

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

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**APPLICATION FOR BENEFICIAL WATER  
USE PERMIT NO. 42KJ 30164498 BY } DRAFT PRELIMINARY DETERMINATION  
SUNLIGHT RANCH COMPANY } TO GRANT PERMIT**

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On February 7, 2025, Sunlight Ranch Company (Applicant) submitted Application for Beneficial Water Use Permit No. 42KJ 30164498 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) for 18.5 AF of water for livestock drinking directly from the source. Livestock direct from source is not assigned a specific flow rate. The Department published receipt of the application on its website. A preapplication meeting was held between the Department and the Applicant on 9/18/2024, in which the Applicant designated that the technical analyses for this application would be completed by the Department. The Applicant returned the completed Preapplication Checklist on 9/18/2024. The Department delivered the Department completed technical analysis on 10/18/2024. The application was determined to be correct and complete as of February 27, 2025. An Environmental Assessment for this application was completed on February 27, 2025.

**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:
  - Letter dated January 7, 2025, from the Montana Sage Grouse Habitat Conservation Program to Martin Smith, attorney for the Applicant.
- Maps:
  - Two USGS topographic maps at different scales showing the proposed place of use and transitory point of diversion.
- Department-completed technical analyses based on information provided in the Preapplication Checklist, dated 9/18/2024.
  - Errata memo dated 2/21/2025, clarifying requested volume.

#### Information Received after Application Filed

- E-mail from Martin Smith, attorney for the Applicant, dated February 11, 2025, clarifying that the requested volume was 18.5 AF, as listed on the preapplication meeting form, not 18.2 AF, as erroneously listed in the Technical Analysis and on the original Application.

#### Information within the Department's Possession/Knowledge

- DNRC, 2016. Instructions for Using the USGS Thornthwaite Model, dated January 21, 2016
- McCabe, G.J. & Markstrom, S.L., 2007. A Monthly Water-Balance Model Driven by a Graphical User Interface: U.S. Geological Survey Open-File Report 2007-1088, 6 p.
- USGS StreamStats web application <https://streamstats.usgs.gov/ss/>
- Montana Climate Summaries, Western Regional Climate Center, Hysham, Montana 244358 <https://wrcc.dri.edu/summary/climsmmt.html>
- DNRC water right database

The Department has fully reviewed and considered the evidence and argument submitted in this application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

For the purposes of this document, Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AF/YR means acre-feet per year; UT means unnamed tributary; and AU means animal units.

### **PROPOSED APPROPRIATION**

#### **FINDINGS OF FACT**

1. The Applicant proposes to divert water from January 1 to December 31 from Kray Coulee, a tributary to Sarpy Creek by livestock drinking directly from the source. No flow rate is defined for livestock direct from a source. Up to 18.5 AF of water would be used between January 1 and December 31 for stock on SE and SW Section 18, T2N, R37E, Treasure County and SESE Section 13, T2N, R36E, NE and NWSE Section 23, T2N, R36E, Big Horn County. The point of diversion would be transitory from NESWSE Section 23, T2N, R36E, Big Horn County (POD #1, Figure 1) to SENENE Section 23, T2N, R36E, Big Horn County (POD #2, Figure 1) and transitory from SWSESE Section 13, T2N, R36E, Big Horn County (POD #3, Figure 1) to NESESE Section

18, T2N, R37E, Treasure County (POD #4, Figure 1). The Water Resources Information System (WRIS) automatically sorts PODs by legal land description in a way that cannot be overridden. On the abstract for this water right the first listed POD is the upstream end of the second transistory point of diversion and referred to in this preliminary determination and on Applicant maps as POD #3. The second POD listed on the abstract is referred to herein as POD#2. The third POD listed on the abstract is referred to herein as POD#1. The forth POD listed on the abstract is referred to herein as POD#4.

2. This water right would share a place of use with Statements of Claim 42KJ 33948-00, 42KJ 19762-00, 42KJ 19763-00, 42KJ 19887-00, 42KJ 19784-00, and 42KJ 19848-00. These water rights serve the same herd.

3. The proposed appropriation lies within the Powder River Basin Controlled Groundwater Area, The Powder River Basin Controlled Groundwater Area applies only to wells designed and installed for the extraction of coalbed methane (CBM).

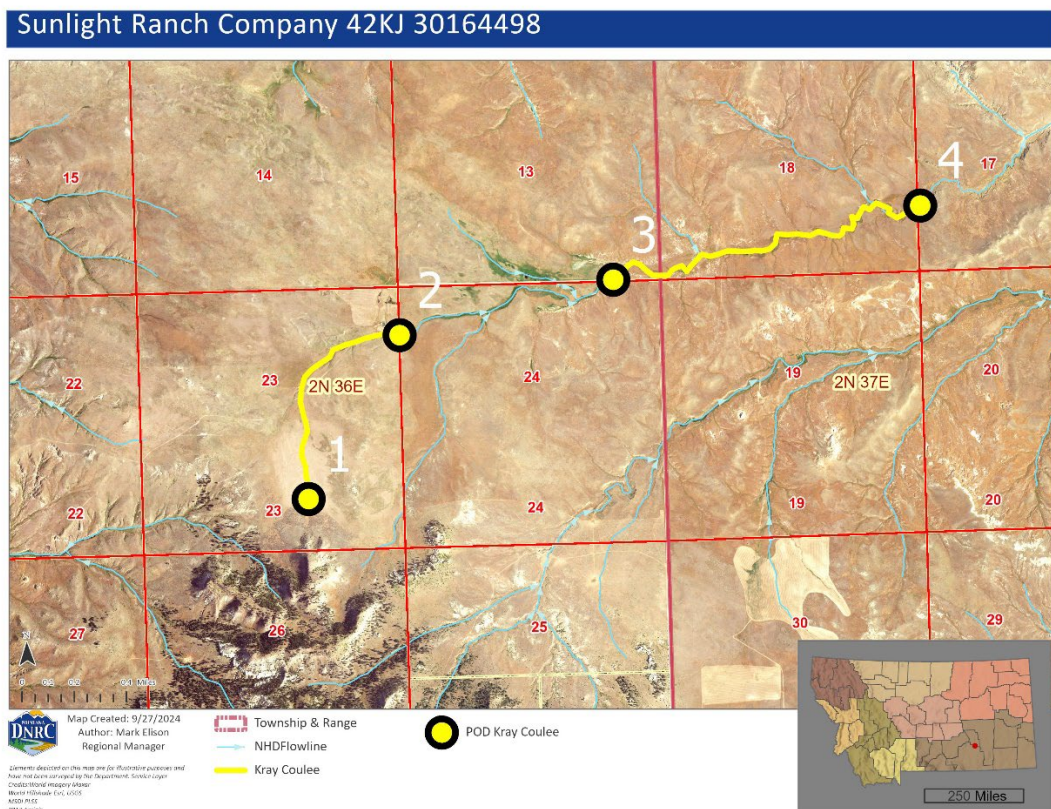


Figure 1. Proposed point of diversion and place of use.

## **§ 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, Starnes*, 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080 (1996), *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

*See also, Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

*Montana Power Co.*, 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

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

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

## **PHYSICAL AVAILABILITY**

### **FINDINGS OF FACT**

10. The Applicant proposes to appropriate 18.5 AF of water from Kray Coulee for stock use from January 1 through December 31.

11. Kray Coulee is ephemeral and streamflow estimation techniques for perennial sources cannot be used. Physical and legal availability of water on ephemeral streams are determined on the basis of annual volumes per ARM 36.12.1702.

12. The United States Geological Survey (USGS) graphical user interface called the Thornthwaite Monthly Water Balance Program (McCabe & Markstrom, 2007) was used to estimate annual runoff for the Kray Coulee drainage. The Thornthwaite Monthly Water Balance Model uses temperature and precipitation data from a nearby weather station and preset values of local parameters such as runoff factor, soil moisture storage capacity, and latitude, to estimate monthly runoff in millimeters. The runoff is converted to feet, summed over the year, and multiplied by the number of acres in the drainage basin to get annual runoff in AF. The Department supports the use of the Thornthwaite Monthly Water Balance Model to determine annual water yields in an ephemeral watershed.

13. Mean monthly precipitation and temperature were obtained from the Hysham weather station and converted from inches and degrees Fahrenheit to millimeters and degrees Celsius. These were formatted to an input table for the Thornthwaite Program. Appropriate model presets as determined by the Department were selected (DNRC, 2016). The model was run, and the

output converted to feet and summed over the year giving an annual yield of 0.145 feet. The results were multiplied by the number of acres in the contributing drainage basin as determined from USGS StreamStats. The estimated annual runoff volume for Kray Coulee is 353.5 AF given a contributing area of 3.8 square miles (2432 Acres). The estimated annual runoff (353.5 AF) is more than the requested volume (18.5 AF).

14. The Department finds that surface water is physically available in the amount the Applicant proposes to appropriate during the proposed period of diversion.

## **LEGAL AVAILABILITY**

### **FINDINGS OF FACT**

15. The area of potential impact for this application is the entire drainage basin of Kray Coulee to its confluence with Sarpy Creek. The ephemeral character of the source indicates that stream reaches below the confluence with Sarpy Creek are not dependent on flow from this stream. Because the proposed point of diversion extends along the entire length of Kray Coulee and because the entire drainage basin of Kray Coulee was used to calculate an annual runoff volume, all legal demands on the source need to be considered as being within the area of potential impact. The area of potential impact was determined by including all water rights dependent on runoff from the source. This requires that the area of potential impact be the entire drainage basin of Kray Coulee. There are four existing surface water rights within the area of potential impact all owned by the Applicant.

**Table 1. Water rights within the area of potential impact.**

WATER RIGHT NUMBER	ALL OWNERS	PURPOSES	SOURCE NAME	VOLUME	PERIOD OF DIVERSION	ANIMAL UNITS
42KJ 19918 00	SUNLIGHT RANCH CO	STOCK	SPRING, UNNAMED TRIBUTARY OF KRAY COULEE	0.68	01/01 to 12/31	20.0
42KJ 19848 00	SUNLIGHT RANCH CO	STOCK	KRAY COULEE	1.73	01/01 to 12/31	51.0
42KJ 19761 00	SUNLIGHT RANCH CO	STOCK	SPRING, UNNAMED TRIBUTARY OF KRAY COULEE	0.68	01/01 to 12/31	20.0
42KJ 19763 00	SUNLIGHT RANCH CO	STOCK	KRAY COULEE	0.68	01/01 to 12/31	20.0

Volume calculated as Department adjudication standard of 0.34 AF/YR/AU because all legal demands are Statements of Claim.

16. The total legal demand within the area of potential impact is 3.77 AF.



17. The comparison between physically available and legally available water in Kray Coulee indicates that water is legally available for the proposed appropriation (353.5 AF (FOF 13) – 3.77 AF (FOF 16) = 349.7 AF).

18. The Department finds the proposed appropriation of 18.5 AF to be legally available during the proposed period of use.

### **ADVERSE EFFECT**

#### **FINDINGS OF FACT**

19. The Applicant proposes to move livestock away from the source if call is made. The Applicant has the ability to move livestock and cease diversion from the source.

20. The Applicant has proven that enough water remains in Kray Coulee to meet both the existing legal demands within the area of potential impact and the proposed appropriation of 18.5 AF.

21. The Applicant owns multiple water rights (Table 1) that would be accessible to cattle drinking directly from the source under this authorization. The cattle will drink from whichever source is available. These water rights will serve the same herd and are not additive.

22. The Department finds the proposed use of 18.5 AF diverted volume will not have an adverse effect on existing water users.

### **ADEQUATE MEANS OF DIVERSION**

#### **FINDINGS OF FACT**

23. This application is for livestock drinking directly from the source of water. There are no proposed diversion or conveyance facilities.

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

### **BENEFICIAL USE**

#### **FINDINGS OF FACT**

25. The Applicant proposes to divert water from January 1 to December 31 from Kray Coulee by livestock drinking directly from the source. No flow rate is defined for livestock direct from a source. Up to 18.5 AF of water would be used between January 1 and December 31 for stock on SE and SW Section 18, T2N, R37E, Treasure County and SESE Section 13, T2N, R36E, NE and NWSE Section 23, T2N, R36E, Big Horn County. The point of diversion would be

transitory from NESWSE Section 23, T2N, R36E, Big Horn County to SENENE Section 23, T2N, R36E, Big Horn County and transitory from SWSESE Section 13, T2N, R36E, Big Horn County to NESESE Section 18, T2N, R37E, Treasure County.

26. Applicant proposes to use water for stock which is a recognized beneficial use under the Montana Water Use Act. §85-2-102 (4), MCA.

27. The requested volume of 18.5 AF is the Department standard for 1,100 AU at 15 gallons per day per animal unit. Other water rights (Table 1) serve the same animal units. The Applicant is requesting the full standard volume for these animal units due to the ephemeral character of the sources.

28. The Department finds the proposed water use is beneficial, and that the requested annual volume of 18.5 AF is reasonably justified per ARM 36.12.1801(3).

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

29. Tyrell McClain, Sunlight Ranch General Manager, signed the application form affirming the Applicant has possessory interest or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

## **CONCLUSIONS OF LAW**

### **CONTROLLED GROUNDWATER AREA**

30. Pursuant to Order dated December 15, 1999, in *In the Matter of Designation of the Powder River Basin Controlled Groundwater Area*, the Department may process and grant a permit for groundwater subject to applicable conditions. The Powder River Basin Controlled Groundwater Area applies only to wells designed and installed for the extraction of coalbed methane (CBM). This application may be processed under the terms of the Order establishing this Controlled Ground Water Area, subject to proof of the applicable permit criteria.

### **PHYSICAL AVAILABILITY**

31. 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.”

32. 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).

33. 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).

34. 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 10 - 14)

### LEGAL AVAILABILITY

35. 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).

36. 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.

37. 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 15 - 18)

### ADVERSE EFFECT

38. 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.

39. 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).

40. 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).

41. 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).

42. 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.

43. 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).

44. 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 19 - 22)

#### ADEQUATE DIVERSION

45. 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.

46. 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.

47. 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 23 - 24).

#### BENEFICIAL USE

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

49. 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).

50. 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).

51. 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*.

52. Applicant proposes to use water for stock which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 18.5 AF of diverted volume is the amount needed to sustain the beneficial use. Section 85-2-311(1)(d), MCA. (FOF 25 - 28)

### POSSESSORY INTEREST

53. 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.

54. 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.

55. 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 29)

### **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. 42KJ 30164498 should be Granted.

The Department determines the Applicant may divert water from the Kray Coulee, by means of livestock drinking directly from the source, from January 1 to December 31 up to 18.5 AF, from a transitory point of diversion extending from NESWSE Section 23, T2N, R36E, Big Horn County to SENENE Section 23, T2N, R36E, Big Horn County and transitory from SWSESE Section 13, T2N, R36E, Big Horn County to NESESE Section 18, T2N, R37E, Treasure County, for stock use from January 1 to December 31. The place of use is located in SE and SW Section 18, T2N, R37E, Treasure County and SESE Section 13, T2N, R36E, NE and NWSE Section 23, T2N, R36E, Big Horn 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 Draft Preliminary Determination to Grant

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 19<sup>th</sup> day of March 2025.

/Original signed by Mark Elison/

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 19<sup>th</sup> day of March 2025, by first class United States mail.

Felt Martin PC  
c/o Laurence Martin & Martin Smith  
550 N 31<sup>st</sup> St. Suite 500  
Billings, MT 59101  
[msmith@feltmartinlaw.com](mailto:msmith@feltmartinlaw.com)

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Billings Regional Office, (406) 247-4415