

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41Q 30068688 BY MONTANA PRAIRIE NEST II	}	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On July 22, 2014, Montana Prairie Nest II, (Applicant) submitted Application for Beneficial Water Use Permit No. 41Q 30068688 to the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The proposed appropriation is for 70 gallons per minute (GPM) up to 112.9 acre feet (AF) annually for irrigation purposes. The water source is groundwater (Madison Formation), 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 January 15, 2015. Applicant responded with information dated February 23, 2015. The application was determined to be correct and complete on April 16, 2015. An Environmental Assessment for this application was completed on July 14, 2015.

INFORMATION

The Department considered the following information submitted by the Applicant:

Application as filed:

- Application for Beneficial Water Use Permit, Form 600 and Supplement
- Attachments:
 - Aquifer Testing Addendum
 - Aquifer Test Report (Madison Aquifer Test, Prairie Nest Irrigation Well, Great Falls, MT)
 - Reservoir/Place of Storage Addendum
- Maps (multiple)

Information Received after Application Filed

- Applicant's February 23, 2015 response to the Department's deficiency letter.

Information within the Department's Possession/Knowledge

- Upper Missouri Water Availability Analysis, Montana Department of Natural Resources and Conservation, December 1997.

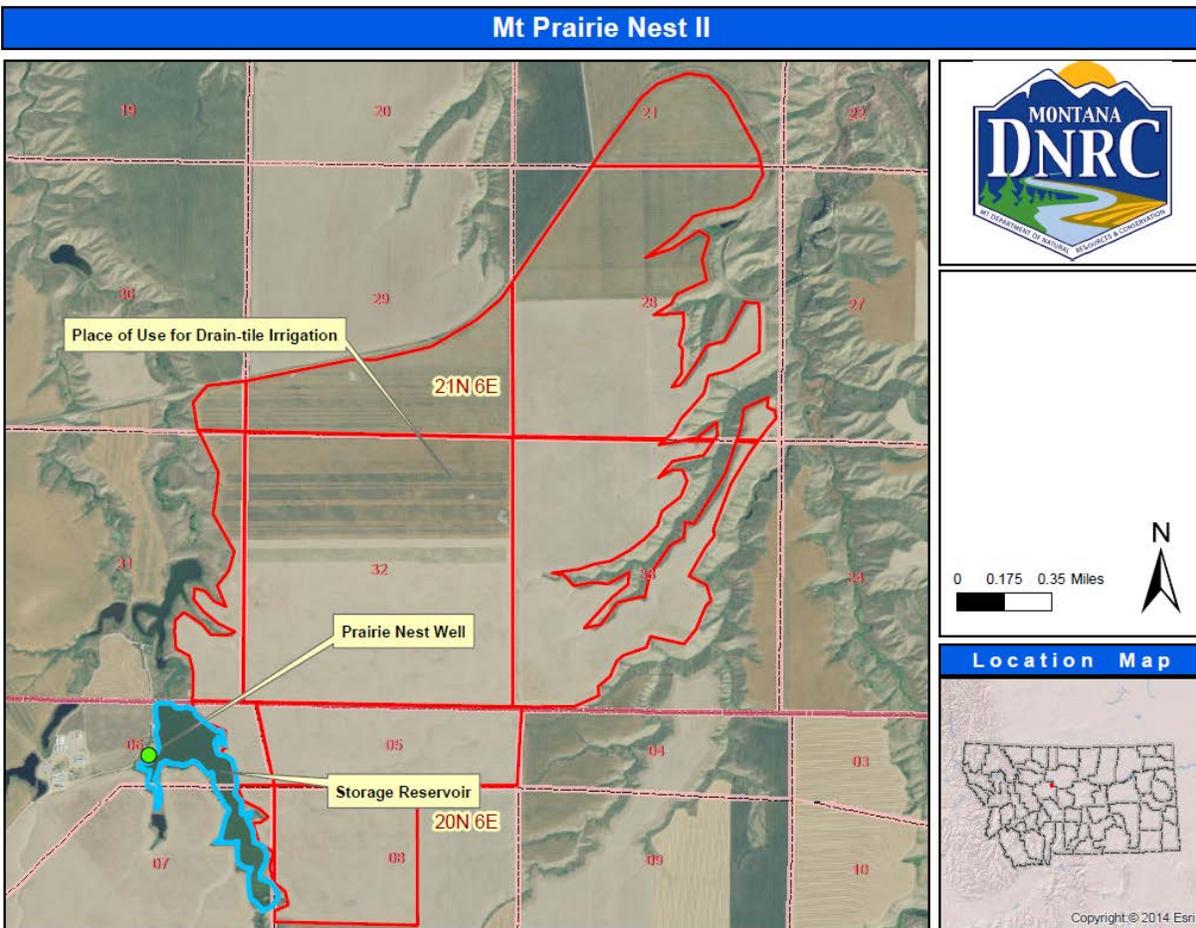
- Aquifer Test Report by Department Groundwater Hydrologist, Attila Folnagy, dated August 12, 2014.
- Depletion Report by Department Hydrologist, Attila Folnagy, dated August 11, 2014.

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. Applicant proposes to appropriate groundwater from January 1 through December 31 from the Madison Formation in an amount of 70 GPM up to 112.9 AF per year. The means of diversion is an 800 foot deep well, and the general location of the project is 10 miles east of Great Falls, Montana. The proposed appropriation is for irrigation purposes, and an existing 1,405.8 AF reservoir will be used to store groundwater prior to pumping to the place of use. The period of use for irrigation is April 1 to October 31 annually. The volume of water consumed will be 100 percent of the appropriation, or 112.9 AF per year (there will be no return flows to groundwater or surface water). Application; Department Depletion Report.
2. The point of diversion (well) is located in the SWNWSE Section 6, T20N, R6E, Cascade County, and the place of use consists of 2,234 acres located in Sections 5, 6, 7, and 8, T20N, R6E; and Sections 21, 28, 29, 30, 31, 32, and 33, T21N, R6E.
3. The proposed appropriation is associated with a previously-issued permit (Provisional Permit No. 41Q 30026974). They share the same point of diversion (groundwater well) and a portion of the place of use. Simultaneous with this current permit proceeding, the Applicant has filed an application to change Provisional Permit No. 41Q 30026974. The proposed modification to 41Q 30026974 is to change the place of use so that both water rights overlap perfectly in place of use (2,234 acres).
4. Applicant agrees to a condition of water measurement. Appropriations from the groundwater well into the reservoir will be measured, as well as the volume of water pumped from the reservoir into the irrigation system. See the Conditions section for specific details of the water measurement condition.



Map showing location of MT Prairie Nest Well with reservoir and proposed location of drain-tile irrigation.

BASIN CLOSURE IMPACTS

FINDINGS OF FACT

5. This application is for irrigation purposes and is geographically located outside the statutorily-created upper Missouri River basin closure area. However, the Department has determined the impacts from the proposed well will manifest themselves inside the closure area.

6. Applicant's plan to prevent adverse effect to water rights within the closure area is to mitigate hydraulically connected surface water depletions by replacing the total amount of water consumed with contract water purchased from the United States Bureau of Reclamation. The contract water will be released from Canyon Ferry Reservoir and mitigate the reach of the Missouri River where depletions from the proposed appropriation will occur.

CONCLUSIONS OF LAW

7. DNRC can grant an application for a permit to appropriate groundwater within the upper Missouri River basin before final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, provided the applicant complies with a plan for mitigating surface water depletions. §§ 85-2-343(1); 85-2-360, 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 outside the Upper Missouri River basin closure area, but the impacts from the pumping well will manifest themselves inside the closure area and above Morony Dam.

8. 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.

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

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 . . .

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); Admin. R. Mont. (ARM) 36.12.207.

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

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).

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 Formation at a flow rate of 70 gallons per minute (GPM) up to 112.9 acre feet (AF) per year. The production well is 800 feet deep. The combined flow rate of this permit proposal and Application To Change A Water Right No. 41Q 30026974, which share the same well, is 420 GPM.

16. The Montana Bureau of Mines and Geology conducted a 168-hour aquifer test on the proposed well between October 20 and October 27, 2010, at an average rate of 416 GPM. The initial flow rate for the test was 360 GPM, and was adjusted and stabilized at 420 GPM between 4,000 minutes and 10,080 minutes. Therefore, the well was pumped at the proposed, combined flow rate of 420 GPM for 101.3 hours. The discharged groundwater was measured using a v-notch weir and disposed of via plastic sheeting to a nearby reservoir, so as to not affect the aquifer test results. Application; Department Aquifer Test Report.

17. During the first five minutes of the aquifer test, the majority of drawdown occurred, 250 feet, and an additional one foot of drawdown was observed for the remainder of the test. The maximum drawdown observed left 115 feet of available drawdown above perforations in the well, which are located at 450 feet below ground surface. The water level in the well recovered to 100 percent of the pre-pumping level within 24 hours after cessation of the test. Department Aquifer Test Report.

18. The Department extrapolated data from the aquifer test to project drawdown in the proposed well after a 365-day pumping period, which is the length of the proposed period of appropriation. The results for predicted drawdown at the end of the period of appropriation were 257 feet, leaving 109 feet of water column above the perforations in the well. A second Department analysis of drawdown, utilizing a different method than that described in FOF 16, resulted in a projected maximum drawdown of 262 feet in the proposed well, still leaving 104 feet of available drawdown above the bottom of the well. This second method to project drawdown included the projections for a constant pumping schedule and factoring in interference from nearby wells. Both of the methods conducted by the Department show that water is available in sufficient quantity at the well, after a full season of use, to supply the requested amount. Department Aquifer Test Report.

19. The Department calculated groundwater flux, or the rate of groundwater flow, through the projected zone of influence (ZOI) at 1,106 AF per year. The Applicant is requesting 112.9 AF per year. Department Aquifer Test Report.

20. The Department finds that groundwater is physically available in the requested flow rate and volume during the proposed period of appropriation. Department Technical Report.

CONCLUSIONS OF LAW

21. 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.”

22. 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).

23. The Applicant has proven by a preponderance of the evidence that groundwater is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 18-20)

Legal Availability:

FINDINGS OF FACT

Groundwater

24. The Department calculated the zone-of-influence of the pumping well to extend 24,000 feet from the well. The zone-of-influence extends to the Missouri River. According to the Department’s database, there are 16 groundwater rights that withdraw groundwater from the Madison Aquifer within the zone-of-influence. The total volume of water associated with the 16 rights is 784.8 AF. By comparison, the estimated flux through the zone-of-influence, or volume of water physically available annually, is 1,106 AF, or approximately 321 AF greater than demands. The Department finds that groundwater is legally available in the amount proposed. DNRC Aquifer Test Report.

Surface Water

25. The proposed groundwater appropriation is from the Madison Aquifer. According to Department Groundwater Hydrologist Attila Fohnagy, the groundwater source is hydraulically connected to the Missouri River in and around Giant Springs, a well-known, large spring that discharges Madison Aquifer groundwater along the bank of the Missouri River east and downstream of Great Falls. The Madison Aquifer is estimated to discharge 300-600 cubic feet

per second (CFS) to the Missouri River along the reach including Giant Springs and springs upwelling in the river. Department Depletion Report.

26. The combined legal demands from Giant Springs are 57.6 CFS. Department water right database. Flow of the springs exceeds legal demands by a large margin, at least 150 CFS. The Department finds that water is legally available in Giant Springs and the reach between the springs and the Missouri River.

27. The legislatively-created upper Missouri River basin closure area extends from the headwaters of the Missouri River downstream to Morony Dam. In the reach of the river between Giant Springs and Morony Dam there are four water users with maximum monthly legal demands totaling 10,016.59 CFS up to 616,101.9 AF. Northwestern Energy Corporation 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 located upstream of Morony Dam. The Cochrane Dam water right has an authorized flow rate of 10,000 CFS and is the controlling water right for Northwestern, because all other Northwestern water rights are met if the Cochrane Dam water right is met. Montana DFWP holds an instream water reservation and instream water right with a cumulative maximum flow rate of 3,876 CFS. Both of these reservations/rights and the Northwestern Energy Corporation water right for Cochrane Dam can be considered to run concurrently in determining legal demands; the nature of water use is either instream flow or “run of the river” hydropower diversions. Therefore, for purposes of this analysis, the maximum combined legal demands in the affected reach are 10,016.59 CFS up to 616,101.9 AF per month. Department records.

28. The upper Missouri River basin is closed, in part, because of the large hydropower water rights on the Missouri River and its tributaries owned by Northwestern Energy Corporation. According to a Department hydrologic study, flows greater than appropriations claimed by prior water rights occur upstream of Cochrane Dam only during May and June, and only during average to wet years (above average years). Flows above the water right legal demands from August through March are rare. See *Upper Missouri Water Availability Analysis*, Montana Department of Natural Resources and Conservation, December 1997.

29. Applicant has addressed legal availability of surface water in the Missouri River by providing a mitigation plan which proposes to mitigate depletions to surface water in full. Applicant will purchase a Water Service Contract from the U.S. Bureau of Reclamation in the amount of 112.9 AF per year, representing the entire consumed volume, in order to off-set surface water depletions. The Bureau of Reclamation contract water will be released from the

Bureau's Canyon Ferry Dam and flow through the entire affected reach of the Missouri River. The mitigation plan is further addressed under "Adverse Effect" below (FOF 37-38).

30. Applicant will install a measuring device (in-line flow meter) at the wellhead to quantify appropriations. Additionally, Applicant agrees to install a flow meter in the secondary diversion works where the water will be pumped from the reservoir to the place of use. All appropriations will be measured. 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 for specific language.

CONCLUSIONS OF LAW

31. 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).

32. 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.

33. 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* Loyning 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. Dillon 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) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

34. 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 for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *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.

35. 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 proposed mitigation plan, the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 24 and 29)

Adverse Effect

FINDINGS OF FACT

Groundwater

36. The modeled zone-of-influence of the proposed well has a radius of 24,000 feet (approximately 4.5 miles). There are 16 groundwater rights within the zone-of-influence that are known to or may appropriate water from the Madison Formation. The combined appropriation of those wells is 784.8 AF per year. Groundwater flux through the zone, based on regional aquifer parameters selected by Department hydrogeologists, is modeled to be 1,106 AF per year. Groundwater flux exceeds groundwater legal demands by 321 AF. Aquifer Test Report.

Surface Water

37. Groundwater in the Madison Formation is hydraulically connected to Giant Springs and the Missouri River from Giant Springs to Morony Dam. Legal demands from Giant 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 is located within the legislatively-created upper Missouri River basin Closure Area. Without a mitigation plan, water is not legally available in this reach because legal demands exceed the physical supply in all but two months of an average water year and rarely in some other months. Department Depletion Report; Upper Missouri Water Availability Analysis, Montana Department of Natural Resources and Conservation, December 1997.

38. Department analysis predicts that there will be a net depletion to the Missouri River equal to the total volume of water diverted/consumed by the proposed appropriation (112.9 AF per year). In order to mitigate the depletion, and therefore prevent adverse effects, Applicant proposes to off-set the depletion by replacing the entire depleted volume with water purchased from the U.S. Bureau of Reclamation (BOR). Applicant shall 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. Groundwater appropriations will be measured to ensure compliance with the Permit. The following mitigation condition will be added to the water right.

****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 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 112.9 ACRE-FEET PER YEAR. ACTUAL DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATOR'S 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 DEPARTMENT'S 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.

39. 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 112.9 AF of water, and secures a contract for the depleted amount on an annual basis. The proposed mitigation plan off-sets depletions to surface water in timing, amount and location.

CONCLUSIONS OF LAW

40. 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.

41. 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).

42. 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.

43. 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 (1991), 249 Mont. 425, 816 P.2d 1054.

44. 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.

45. 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.

46. 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).

47. A plan to prove legal availability and prevent adverse effect can be to use mitigation or augmentation. § 85-2-360, MCA; 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); *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12; *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (HB 831, DNRC Final Order 2009) (permit denied in part for failure to analyze legal availability for surface water for depletion of 1.31 AF to Bitterroot River)§ 85-2-360, MCA. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-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).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See *Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148 Mont. 355, 423 P.2d 587. 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.

(Emphasis added.)

48. 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.

49. 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).

50. 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. § 85-2-311(1)(b) MCA. (FOF 36 and 39)

Adequate Diversion

FINDINGS OF FACT

51. The water well was constructed by a Montana licensed well driller. Application.

52. Water will be appropriated by a groundwater well completed into the Madison Aquifer at a depth of 800 feet. Department hydrogeologists modeled maximum drawdown to the pumping well of 251-262 feet following pumping throughout the period of appropriation at a rate of 420 GPM. Maximum drawdown of this magnitude will leave at least 104 feet of water above the production zone of the well (perforations). Department Aquifer Test Report.

53. Water will be diverted from the well using a 60 horsepower Goulds pump/motor. The pump will deliver water at a flow rate of 420 GPM to an existing 1,405.8 AF storage reservoir located on the East Fork Rogers Coulee via 100 feet of 4-inch pipeline. The reservoir was constructed in 1952 and is permitted under other existing water rights. From the reservoir water will be pumped to the place of use using a Cornell 225 horsepower pump, at a rate of up to 5,000 gallons per minute (specifications for the pumping systems are located in the file). The method of irrigation will be a controlled subirrigation or drain-tile distribution system consisting of buried drain tile branching into zones throughout the 2,234 acre place of use. The sub-irrigation system is highly efficient (e.g. designed to allow no evaporation from the soil surface) and manages a shallow groundwater table to optimize crop consumption. System specifications are located in the file. Application.

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

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.

56. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

57. 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. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

58. 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. § 85-2-311(1)(c), MCA. (FOF 54)

Beneficial Use

FINDINGS OF FACT

59. The groundwater well proposed in this matter was previously permitted by the Department in 2007 for a flow rate of 350 GPM and a volume of 564.6 AF, to irrigate 892 acres. The 2007 Permit (Permit 41Q 30026974) was issued for a center pivot sprinkler irrigation system, but the

system was not constructed and the appropriation was not perfected. Since 2007, the Permittee/Applicant decided to change its plans for the method of irrigation and number of acres irrigated. Applicant now proposes to irrigate 2,234 acres (an expansion from the 892 acres permitted in 2007) under a sub-irrigation or drain-tile system. Simultaneous to this permit proceeding, the Applicant has filed an application to change its 2007 Permit to accommodate the new sub-irrigation system and expanded acreage. The 2007 appropriation will be combined with this proposed appropriation to irrigate all 2,234 acres. Application.

60. Groundwater will be used for irrigation purposes, which is recognized as a beneficial use under statute. § 85-2-102(4)(a), MCA. The appropriation will be 70 GPM up to 112.9 AF. The requested flow rate is that which the groundwater well can produce. The well was previously permitted by the Department in 2007 for a flow rate of 350 GPM and a volume of 564.6 AF, and the appropriation was determined to be beneficial during that proceeding.

61. The volume of water to be appropriated under this permit is 112.9 AF. The appropriation will be used in conjunction with the 2007 permitted volume of 564.6 AF, for a combined appropriation of 677.5 AF. The Applicant understands that if all 2,234 acres are to be irrigated in any given year, the combined volume of water is insufficient for full-service irrigation. In that event, the per-acre volume will be 0.3 AF. During some years the Applicant may irrigate less acreage in order to expand its per-acre volume allocation. The determination will be made on a yearly basis, based on the type of crops grown, market conditions, and growing conditions. Applicant intends on growing wheat, barley, oats, lentils, canola, alfalfa, and peas, all crops that are typically grown in Montana. Applicant asserts that whether the appropriation of water amounts to full-service irrigation or partial-service irrigation, the appropriation will increase crop production beyond those obtained under dryland farming. The Department agrees and finds the appropriation of water to be a beneficial use. Application; Department Technical Report.

CONCLUSIONS OF LAW

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

63. 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. 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 et al, 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).

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. Applicant proposes to use water for irrigation purposes, which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and the amount of water proposed in this proceeding is a beneficial use. § 85-2-311(1)(d), MCA, (FOF 61)

Possessory Interest

FINDINGS OF FACT

65. The Applicant signed the affidavit and certification on 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

66. 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.

67. 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.

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 65)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Preliminary Determination, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41Q 30068688 should be **GRANTED**.

The Department determines the applicant may divert groundwater from the Madison Aquifer, by means of an 800 foot deep well, from January 1 through December 31 at 420 GPM up to 112.9 AF, from a point in the SWNWSE Section 6, T20N, R6E, Cascade County. Applicant may impound water in an existing 1,405.8 AF storage reservoir. The purpose of use is irrigation, with an associated period of use of April 1 to October 31 annually. The place of use consists of 2,234 acres located in Sections 5, 6, 7, and 8, T20N, R6E; and Sections 21, 28, 29, 30, 31, 32, and 33, T21N, R6E.

The Permit is conditioned as follows:

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 INTO THE RESERVOIR, INCLUDING THE PERIOD OF TIME.

FURTHER, THE APPLICANT SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE DELIVERY LINE OF THE PUMPING SYSTEM FROM THE RESERVOIR THAT CONVEYS WATER TO THE IRRIGATION SYSTEM. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED TO THE IRRIGATION SYSTEM UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE VOLUME OF ALL WATER DIVERTED FROM THE RESERVOIR AND INTO THE IRRIGATION SYSTEM, INCLUDING THE PERIOD OF TIME.

THE APPROPRIATOR SHALL KEEP RECORDS AND SUBMIT RECORDS 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 PERMIT. THE RECORDS MUST BE SENT TO THE LEWISTOWN WATER RESOURCES REGIONAL OFFICE BY NOVEMBER 30 OF EACH YEAR. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES SO THEY ALWAYS OPERATE PROPERLY AND MEASURE THE FLOW RATE AND VOLUME OF WATER 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 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 112.9 ACRE-FEET PER YEAR. ACTUAL DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATOR'S 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 DEPARTMENT'S 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.

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 29th day of July 2015

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