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

APPLICATION FOR BENEFICIAL
WATER USE PERMIT NO. 41K 30063379
BY HILLCREST COLONY

PRELIMINARY DETERMINATION TO GRANT PERMIT

On June 14, 2012, Hillcrest Colony (Applicant) submitted Application for Beneficial Water Use Permit No. 41K 30063379 to the Lewistown Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for an appropriation of 160 gallons per minute (GPM) up to 150.7 acre feet (AF) annually. The source is ground water, and the diversion means is a well. The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated November 24, 2012. The Applicant requested an additional 15 days beyond the 30 day deadline to provide the required information. The Applicant responded with information dated December 21, 2012. The Application was determined to be correct and complete as of April 25, 2013. An Environmental Assessment for this Application was completed on May 13, 2013.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments/Addendums
  - Applicant’s Addendum A1: Aquifer Test Requirements
  - Applicant’s Addendum B1: Basin Closure
  - Applicant’s Addendum: Mitigation Addendum
  - Applicant’s Hydrogeologic Assessment Report (electronic file)
- Maps and Aerial Photographs

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EXHIBIT 1
Information Received after Application Filed

- Applicant’s December 21, 2012 Deficiency Response
- Electronic communication from Russell Levens, Department Groundwater Hydrologist, April 12, 2013.
- Electronic communication regarding summary of Giant Springs stream flows from Russell Levens, Department Groundwater Hydrologist, April 24, 2013.

Information within the Department’s Possession/Knowledge

- Aquifer Test Analysis Memo, Russell Levens and Attila Folinagy, DNRC Groundwater Hydrologists, August 17, 2012
- Upper Missouri Water Availability Analysis, MT Dept. of Natural Resources and Conservation, December 1997.

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).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater from a 1,770-foot deep well completed in the Madison Formation and located approximately 12 miles northwest of Great Falls, Montana in Cascade County. The requested appropriation is 160 GPM up to a volume of 150.7 AF per year, to be used for domestic, stock and irrigation purposes. The volume of water associated with each purpose is as follows: 1) multiple domestic (35 homes) is 8.8 AF; 2) stock is 16.5 AF; irrigation (alfalfa) is 100.3 AF and lawn and garden use is 25.1 AF. The point of diversion (well) is located in the NESWSE Section 29, and the places of use are all generally located in the E2, Section 29, T22N, R2E. Appropriations for multiple domestic and stock purposes will occur year-around, and from April 1 through October 15 for irrigation purposes. The appropriation is considered to be entirely consumptive, because no portion of water will return to the Madison Formation. A pit with a capacity of 35.2 AF will store groundwater appropriations for irrigation purposes.

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2. The proposed appropriation is associated with and in addition to an existing Ground Water Certificate (41K 30052259) that was issued in 2011 on the same groundwater well, for 20.0 GPM up to 9.4 AF annually.

BASIN CLOSURE

FINDINGS OF FACT
3. This application is for irrigation, multiple domestic and stock purposes, and is geographically located within the Upper Missouri River Basin Closure Area.

4. Applicant did not submit an accompanying Application to Change a Water Right. However, Applicant’s plan to prevent adverse effects is to mitigate hydraulically-connected surface water depletions by replacing depletions with contract water purchased from the U.S. Bureau of Reclamation. The contract water will be released from Canyon Ferry Reservoir and mitigate the reach of stream where depletions from the proposed appropriation will occur.

CONCLUSIONS OF LAW
5. DNRC cannot grant an application for a permit to appropriate water within the upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin. § 85-2-343(1), MCA. The upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA). The proposed well is located within the Upper Missouri River Basin Closure Area.

6. This application is for an appropriation of groundwater. The application falls under the exceptions for the basin closure, 85-2-343(2)(a), MCA.

7. In reviewing an application for groundwater in a closed basin, the District Court in Sitz Ranch v. DNRC observed:

The basin from which applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors.

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Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 7.

8. A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee (DNRC Final Order 2011); In the Matter of Application for Beneficial Water Use Permit No. 41K-30045713 by Nicholas D. Konen, (DNRC Final Order 2011).

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

GENERAL CONCLUSIONS OF LAW

9. 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 . . .

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10. 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.” § 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.

11. 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); ARM 36.12.207.

12. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti; 64988-G76L, Stamer (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, 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.

   The 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).

13. 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. § 85-2-311(6), MCA.

14. 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**

15. The proposed groundwater appropriation is from the Madison Aquifer at a flow rate of 160 GPM and volume of 150.7 AF per year. The production well is 1,770 feet deep. Applicant conducted a 72-hour aquifer test on the well beginning March 16, 2008, at an average pumping rate of 176.8 GPM, greater than the requested rate of 160 GPM. The aquifer test conformed substantially to standards and procedures specified in administrative rules, with the exception of collecting certain observation well data. ARM 36.12.121(3)(d). However, on March 21, 2012 the Department granted a variance to the Applicant waiving the requirement of collecting drawdown data from an observation well. File.

16. Department groundwater hydrologist Russell Levens analyzed the Applicant’s aquifer testing data and analysis, and found errors in the calculations to determine physical water availability. In his Aquifer Test Analysis Memo Levens identified errors in the storativity value and hydraulic gradient estimated by Applicant’s consultant, but then determined the errors to be off-setting. The off-setting nature of the errors resulted in an acceptable estimate of groundwater flux through the zone-of-influence, according to Levens.

*The applicant’s analysis of groundwater flux used in their evaluations of physical and legal availability of groundwater is flawed because they use an incorrect storativity value and likely an over-estimate of hydraulic gradient. Nonetheless, I recommend the results of the applicant’s physical availability calculations and assessment of legal availability of groundwater be accepted because the mistaken input values are uncertain and have offsetting effects.*

Department Aquifer Test Analysis Memo

17. Applicant’s consultant calculated the radius of the zone-of-influence to be 8.3 miles with a groundwater flux through the zone-of-influence of 568 to 745 AF per annum, using the error noted by the Department (FOF No. 16). The calculated flux through the zone exceeds the proposed appropriation of 150.7 AF, indicating water is physically available in the aquifer. As an added check for quality purposes, the Lewistown Regional Office requested Department

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hydrologist Levens to recalculate the groundwater flux with corrected aquifer properties (storativity value and hydraulic gradient). Levens responded with a short electronic communication on April 12, 2013 with the requested information. Levens calculated the corrected zone-of-influence to be 13.1 miles, and groundwater flux at 2,110 AF annually. File.

18. Applicant’s aquifer/pump test and estimated groundwater flux through the zone-of-influence, and the Department’s corrected flux calculation, show that water is physically available. The Department finds that groundwater is physically available in the amounts requested (160 GPM up to a volume of 150.7 AF).

CONCLUSIONS OF LAW

19. 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.”

20. 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).

21. 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).

22. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF Nos. 15, 17, and 18)
Legal Availability:

FINDINGS OF FACT

Groundwater

23. Applicant initially calculated the zone-of-influence of the pumping well to extend 8.3 miles from the production well. Upon request from the Department to recalculate the zone-of-influence using different aquifer properties, the Applicant updated its zone to 13.1 miles. Applicant's Deficiency Response, December 21, 2012. The Department then recalculated the groundwater flux through the zone at 2,110 AF. Within the 13.1-mile zone-of-influence there exist 18 water rights appropriating water from the Madison Formation with a combined appropriative volume of 761.5 AF. The 2,110 AF available through the zone exceed the 761.5 AF in legal demands by 1,348.5 AF. Therefore, groundwater is legally available in the amount sought. Department Aquifer Test Analysis Memo; Applicant's Deficiency Response Letter; Levens Electronic Communication, April 12, 2013.

Surface Water

24. The proposed groundwater appropriation is from the Madison Aquifer. According to the application materials, the confined nature, depth to the top of the Madison Aquifer, static water levels, gentle dip of the geologic strata in the region and generally flat physiography suggest there is no connection between the aquifer and surface water within the zone-of-influence. The Department agrees with this analysis as it relates to surface water connectivity within the zone-of-influence. However, the ultimate discharge of Madison groundwater in the region is somewhere near or down gradient of Great Falls, Montana, in the Missouri River, and at Giant Springs. Giant Springs is known to be hydraulically-connected to the Madison Aquifer. Department Aquifer Test Analysis Memo. The application contains a potentiometric map showing groundwater flow in a west to east pattern, from the well vicinity towards the Missouri River. The potentiometric map also shows a groundwater flow direction of south to north, in a region south of the Missouri River. The application concludes that groundwater in the region converges beneath the Missouri River at and below Great Falls. It further acknowledges the hydraulic connection with the river and springs in the Great Falls area. The Department finds
that groundwater to be appropriated by the proposed well is hydraulically connected to both Giant Springs and the Missouri River. File.

25. Giant Springs emanates from the banks of the Missouri River near Great Falls, Montana. According to the U.S. Geological Survey, flows range between 270-330 CFS. Levens Electronic Communication, April 24, 2013. The combined legal demands from Giant Springs are 57.9 CFS. Application. Actual spring flow exceeds legal demands on that single source by at least 212 CFS. Therefore, water is legally available in Giant Springs and the minimal reach between the springs and the Missouri River.

26. The depleted stream reach and area of impact of the Missouri River begins where Giant Springs flows into the river and extends to Morony Dam, a distance of approximately 9 miles. The legislatively-created Upper Missouri River Basin Closure Area extends downstream to Morony Dam. In that reach of river there are four water users who hold water rights/reservations – PPL, Montana LLC (PPL); Montana Department of Fish, Wildlife and Parks (DFWP); City of Great Falls; and Duane Urquhart By-Pass Trust. The combined total of the City of Great Falls water reservation and the Urquhart water right is 20.4 CFS. The DFWP instream flow water reservation is 3,876 CFS. PPL holds several water rights for hydropower generation at each of their dams in the region, however, the dam with the highest flow capacity is Cochrane Dam, with an associated water right of 10,000 CFS. The Cochrane Dam water right is the controlling water right for PPL, because all other PPL water rights are met if the Cochrane Dam water right is met. The DFWP water reservation and PPL water right can be considered to run concurrently in determining legal demands, since the nature of water use is instream flow. Therefore, for purposes of this analysis, the combined legal demands in the affected reach are 10,020 CFS.

Department Water Right Records.

27. The Upper Missouri River Basin is closed, due to, in part, large hydropower water rights on the Missouri River and its tributaries owned by PPL, Montana LLC. According to a previous Department hydrologic study, streamflows greater than appropriations claimed by prior water rights in the Upper Missouri Basin, including the PPL water rights, generally occur upstream of Cochrane Dam in the following circumstances: 1) during very wet Aprils (10th percentile flow or at least one year in ten); 2) during average and above average months in May and June (50th
percentile flow or at least 5 years in ten); and 3) during very wet months of July (10th percentile flow or at least one year in ten). The results for Morony Dam are similar to Cochrane Dam, except streamflows exceed the Morony Dam water right(s) in 2 years in ten during March, April and July of wet years. Flows rarely occur above the water right legal demand during the other eight months from August through March. Upper Missouri Water Availability Analysis, MT Dept. of Natural Resources and Conservation, December 1997.

28. Applicant has addressed legal availability of surface water in the Missouri River by providing a mitigation plan which proposes to mitigate the depletions to surface water in full. Applicant will purchase a Water Service Contract from the U.S. Bureau of Reclamation in the amount of 150.7 acre-feet, (which represents the entire diverted volume), in order to off-set surface water depletions from its groundwater appropriation. The mitigation plan is addressed under “Adverse Effect” below. Application.

29. The Applicant has met its burden of proof in regard to legal availability, given its plan to mitigate depletions to the Missouri River. By virtue of its plans to measure appropriations and purchase a Water Service Contract from the U.S. Bureau of Reclamation to off-set depletions, Applicant agrees to conditions acknowledging its obligation to meet legal demands. See conditions in the Conditions section of this Order.

CONCLUSIONS OF LAW

30. 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.
31. It is the applicant's burden to present evidence to prove water can be reasonably considered legal 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.

32. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pgs. 7-8; In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 By Utility Solutions LLC (DNRC Final Order 2006)(mitigation of depletion required), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, Opinion and Order (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, citing Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, citing Loynings v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v.
Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillion Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880; In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water.§ 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC (DNRC Final Order 2007) (permit denied); In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pgs. 5; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, Memorandum and Order, (2011) Pgs. 11-12.

33. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, Opinion and Order (June 23, 1994); In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC (DNRC Final Order 2006)(permits granted), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007)(permit granted), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By
Utility Solutions LLC (DNRC Final Order 2007) (permit denied); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC (DNRC Final Order 2008); In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, Memorandum and Order, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

34. Applicant states it will install a water measuring device to measure appropriations. It also proposes to purchase a Water Service Contract from the U.S. Bureau of Reclamation to off-set the entire, proposed 150.7 acre-feet of appropriation. Therefore, Applicant has agreed to conditions to ensure legal demands are met by prior appropriations, and has proven by a preponderance of the evidence that groundwater can reasonably be considered legally available during the period in which it seeks to appropriate. (FOF Nos. 23-25, 28-29)


**Adverse Effect**

**FINDINGS OF FACT**

**Groundwater**

35. The estimated zone-of-influence of the proposed production well is 13.1 miles, and there are 18 groundwater rights appropriating water from the Madison Aquifer that exist within the zone. Their combined appropriation of water is 761.5 acre-feet. Groundwater flux through the zone is estimated at 2,110 AF, or 1,348.5 AF greater than existing legal demands. File.

36. Applicant's consultant modeled drawdown to all existing groundwater wells within the zone-of-influence. The results showed that the predicted drawdown after one year of pumping left a water column between 439 and 982 feet for all existing wells.

37. The Department finds that groundwater rights will not be adversely affected by the proposed appropriation. File.

**Surface Water**

38. Groundwater in the Madison Aquifer is hydraulically-connected to Giant Springs and the Missouri River downgradient from Giant Springs. Legal demands on the reach of the source from the springs to the river do not exceed the physical supply of water, therefore no adverse effects will result by depletions to Giant Springs. The effected reach of river includes a 9-mile segment from the springs to Morony Dam, and is located within the Upper Missouri River Closure Area. Without a mitigation plan, water is not legally available in this reach because demands exceed the physical supply in all but two months of the year. Finding of Fact 27

39. Applicant's hydrogeologic assessment predicts that there will be a net depletion to the Missouri River equal to the total volume of water appropriated by the proposed groundwater well, or 150.7 acre-feet. In order to mitigate the depletion, and therefore prevent adverse effects, Applicant proposes to off-set the depletion by replacing the entire amount with water purchased from the U.S. Bureau of Reclamation (BOR). Applicant will purchase a Water Service Contract from the BOR, and BOR will release the allocation from Canyon Ferry Reservoir and convey it to the affected river reach. Application indicates that groundwater appropriations will be
measured to ensure compliance with the Permit. Applicant's plan is adequate to prevent adverse effects to other water users.

40. The Department finds that no adverse effects will result from the proposed appropriation, provided that Applicant purchases a Water Service Contract from the U.S. Bureau of Reclamation for 150.7 acre-feet of water, and secures a contract for the amount on an annual basis. The mitigation plan off-sets depletions to surface water in timing, amount and location. In addition, Applicant's groundwater appropriations will be measured to ensure compliance with the Permit.

CONCLUSIONS OF LAW

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. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users). Bostwick Properties, Inc. ¶ 21.

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(8).

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, (2011) Pg. 4.

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

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, (2011) Pg. 7 (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). (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, (2011) Pg. 8.

47. The Department can and routinely does, condition a new permit’s use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); In the Matter of Combined Application for Beneficial Water Use Permit No. 76H-30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville (DNRC Final Order 2011).

48. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. E.g., In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), affirmed, Montana River Action Network v. DNRC, Cause No.
CDV-2007-602, Montana First Judicial District Court, (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); In the Matter of Beneficial Water Use Permit Application No. 411-104667 by Woods and Application to Change Water Right No 411-G(W) 125497 by Ronald J. Woods, (DNRC Final Order 2000); In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation,( DNRC Final Order 2001); In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order (1988).


Augmentation/mitigation is also recognized in other prior appropriation states for various purposes. E.g., C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

The requirement for mitigation in closed basins has been codified in § 85-2-360, et seq., MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

E.g., Combined Application for Beneficial Water Use Permit No. 76G-30050801 and Change Authorization 76G-30050805 by Missoula County (DNRC Final Order 2012)(permit granted conditioned on mitigation of depletion ranging .8 to 7.4 gpm); In the Matter of Application No. 76H-30046211 for a Beneficial Water Use Permit and Application No. 76H-30046210 to Change Preliminary Determination to Grant Application for Beneficial Water Use Permit No. 41K 30063379
a Non-filed Water Right by Patricia Skergan and Jim Helmer (DNRC Final Order 2010, Combined Application) (permit granted conditioned on mitigation).

49. If the applicant seeks to use a mitigation plan to prove lack of adverse effect, the applicant must have a defined mitigation proposal at the time of application. It is the Applicant’s burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on this basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, Memorandum and Order, (2011) Pg. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC (DNRC Final Order 2006) (permits granted based on plan for mitigation of depletion), affirmed, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (DNRC Final Order 2007) (permit granted on basis of plan for mitigation of depletion), affirmed, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); §85-2-360 et seq., MCA.

50. Pursuant to § 85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

51. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant
proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008).

52. 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 as conditioned on Applicant’s plan. § 85-2-311(1)(b), MCA. (FOF Nos. 35-37, 39-40)

Adequate Diversion

FINDINGS OF FACT

53. Water will be appropriated by a groundwater well completed into the Madison Aquifer at a depth of 1,770 feet. The well was drilled in 2008 by Boland Drilling, a Montana licensed well driller (License No. WWC-482). A 50 horsepower Grundfos submersible pump will deliver a flow rate of 160 GPM to either two 30,000 gallon storage tanks or a 35.2 AF capacity pumping pit. Water diverted to the storage tanks will be re-diverted for domestic and stock purposes, and water diverted to the pit will be re-diverted for irrigation purposes, for either crop or garden irrigation. The crop irrigation system will consist of a wheel line sprinkler system. The garden irrigation method will be via hand line. Both irrigation systems are expected to be 80% efficient. System design, diagrams, plans and other information is contained in the file. File

54. The Department finds the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use.

CONCLUSIONS OF LAW

55. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. 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. 33938341Q by Hoyt (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

56. Water wells must be constructed according to the laws, rules and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. In the Matter of Application for Beneficial Water Use Permit No. 411-105511 by Flying J Inc. (DNRC Final Order 1999).

57. 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. (FOF No. 54)

**Beneficial Use**

**FINDINGS OF FACT**

58. Groundwater will be used for multiple domestic, stock and irrigation purposes. The appropriation will be 160 GPM up to 150.7 AF. A Certificate of Water Right exists on the well for 9.4 AF, making the combined appropriation 160.1 AF. The volume of water associated with each purpose (for the proposed permit) is as follows: 1) domestic (35 homes) is 8.8 AF; 2) stock is 16.5 AF; irrigation (alfalfa) is 100.3 AF and lawn and garden use is 25.1 AF. The proposed volumes for irrigation, lawn & garden and stock purposes were calculated using Department water use and evaporation standards set in administrative rules, and the volume for multiple domestic purposes was calculated using Montana Department of Environmental Quality standards for per capita water use.

59. The Department finds the purposes and proposed amounts of water to be a beneficial use and the amounts of water necessary to sustain the uses.

**CONCLUSIONS OF LAW**

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

61. 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, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.


63. 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, (2011) Pg. 3 (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).

64. It is the applicant’s burden to produce the required evidence. 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.

65. Applicant proposes to use water for multiple domestic, irrigation and stock purposes, which are recognized beneficial uses. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that 160 GPM and 150.7 AF are the amounts needed to sustain the beneficial use. (FOF No. 59)

Possessory Interest

FINDINGS OF FACT

Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 41K 30063379

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66. The applicant signed and had the affidavit on the application form notarized 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

67. 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.

68. 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.

69. 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. § 85-2-311(1)(e), MCA. (FOF No. 66)
CONDITIONS

The application will be subject to the following conditions, limitations or restrictions.

1. **WATER MEASUREMENT RECORDS REQUIRED**
   The appropriator shall install a department approved in-line flow meter in the delivery line of the groundwater well associated to this water right. The location of the flow meter must be approved by the department. Water must not be diverted until the required measuring device is in place and operating. The appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation of the authorization. The records must be sent to the Lewistown Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures the flow rate and volume accurately.

   SUBMIT RECORDS TO:
   Lewistown Water Resources Office
   613 NE Main St, Suite E
   Lewistown, MT
   PHONE: 406-538-7459
   FAX: 406-538-7012

2. **MITIGATION PLAN**
   Prior to commencing diversions under this permit the appropriator shall make provision to mitigate adverse effect to surface water rights by replacing the full volume of net depletion of the appropriation. The appropriator shall replace an equivalent amount of water to the mainstem of the Missouri River above Rainbow Dam in the following manner: the appropriator shall mitigate depletions to surface water and provide for legal availability of surface water under this permit through the purchase of a U.S. Bureau of Reclamation (BOR) water service contract from Canyon Ferry Reservoir. The volume of water stated on the contract must be at least 150.7 acre-feet per year. Actual deliveries of water under such contract must be commenced the calendar year.
AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATORS CONTRACT WITH THE BOR MAY PROVIDE THAT IN THE CALENDAR YEARS SUBSEQUENT TO THE FIRST CALENDAR YEAR IN WHICH WATER IS TO BE PUT TO BENEFICIAL USE, THE CONTRACT VOLUME DELIVERED MAY BE EQUAL TO BUT NOT LESS THAN THE VOLUME OF WATER ACTUALLY DIVERTED BY THE APPROPRIATOR IN THE PREVIOUS CALENDAR YEAR. A DELIVERY SCHEDULE ALLOWED BY THE BOR AND WHICH RESULTS IN THE FULL REPLACEMENT OF THE PRIOR CALENDAR YEARS DIVERSION VOLUME DURING THE FOLLOWING CALENDAR YEAR SHALL BE DEEMED SUFFICIENT UNDER THIS PERMIT. APPLICANT SHALL SUBMIT TO THE LEWISTOWN REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH BOR AS DESCRIBED ABOVE. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL A WATER SERVICE CONTRACT WITH THE BOR IS EXECUTED. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES.

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. 41K 30063379 should be GRANTED.

The Department determines the Applicant may divert groundwater from the Madison Aquifer at a flow rate of 160 GPM and volume of 150.7 AF, by means of a well from January 1 to December 31. The production well is 1,770 feet deep and is located in the NESWSE Section 29, T22N, R2E, Cascade County. Water may be used for multiple domestic, lawn and garden, irrigation and stock purposes, and Applicant may store water in a 35.2 AF storage pit. The place of use is located in the E2 Section 29 for the combination of purposes and will be more specifically defined in the Permit. Applicant shall comply with water measurement and mitigation conditions as outlined in the Conditions section.

NOTICE

This Department will provide public notice of this Application and the Department’s Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this
Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 30th day of May, 2013

/Original signed by Scott Irvin/
Scott Irvin, Manager
Lewistown Regional Office
Department of Natural Resources and Conservation