

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

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**APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 42J 30164864) DRAFT PRELIMINARY
BY MATTHEW AND DANELLE) DETERMINATION TO GRANT PERMIT
STIEGELMEIER)**

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On February 12, 2025, Matthew and Danelle Stiegelmeier (Applicants) submitted Application for Beneficial Water Use Permit No. 42J 30164864 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 35.6 CFS flow rate and 928 AF volume for irrigation of 232 acres. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicants on November 15, 2024. Matthew Stiegelmeier was present for the Applicants; Mark Elison, Billings Regional Manager; and Veronica Corbett and Cassey Strebeck, Water Resource Specialists were present for the Department. The Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Checklist on November 15, 2024. The Department delivered the completed technical analysis on December 27, 2024. The application was determined to be correct and complete as of February 27, 2024. An Environmental Assessment for this application was completed on March 18, 2025.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Maps:
 - Four undated aerial images with proposed transitory points of diversion, places of use, and conveyance system drawn over them.

- Department-completed technical analyses based on information provided in the Preapplication Checklist, dated December 27, 2024

Information within the Department's Possession/Knowledge

- USGS Stream Gage No. 06324500 Powder River at Moorhead, MT with a period of record from 10/1/1929 to 08/31/2024
- DNRC Water Right Information System (WRIS)
- National Hydrography Dataset (NHD)
- USGS StreamStats for Montana Chapter G
- USGS StreamStats web application at <https://streamstats.usgs.gov/ss/>.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available online or upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents:
 - Department Technical Memorandum: Physical Availability of Surface Water with Gage Data dated November 1, 2019
 - Montana DNRC Permit Application Manual

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; USDA NRCS means US Department of Agriculture Natural Resources Conservation Service; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; and AF/YR means acre-feet per year.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicants propose to divert water from the Powder River. The points of diversion will be two transitory pumps. The first transitory pump will be moveable anywhere along the Powder River from the Montana-Wyoming state line in the southern end of Government Lot 8

(SESW) to the northern end of Government Lot 3 (E2E2), Sec. 36, T9S, R47E, a distance of approximately 1 mile. The second transitory pump will be moveable anywhere along the Powder River from the southeastern end of Government Lot 4 (SWNW) to the northwestern end of Government Lot 4 (SWNW), Sec. 25, T9S, R47E, a distance of approximately 0.6 mile. The period of diversion and period of use will be from January 1 through December 31 at 35.6 CFS up to 928 AF, for irrigation use from January 1 to December 31. The Applicants propose to irrigate 232 acres. The place of use is shown in Table 1.

Table 1. Place of Use

Acres	Gov't Lot	¼	¼	¼	Section	Township	Range
20	7		SW	SW	36	9S	47E
30	8		SE	SW	36	9S	47E
25	6		NW	SE	36	9S	47E
24	3		E2	E2	36	9S	47E
35			SW	NE	36	9S	47E
5		SE	SE	NW	36	9S	47E
30			NE	SW	36	9S	47E
43	4		SW	NW	25	9S	47E
18			SE	NW	25	9S	47E
2	3	E2	SE	NE	26	9S	47E
Total: 232							

2. There are no supplemental water rights that share this place of use.
3. The proposed project is located north of the Montana-Wyoming border, approximately 3-5 miles south southwest of Moorhead, MT. Figure 1 shows the proposed transitory PODs and the proposed irrigated acres along the Powder River.

42J 30164864 - Stiegelmeier

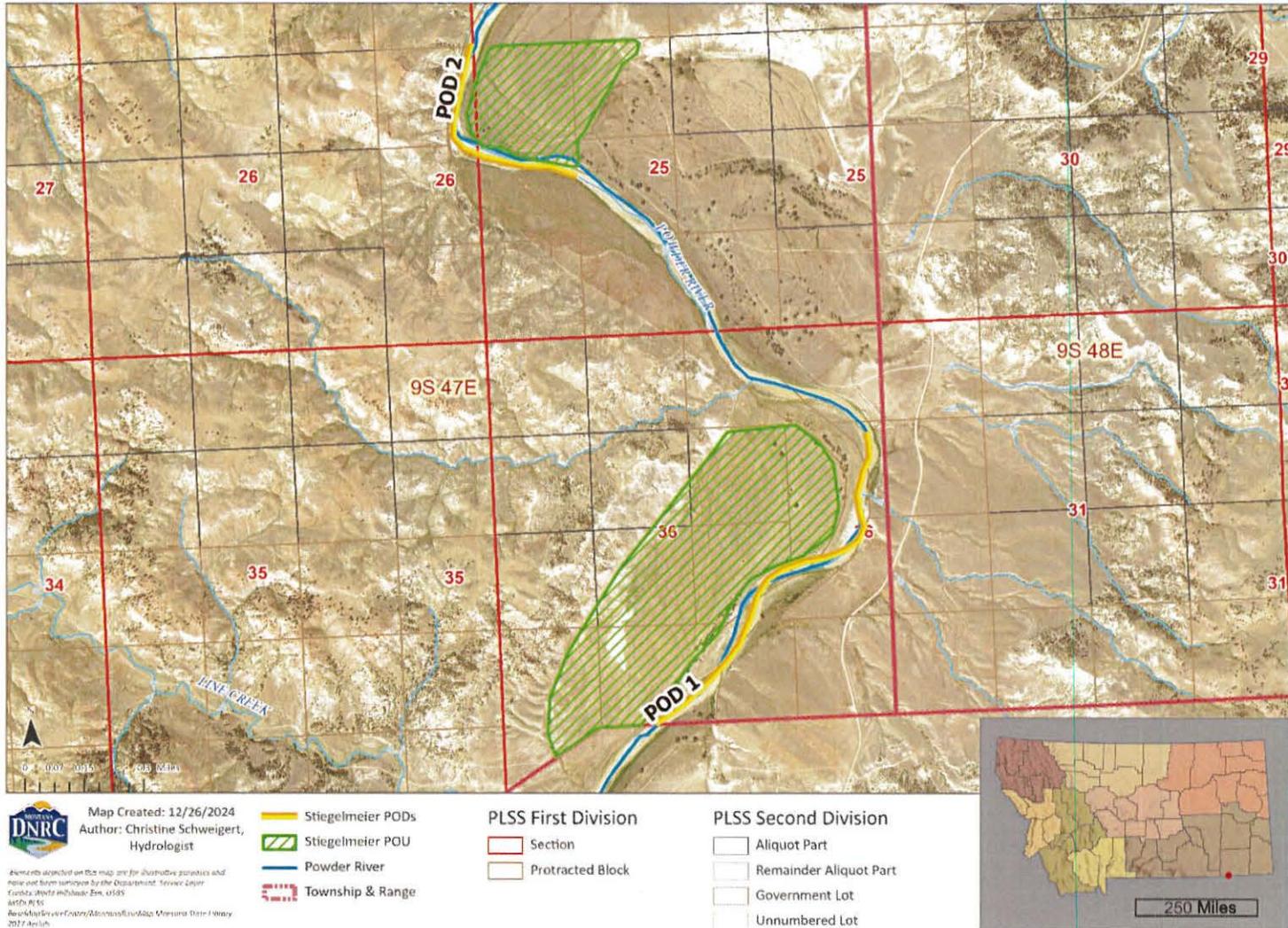


Figure 1. Map of Applicants' proposed transitory PODs and proposed place of use

§ 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 Applicants propose to divert water using two transitory pumps. The first transitory pump will be moveable anywhere along the Powder River from the Montana-Wyoming state line in the southern end of Government Lot 8 (SESW) to the northern end of Government Lot 3 (E2E2), Sec. 36, T9S, R47E, a distance of approximately 1 mile. The second transitory pump will be moveable anywhere along the Powder River from the southeastern end of Government Lot 4 (SWNW) to the northwestern end of Government Lot 4 (SWNW), Sec. 25, T9S, R47E, a distance of approximately 0.6 mile. Water will be diverted from the Powder River at a rate of 35.6 CFS year round. A diverted volume of 928 AF of water would be used between January 1

and December 31 for irrigation on 232 acres in Sections 25 and 36, T9S, R47E, Powder River County. The full place of use descriptions are in Table 1 (FOF 1).

11. The Department analyzed physical availability of water using the USGS Gage No. 06324500 Powder River at Moorhead, MT, with a period of record from October 1, 1929, through August 31, 2024. This gage is approximately 4.5 miles downstream of the lower end of POD 2. This is the nearest gage on the Powder River, and it has a period of record spanning nearly 95 years. ARM 36.12.1702(1)(a) requires the Department to use stream gaging records when they are available. According to DNRC Technical Memorandum: Physical Availability of Surface Water with Gage Data dated November 1, 2019, when the POD is located above the gage, water rights between the gage and the POD will be added to the monthly median of the mean gage values to provide an estimate of physical availability at the POD.

12. The Department calculated the median of the mean monthly flow rate in CFS for the Powder River using USGS Gage 06324500 Powder River at Moorhead, MT records for each month in the proposed period of diversion. Those flows were converted to monthly volumes using the following conversion found on the DNRC Water Calculation Guide: median of the mean monthly flow (CFS) x 1.98 (AF/Day/1 CFS) x the number of days each month = AF/month. The median of the mean monthly flow rate and volume are shown in Table 2.

Table 2. Median of the mean monthly flow rate and volume at USGS Gage 06324500

Month	Median of the Mean Monthly Flow at Gage 06324500 (CFS)	Median of the Mean Monthly Volume at Gage 06324500 (AF)
January	150.8	9,256.1
February	209.3	11,603.6
March	509.8	31,291.5
April	450.1	26,735.9
May	916.6	56,260.9
June	1,148.8	68,191.2
July	292.4	17,947.5
August	110.8	6,800.9
September	97.8	5,809.3
October	200.4	12,300.6
November	225.9	13,418.5
December	154.8	9,501.6

13. The Department calculated the monthly flows appropriated by existing users upstream of the gage on the source by generating a list of existing water rights on the Powder River from the DRAFT Preliminary Determination to GRANT Application for Beneficial Water Use Permit No. 42J 30164864

uppermost proposed point of diversion to USGS Gage 06324500 Powder River at Moorhead, MT (Table 3); designating the period of diversion for each existing water right; assigning a single combined flow rate of 0.1 CFS (46 GPM) for all livestock direct from source rights without a designated flow rate; and assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This leads to overestimation of existing uses from the source. The Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

14. The Department back calculated the flow rate for livestock direct from source rights using the Department standard practice found in the DNRC water right change manual. Based on 524 animal units (AU) and year round period of diversion and use. The calculation is $524 \text{ AU} * 30 \text{ GPD/AU} \div 1440 \text{ min/day} = 11 \text{ GPM}$. The standard practice is to add 35 GPM, so the total flow rate assigned for all livestock direct rights is 46 GPM or 0.1 CFS. For simplicity, this flow rate is assigned to the first water right in Table 3, all others are zeroed out. There are two water reservations on the Powder River. The water reservation for instream flow, owned by Montana Fish Wildlife and Parks, that was broken down into monthly flow rates based on the Order of the Board Establishing Water Reservations dated December 1978. The water reservation for the Powder River Conservation District was not considered because there are no perfected portions of the water reservation within the area of potential impact. There is one water right for a fueled pump for irrigation from April 1 to October 31. The full flow rate for that right was assigned to each month in the period of diversion. The quantification of the water rights in Table 3 are not a re-adjudication or historical use analysis. The Department method for estimating legal demands is meant to overestimate the flow rate and volume of existing legal demands to ensure that they are met.

Table 3. Legal Demands in the Area of Potential Impact

Water Right No.	Owner(s)	Purpose	Period of Diversion	Flow Rate (CFS)	Volume (AF)
42J 2790 00	MONTANA STATE BOARD OF LAND COMMISSIONERS	STOCK	01/01 to 12/31	0.10	1.50
42J 2801 00	MONTANA STATE BOARD OF LAND COMMISSIONERS	STOCK	01/01 to 12/31	0.00*	1.50

42J 2808 00	MONTANA STATE BOARD OF LAND COMMISSIONERS	STOCK	01/01 to 12/31	0.00	1.50
42J 2810 00	MONTANA STATE BOARD OF LAND COMMISSIONERS	STOCK	01/01 to 12/31	0.00	1.50
42J 30017743	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	FISHERY	01/01 to 12/31	424.00**	95,201.00
42J 30142405	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	01/01 to 12/31	0.00	1.22
42J 30142410	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	01/01 to 12/31	0.00	0.34
42J 30142414	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	01/01 to 12/31	0.00	10.68
42J 717 00	DANELLE STIEGELMEIER; MATTHEW STIEGELMEIER	STOCK	01/01 to 12/31	0.02	1.50
42J 8004 00	GAY RANCH INC; TWIN HEARTS SMILING HORSES INC; USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	01/01 to 12/31	0.04	3.50
42J 9749 00	USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	STOCK	01/01 to 12/31	0.02	2.25
42J 2806 00	MONTANA STATE BOARD OF LAND COMMISSIONERS	IRRIGATION	04/01 to 10/31	10.00	140.00

*The calculated flow rate for livestock rights is explained in FOF 14.

**Flow rate varies by month, rate shown is the highest flow rate of the year.

15. Because the gage is downstream of the POD, the Department added in the flow rates of the existing rights between the gage and the uppermost POD to the median of the mean monthly gage values to determine physical availability at the uppermost POD. This method is standard practice for determining physical availability on a source with a single downstream gage. Calculating physical availability at the uppermost point of one or more transitory diversions is also standard practice. Physically available monthly flows were then converted to monthly

volumes. The flow rate and volume for the FWP instream flow right were not added to the gage data because it is not diverted from the source. Table 4 displays the amount of water physically available at the uppermost proposed point of diversion:

Table 4. Physically Available Water at the Uppermost Proposed POD on the Powder River

Month	Median of the Mean Monthly Flow at Gage 06324500 (CFS)	Median of the Mean Monthly Volume at Gage 06324500 (AF)	Existing Rights from Uppermost Proposed POD to Gage 06324500 (CFS)	Physically Available Water at Uppermost Proposed POD (CFS)	Physically Available Water at Uppermost Proposed POD (AF)
January	150.8	9,256.1	0.18	151.0	9,258.3
February	209.3	11,603.6	0.18	209.5	11,605.7
March	509.8	31,291.5	0.18	510.0	31,293.7
April	450.1	26,735.9	10.18	460.3	26,758.1
May	916.6	56,260.9	10.18	926.8	56,283.1
June	1,148.8	68,191.2	10.18	1,158.2	68,213.4
July	292.4	17,947.5	10.18	302.6	17,969.7
August	110.8	6,800.9	10.18	121.0	6,823.1
September	97.8	5,809.3	10.18	108.0	5,831.5
October	200.4	12,300.6	10.18	210.6	12,322.7
November	225.9	13,418.5	0.18	226.1	13,420.6
December	154.8	9,501.6	0.18	155.0	9,503.8

16. The Department finds that surface water is physically available in the Powder River during each month of the proposed period of diversion.

LEGAL AVAILABILITY

FINDINGS OF FACT

17. The area of potential impact was determined by considering the requested flow rate and volume, the existing legal demands, the drainage area size, significant hydrologic boundaries, and the data from the USGS gage records. The area of potential impact for this application is from the uppermost POD at the Montana-Wyoming state line to the USGS Gage 06324500 at Moorhead, MT. This reach is approximately 8.2 miles. There are six named tributaries that contribute to the Powder River drainage in this reach and an additional 167.9 square miles of

drainage area. There are 12 water rights in the area of potential impact for this application, they are shown in Table 3 (FOF 14).

18. Existing legal demands were collected from the DNRC Water Right Information System (WRIS) using the DNRC Water Right Query System Points of Diversion layer in Esri ArcPro, which has a real time connection to the DNRC WRIS. The monthly flow rate and volume were calculated as described in FOF 14. A list of the legal demands is shown in Table 3 under FOF 14. Drainage basin size above the point of diversion and above the USGS gage at Moorhead were calculated using the USGS StreamStats web application at <https://streamstats.usgs.gov/ss/>. Hydrologic boundaries were examined using the National Hydrography Dataset in ArcPro.

19. There are no legal demands that are unique to this area such as downstream hydropower rights or compact considerations.

20. The comparison between physically available and legally available water in the Powder River is shown in Table 5, indicating that water is legally available for the proposed appropriation.

Table 5. Comparison of Physical and Legal Availability of Water in the Powder River

Month	Physically Available Water (CFS)	Physically Available Water (AF)	Existing Legal Demands between Uppermost POD and USGS Gage at Moorhead, MT (CFS)	Existing Legal Demands between Uppermost POD and USGS Gage at Moorhead, MT (AF)	Legally Available Water (CFS)	Legally Available Water (AF)
January	151	9,258.3	32.08	1,960.17	118.9	7,298.08
February	209.5	11,605.7	71.98	3,982.74	137.5	7,623
March	510	31,293.7	29.18	1,782.17	480.8	29,511.5
April	460.3	26,758.1	357.18	20,633.95	103.1	6,124.14
May	926.8	56,283.1	434.18	26,047.27	492.6	30,235.79
June	1,158.2	68,213.4	194.18	10,951.75	964	57,261.6
July	302.6	17,969.7	80.18	4,318.75	222.4	13,650.91
August	121	6,823.1	24.68	912.16	96.3	5,910.89
September	108	5,831.5	19.05	549.03	88.93	5,282.44
October	210.6	12,322.7	19.61	600.96	190.97	11,721.74
November	226.1	13,420.6	61.78	3,661.19	164.3	9,759.42

December	155	9,503.8	61.18	3,746.33	93.8	5,757.44
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Math discrepancies are due to rounding errors

21. The Department finds the proposed appropriation of 35.6 CFS and up to 928 AF to be legally available during the proposed period of use.

ADVERSE EFFECT

FINDINGS OF FACT

22. The Applicants’ plan to prevent adverse effect to water rights of a prior appropriator is to shut down pumps, or slow the pumps down to a lower flow rate.

23. The Applicants have proven that enough water remains in the Powder River, between the Montana-Wyoming state line (uppermost POD) and the USGS gage at Moorhead, MT (bottom of the area of potential impact), to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 35.6 CFS and 928 AF.

24. The Department finds that the flow rate and volume proposed for appropriation will not have an adverse effect on existing water users.

ADEQUATE MEANS OF DIVERSION

FINDINGS OF FACT

25. The proposed means of diversion are two moveable, trailer-mounted, 16-inch Crisafulli pumps with 15 to 20 feet of hydraulic head. The full capacity of each pump is 8,000 GPM (17.8 CFS). Each pump will divert water either directly onto the fields or through a 15-inch pipe to a main level ditch. Water will be spread across the fields using a system of ditches and dykes with culverts and drains. The system is estimated to be 45 percent efficient.

26. The flow rate can be controlled by speeding up or slowing down the power sources. One pump will be powered with it’s own dedicated engine, the other will be powered using the power take off from the Applicants’ tractor.

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

BENEFICIAL USE

FINDINGS OF FACT

28. The Applicants propose to divert 35.6 CFS up to 928 AF from the Powder River using two transitory pumps, one in Government Lots 3, 6, and 8, in Sec. 36; and one in Government Lot 4 in Sec. 25, and Government Lot 3 in Sec. 26, T9S, R47E, Powder River County. Water will be diverted and used between January 1 and December 31 for irrigation on 232 acres in Sections 25 and 36, T9S, R47E, Powder River County. The full place of use descriptions are in Table 1 (FOF 1).

29. The requested flow rate is based on the capacity of the pumps. The Applicants are proposing to use two 16-inch high-capacity Crisafulli pumps. These pumps are commonly used for flood irrigation in southeastern Montana, especially on the Powder River.

30. The requested volume is based on the Department standard for 45 percent efficient irrigation in USDA NRCS climatic area 2 found in ARM 36.12.115(2)(e).

31. The requested period of diversion is outside the DNRC standard in ARM 36.12.112 and is based on the nature of the Powder River. The Powder River is well known for having high salinity. Irrigation from the Powder River is often done using water spreading systems, which take water whenever it is available, especially during high spring flows originating from snowmelt and rain events. The higher flows equate with lower salinity, which is more beneficial to the crops. The proposed method of irrigation is very similar to water spreading but is more efficient and allows the Applicant to have more control over the flow rate, volume, and timing of irrigation water. It is not uncommon for people to irrigate in the winter months if the ground and river are not frozen. The application of water in the winter months is beneficial because there are some crops that stand over winter and the water helps fill the soil profile.

32. The Department finds that the purpose, flow rate, volume, period of diversion, and period of use proposed for appropriation are a beneficial use of water and that the requested flow rate of 35.6 CFS and annual volume of 928 AF are reasonably justified per ARM 36.12.1801(3).

POSSESSORY INTEREST

FINDINGS OF FACT

33. The Applicants signed the application form affirming the Applicants have 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. 27665-411 by Anson* (DNRC Final Order 1987) (Applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

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 Applicants have 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 10-16)

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. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

41. Applicants have proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicants 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 17-21.)

ADVERSE EFFECT

42. 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.

43. 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).

44. 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).

45. 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).

46. 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.

47. 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).

48. The Applicants have 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 22-24)

ADEQUATE DIVERSION

49. 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.

50. 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.

51. Applicants have 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 25-27).

BENEFICIAL USE

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

53. 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).

54. 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).

55. 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.*

56. Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence irrigation is a beneficial use and that 928 AF of diverted volume and 35.6 CFS is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 28-32)

POSSESSORY INTEREST

57. 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.

58. 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.

59. The Applicants have 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 33s)

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. 42J 30164864 should be GRANTED.

The Department determines the Applicants may divert and use water from the Powder River, by means of two transitory pumps, from January 1 to December 31 at 35.6 CFS up to 928 AF. The first transitory pump will be moveable anywhere along the Powder River from the Montana-Wyoming state line in the southern end of Government Lot 8 (SESW) to the northern end of Government Lot 3 (E2E2), Sec. 36, T9S, R47E, a distance of approximately 1 mile. The second transitory pump will be moveable anywhere along the Powder River from the southeastern end of Government Lot 4 (SWNW) to the northwestern end of Government Lot 4 (SWNW), Sec. 25, T9S, R47E, a distance of approximately 0.6 mile. The Applicants may irrigate 232 acres. The proposed place of use is located as shown in Table 5.

Table 5. Proposed Place of Use

Acres	Gov't Lot	¼	¼	¼	Section	Township	Range
20	7		SW	SW	36	9S	47E
30	8		SE	SW	36	9S	47E
25	6		NW	SE	36	9S	47E
24	3		E2	E2	36	9S	47E
35			SW	NE	36	9S	47E
5		SE	SE	NW	36	9S	47E
30			NE	SW	36	9S	47E
43	4		SW	NW	25	9S	47E
18			SE	NW	25	9S	47E
2	3	E2	SE	NE	26	9S	47E

Total: 232							
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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 21st day of March 2025.



Mark Elison, Manager
Billings Regional Office
Montana Department of Natural Resources and
Conservation

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 21st day of March, 2025, by first class United States mail.

MATTHEW AND DANELLE STIEGELMEIER

44 BLISS RD

OTTER, MT 59062

DACHICKEN45@HOTMAIL.COM



Billings Regional Office, (406) 247-4419