diverted volume and 1.0 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 29-32)

POSSESSORY INTEREST

56. 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.

57. 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.

58. 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 33)

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 30171861 should be GRANTED.

The Department determines the Applicant may divert water from Sand Creek, from May 1 to September 30, by means of a pump, at a flow rate of 1.0 CFS and up to 17.09 AF in volume, from a proposed point of diversion located in the SWNWNE Section 8, Township 6 South, Range 23 East, Carbon County. The Applicant may use water for crop irrigation from May 1 to September 30, to irrigate 6.85 acres, consisting of 2.2 AC in the NWNWNE, 0.15 AC in the NENWNE, 1.7 AC in the SWNWNE, and 2.8 acres in the SENWNE, all in Section 8, Township 6 South, Range 23 East, Carbon County.

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 19th day of June 2026

/Original signed by Christine Schweigert/

Christine Schweigert
Hydrologist
Billings Regional Office, Department of
Natural Resources and Conservation
Water Resources Division
1371 Rimtop Drive
Billings, MT, 59105

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 19th day of June, 2026, by first class United States mail.

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