

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

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q 30103018 BY GRANITE PARK, LLC)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On September 9, 2015, Granite Park, LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 43Q 30103018 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 485 GPM (1.08 CFS) and 165 AF for multiple domestic and lawn and garden uses. The Department published receipt of the Application on its website. An Environmental Assessment for this Application was completed on February 16, 2016. The Application was determined to be correct and complete as of February 19, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
 - Well Logs
 - Aquifer Testing Addendum
 - Form 633 in electronic format (3.5 hour, 24 hour and 72 hour tests)
 - Granite Park water meter data from 8/11/2014 through 8/5/2015
 - Granite Park water demand estimate dated 3/7/2006
 - Water System Design Report and Specifications for Granite Park Subdivision dated April 2006 by Engineering, Inc.
- Maps:

- Topographical map showing points of diversion and place of use.
- Plat map showing subdivision plan and location.

Information Received after Application Filed

- Letter from Applicant’s consultant, Bryan Alexander (Sanderson Stewart) requesting a variance from aquifer testing requirements (ARM 36.12.121) dated November 12, 2015.
- Letter from Regional Manager, Kimberly Overcast, to Applicant’s consultant, Bryan Alexander, approving variance request dated November 19, 2015.
- Letter from Applicant’s consultant, Bryan Alexander (Sanderson Stewart) requesting a variance from aquifer testing requirements (ARM 36.12.121) dated December 14, 2015.
- Letter from Regional Manager, Kimberly Overcast, to Applicant’s consultant, Bryan Alexander, approving variance request dated February 4, 2016.
- Email from Bryan Alexander to Christine Schweigert with Aquifer Test Addendum attached dated January 22, 2016.

Information within the Department’s Possession/Knowledge

- *Hydrogeology of the West Billings Area: Impacts of Land-Use Changes on Water Resources*, Montana Bureau of Mines and Geology Report of Investigation 10, Olson and Reiten, 2002
- Aquifer Test Report by Department hydrogeologist, Attila Felnagy, February 4, 2016.
- Depletion Report by Department hydrogeologist, Attila Felnagy, February 3, 2016.

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). **NOTE:** Department or DNRC means the Department of Natural Resources and Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; IWR mean Irrigation Water Requirements; and POD means point of diversion.

PROPOSED APPROPRIATION

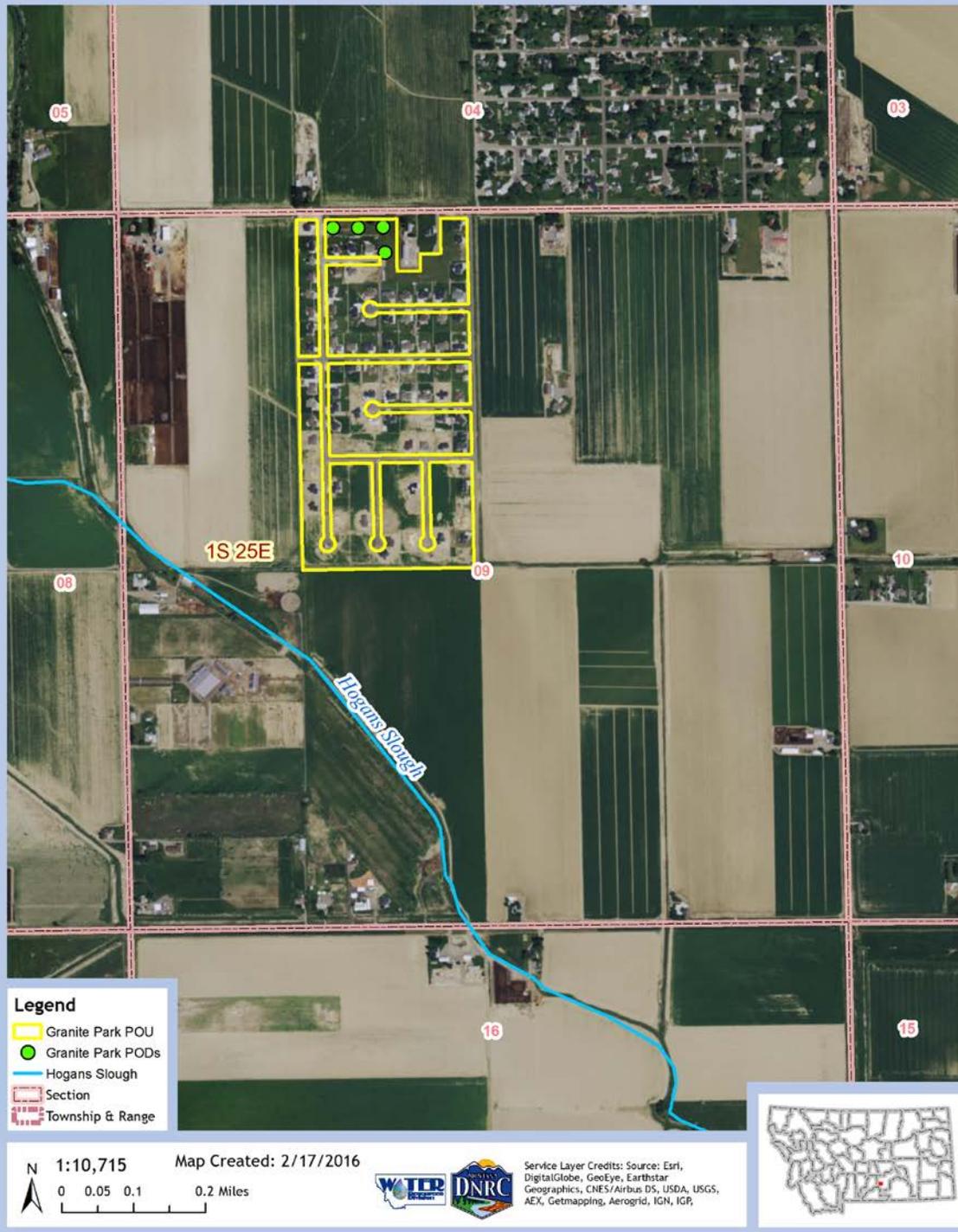
FINDINGS OF FACT

1. The Applicant proposes to divert groundwater, by means of 4 wells each of which are approximately 68-73 feet deep, from January 1 through December 31 at 485 GPM (1.08 CFS) up to 165 AF, from the N2NENW Section 9, T1S, R25E, Yellowstone County. This application is for an existing subdivision in which 118 of 120 lots have been built out. Water is used for multiple domestic use (80 AF) from January 1 through December 31 and lawn and garden use (85 AF) from May 1 through October 15. Each lot has approximately .25 AC of lawn and garden and there is a 4 AC park for a total of 34 AC of lawn and garden. The domestic water system is comprised of 3 wells each capable of producing 225 GPM with 2 running at a time and one serving as a backup. The 4th well is used to irrigate a 4 acre park with a maximum pumping rate of 35 GPM up to 10 AF/year. The place of use is generally located on the west end of Billings south of Central Ave. between South 52nd Street West and South 56th Street West, in the E2NW Section 9, T1S, R25E, Yellowstone County.

2. The Applicant's wells are approximately ½ mile northeast of Hogan's Slough.

3. Department hydrogeologists have estimated that 76.7 AF of water will be consumed. Given a diverted volume of 165 AF, 88.3 AF of water would return to the source aquifer and Hogan's Slough. The map below shows the proposed points of diversion and place of use in relation to Hogan's Slough.

43Q 30103018 Granite Park, LLC



Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 43Q 30103018

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

GENERAL CONCLUSIONS OF LAW

4. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 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.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers (DNRC Final Order 1988)(conditions in stipulations may be included if it further

compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

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

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

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

Physical Availability

FINDINGS OF FACT

10. The Applicant proposes to divert groundwater using 4 wells. The domestic water supply will be provided by 3 wells; 2 pumping at 225 GPM each with the third well being used as a backup, up to 155 AF. The 155 AF was calculated based on water meter reports provided by the Applicant and includes approximately 30 acres of individual lawn and garden area. The 4 acre park area is served by a single well pumping at 35 GPM up to 10 AF. The total flow rate and volume applied for is 485 GPM (1.08 CFS) up to 165 AF/YR.

11. The test wells, referred to as Well #1 (GWIC #226037) , Well #2 (GWIC #226035), Well #3 (GWIC #285449), and Well #4 (GWIC #285448) are approximately 72 feet deep and are completed in a 27 foot thick gravel and sand unit overlain by 30 feet of finer grained sediments. Wells #1-#3 are the domestic wells. Well #4 is the park well. All wells are located in Lot PARK, Block 1, Granite Park Subdivision in the N2NENW of Section 9, T1S, R25E.

12. The Applicant submitted 2 requests for variance from aquifer testing requirements. The first request was from ARM 36.12.121 (3)(a) which states: "Pumping must be maintained at a constant discharge rate equal to or greater than the proposed pumping rate for the duration of the test." and ARM 36.12.121(3)(i) which states: "Groundwater levels in the production well and observation well(s) must be monitored at frequent intervals for at least two days prior to beginning the aquifer test to evaluate background water-level trends. An applicant must evaluate and correct for background water-level trends." The second request for variance was from ARM 36.12.121(3)(e) which states: "Eight-hour duration drawdown and yield tests must be conducted on additional production wells." Variances were granted that allowed the Applicant to test at a rate less than requested, monitor background data for a shorter duration than required by rule and provide less than 8 hours of test data on the backup and park wells because Department

hydrologists determined the proposed testing is sufficient to yield the data needed to evaluate physical and legal availability.

13. The Applicant did 3 aquifer tests. A 72 hour test was performed on Well #1. Background monitoring of static water levels were performed on the pumping well (Well #1) and the observation well (Well #2) beginning on May 8, 2006 at noon and continuing through May 9, 2006 at 11:56 AM. The 72-hour test started on May 12, 2006 at 11:56 AM and continued without interruption until 12:07 PM on May 15, 2006 at an average flow rate of 229 GPM. Discharge was measured using a totalizing flow meter and was disposed into a lateral irrigation ditch that discharged into a field 1,300 feet away. The maximum drawdown in the pumping well (Well #1) was 21 feet below the static water level of 18.1 feet below ground surface (bgs), leaving 32.9 feet of available drawdown above the bottom of the well. The observation well (Well #2) is 185 feet from the pumping well and had a maximum drawdown of 4.2 feet from the static water level of 15.2 feet bgs.

14. A 24-hour test was performed on Well #2 at an average flow rate of 309 GPM. The maximum drawdown in the pumping well was 14.8 feet below the static water level of 15.2 feet bgs, leaving 42 feet of available drawdown above the bottom of the well.

15. A 3.5 hour drawdown and yield test was performed on Well #3 at an average flow rate of 230 GPM with a maximum drawdown of 41.1 feet below the static water level of 17.2 feet bgs, leaving 13.7 feet of available drawdown above the bottom of the well.

16. Well #4 was not tested because it is separate from the public water supply and is proposed to produce 35 GPM up to 10 AF. Because the flow and volume are below the statutory maximum for groundwater certificates well #4 would be exempt from permitting requirements but was made a part of this application rather than filing a separate Notice of Completion of Groundwater Development (DNRC form 602). Well #4 was used as an observation well for the 3.5 hour drawdown and yield test on Well #3.

17. A Department hydrogeologist modeled drawdown in the domestic wells during the period of diversion by modeling each well with 1/3 the monthly pumping schedule and adding drawdown from daily pumping and interference drawdown. The monthly pumping schedule was

obtained by evenly distributing the requested domestic volume throughout the year and apportioning the requested irrigation volume based on the net irrigation requirement from the Billings Station in the IWR program. Modeling showed that the aquifer adjacent to the wells will experience the largest drawdown at the end of July.

18. Total maximum drawdown is the sum of the modeled aquifer drawdown at the end of July and the drawdown at the time (in the aquifer test) it takes to pump 1/3 of July's daily volume. For Well #1 the maximum drawdown is 29.6 ft., with a static water level of 18.1 ft. bgs, there would be 24.3 ft. of available drawdown above the bottom of the well. For Well #2 the maximum drawdown is 23.7 ft., with a static water level of 15.2 ft. bgs, there would be 33.1 ft. of available drawdown above the bottom of the well. For Well #3 the maximum drawdown is 51.6 ft., with a static water level of 17.2 ft. bgs, there would be 3.2 ft. of available drawdown above the bottom of the well.

19. The Dept. used AQTESOLV® (HydroSOLVE, Inc. 2007) to analyze drawdown from the aquifer test and obtain estimates of aquifer properties including transmissivity (T) and storativity (S). The aquifer transmissivity determined by the Neuman (1974) solution is 2,963ft²/day and storativity is 0.1.

20. Physical Availability is analyzed by calculating groundwater flux through a zone of influence, which is determined by the 0.01 foot drawdown contour. The 0.01 foot drawdown contour modeled by the Department occurs at 10,800 feet from the Granite Park, LLC wells. The total volume of aquifer flux each year within the zone of influence can be calculated as TWi , where T is transmissivity (ft²/day), W is the width of the zone of influence (ft.), and i is the hydraulic gradient (ft. /ft.). Using values of transmissivity of 2,963 ft²/day, width of zone of influence of 21,600 ft., and a hydraulic gradient of 0.006 ft./ft. (Olson, 2005), the aquifer flux through the zone of influence is 384,005 ft³/day or 3,218 AF/year. The Applicant is requesting 165 AF/YR.

21. The surface water depletion report from a Dept. hydrogeologist indicated the proposed appropriation would deplete Hogan's Slough. Hogan's Slough was identified as the only

affected surface water source and is hydraulically connected to the source aquifer in Sections 8, 9, 15 and 16, T1S, R25E.

22. There are no gages on Hogan’s Slough, however, the physical availability of water was estimated in the SWSWNE Section 15, T1S, R25E, for Application 43Q 30068497 (City of Billings) using the lowest available monthly measurements (bold numbers in the table below) and interpolating between the points. Measurements were taken from April 4 through October 15, 2013. Google Earth Pro ® aerial imagery shows that Granite Park, LLC subdivision had 44 homes built by August 12, 2011 and 86 homes built by July 1, 2013. Depletions to Hogan’s Slough from these existing homes would have occurred prior to the completion of the measurements by the City of Billings.

Table 1. Physically Available Water in Hogan’s Slough

Month	<i>Jan</i>	<i>Feb</i>	<i>Mar</i>	<i>Apr</i>	<i>May</i>	<i>Jun</i>	<i>Jul</i>	<i>Aug</i>	<i>Sep</i>	<i>Oct</i>	<i>Nov</i>	<i>Dec</i>
Flow rate (CFS)	1.2	1.1	0.97	0.9	16.7	9.0	25.1	21.1	15.1	3.0	1.8	1.43
Volume (AF)	73.7	61.0	59.5	53.3	1025	535	1541	1295	897	184	108	87.8

CONCLUSIONS OF LAW

23. 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.”

24. 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).

25. 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).

26. 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 10- 22)

Legal Availability:

AREA OF AFFECT

The area of effect, or zone of influence, for a groundwater appropriation is determined by the 0.01 foot drawdown contour. Modeling by a Dept. hydrologist determined the 0.01 foot drawdown contour, after one year of pumping, would occur at 10,800 feet from the Granite Park, LLC wells. Hogan’s Slough is approximately 2,500 feet from the Granite Park, LLC wells and is considered hydraulically connected to the source aquifer.

FINDINGS OF FACT

27. There are 374 existing legal demands for groundwater (water rights) within the zone of influence which total 2,917.86 AF/YR. Below is a comparison the water supply and existing legal demands for groundwater within the zone of influence. Subtracting legal demands from the calculated aquifer flux (3,218 AF/YR) gives 300.07 AF/YR. The Applicant is requesting 165 AF/YR.

Table 2. Comparison of Physically Available Groundwater to Legal Demands

Groundwater Physical Availability (AF/YR)	Existing Legal Demands (AF/YR)	Physical Availability minus Existing Legal Demands (AF/YR)
3,218	2,917.96	300.07

28. There is one pending application in the same aquifer 43Q 30102729, within the zone of influence, for 79.6 AF/Year. Assuming that application were to be issued, there would be 220.47 AF (300.07 -79.6 = 220.47) of available groundwater within the zone of influence still legally available.

29. In order to evaluate hydraulic connection to Hogan’s Slough, wells less than 50 feet deep with reported static water levels of less than 15 feet below ground surface and located within 500

feet of the slough were selected in an ArcMap project. The shallow wells that were used to infer hydraulic connection are located along the section of the slough that flows southeast of the proposed place of use. Data from these wells and groundwater level contour maps by Gosling and Pashley (1973) and Olson (2005) suggest Hogan’s Slough is hydraulically connected to the source aquifer downstream of the northern section line of Section 8, Township 1 South, Range 25 East. This is the depleted reach for calculation of stream depletion. Additionally, information and modeling results in application for water right nos. 43Q 30029329, 43Q 30069789 and 43Q 30102729 indicate that their use would deplete Hogan’s Slough. Application 43Q 30029329 was a previous application for this same project and was never completed. Depletions from 43Q 30069789 and 43Q 30102729 are accounted for in the physical and legal availability analysis of this application.

30. Based on Dept. standards for domestic systems using drainfields, consumption is estimated to be 10% of the total demand (80 AF/YR) or 8 AF/YR. Annual consumption for the 34 irrigated acres is estimated to be 68.7 AF based on net irrigation requirement for pasture grass of 24.24 inches (2.02 feet) obtained from the Billings Water Plant, Montana station in IWR. Total annual consumption for domestic and irrigation uses is calculated to be 76.7 AF.

31. Modeling by a Dept. hydrogeologist indicated Hogan’s Slough would be the only affected surface water and that depletions to Hogan’s Slough would experience some lag. Below is a summary of monthly net depletions (flow rate and volume) to Hogan’s Slough from the proposed groundwater appropriation:

Table 3. Estimated Net Depletions to Hogan’s Slough from the Proposed Appropriation

Month	Depletion (GPM)	Depletion (CFS)	Depletion (AF)	Total Consumption (AF)
January	46.2	0.10	6.3	0.7
February	46.4	0.10	5.7	0.7
March	38.5	0.09	5.3	0.7
April	37.0	0.08	4.9	1.8
May	34.4	0.08	4.7	8.4

June	37.9	0.08	5.0	14.4
July	43.2	0.10	5.9	19.4
August	52.3	0.12	7.2	17.5
September	61.8	0.14	8.2	9.0
October	61.5	0.14	8.4	2.9
November	59.6	0.13	7.9	0.7
December	51.8	0.12	7.1	0.7
TOTAL*			76.7	76.7

*differences in tenths due to rounding, numbers generated by AWAS model run by Dept. hydrogeologist

32. The affected reach on Hogan’s Slough is expected to begin at the northern section line of Section 8, T1S, R25E and extend approximately 3.5 miles downstream to the eastern section line of Section 15, T1S, R25E.

33. The Shiloh Drain enters Hogan’s Slough at the eastern edge of Section 15, T1S, R25E, and more than doubles the flow in the slough. All water rights below the confluence of Hogan’s Slough and the Shiloh Drain are met with the exception of 43Q 29373-00 for 8.00 CFS to irrigate 362 acres from April 1 through October 31 of each year. The primary diversion for this water right is a ditch cut high in the side of the slough. Measurements during site visits by the Department and engineering consultants show that this ditch lies 2 to 3 feet above the bed of the slough. This ditch cannot divert water from Hogan’s Slough unless the slough is running full. At flow rates of 7 to 8 CFS in Hogan’s Slough in January, the diversion ditch was 1.5 to 2.0 feet above the water level. When major irrigation ditches in the Billings area are active, Hogan’s Slough flows at more than 30 CFS and the diversion can be used. Prior to irrigation ditch activity and after ditch operations cease, low flows in Hogan’s Slough make it impossible to divert water with this ditch. The primary diversion requires irrigation season flows in Hogan’s Slough and during irrigation season there is available water above the amounts legally allocated. Therefore, all water rights on Hogan’s Slough below its confluence with the Shiloh Drain can reasonably be exercised.

34. There are two water rights within the depleted reach on Hogan’s Slough above the confluence with Shiloh Drain). One is Statement of Claim number 43Q 184007-00 for 255 GPM (0.57 CFS) for irrigation of 15 acres, which would divert 4.1 AF per acre or 61.5 AF according to Dept. adjudication standards for irrigation claims in Climate area 1. The other is Provisional Permit number 43Q 30068497 for 359 GPM (0.8 CFS) and 201 AF for a wetland and fishery. Below is a comparison of physically available water in Hogan’s Slough, (FOF 22), to existing legal demands.

**Table 4. Hogan’s Slough Above Shilo Drain
Physically Available Minus Legal Demands – Flow Rate (CFS)**

Month	Physical Availability (CFS)	Depletions from 43Q 30069789 and 43Q 30102729 (CFS)	Existing Legal Demands (CFS)	Physical minus depletions and legal demands (CFS)
January	1.2	0.05	.8	0.35
February	1.1	0.05	.8	0.25
March	.97	0.04	.8	0.13
April	.9	0.07	.8	0.03
May	16.7	0.21	1.37	15.12
June	9	0.39	1.37	7.24
July	25.1	0.51	1.37	23.22
August	21.1	0.51	1.37	19.22
September	15.1	0.34	1.37	13.39
October	3	0.18	.8	2.02
November	1.8	0.09	.8	0.91
December	1.43	0.06	.8	0.57

**Table 5. Hogan’s Slough above Shilo Drain
Physically Available Minus Legal Demands– Volume (AF)**

Month	Physical Availability (AF)	Depletions from 43Q 30069789 and	Existing Legal Demands (AF)	Physical minus depletions and legal demands

		43Q 30102729 (AF)		(AF)
January	73.7	3.38	16.75	53.57
February	61	2.98	16.75	41.27
March	59.5	2.68	16.75	40.07
April	53.3	4.00	16.75	32.55
May	1025	12.97	29.05	982.98
June	535	22.75	29.05	483.20
July	1541	31.60	29.05	1480.35
August	1295	31.39	29.05	1234.56
September	897	20.67	29.05	847.28
October	184	10.68	16.75	156.57
November	108	5.38	16.75	85.87
December	87.8	3.98	16.75	67.07

35. Physical availability minus legal demands on Hogan’s Slough above the Shiloh Drain exceeds the modeled depletion as determined in Table 3 in both flow rate and volume for all months except April. As stated in FOF 22, aerial imagery from Google Earth Pro ® dated July 1, 2013 shows 86 of the 120 homes built which is 71.6% of the homes. Because 71.6% of the homes were built out, it is reasonable to believe that 71.6% of the depletions to Hogan’s slough had already occurred at the time the measurements were taken. The legally available flow in April is 0.03 CFS, 71.6% of Granite Parks estimated depletion of 0.08 CFS in April is 0.06 CFS, which would mean the future depletion from full build out of the subdivision would be 0.02 CFS in April which is legally available.

CONCLUSIONS OF LAW

36. 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).

37. 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.

38. 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.

39. 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*.

40. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the “area of potential impact” by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the “zone of influence.” Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

41. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA (FOF 27-35)

Adverse Effect

FINDINGS OF FACT

42. The Applicant’s plan to prevent adverse effect is to limit lawn and garden watering. In times of water shortage, irrigation shall be limited to every third day for each lot and the park area. In the case of severe shortages, all residences will be instructed to cease lawn and garden irrigation for the duration of the shortage. The existing Declaration of Covenants for Granite Park Subdivision can be amended to include language to that affect.

43. The evaluation of drawdown in other wells was done by a Dept. hydrogeologist using the aquifer properties cited above and a monthly pumping schedule that accounts for domestic use and lawn and garden irrigation. Modeled drawdown is the largest at the end of July in the fifth year of pumping. Modeled drawdown in excess of 1 foot occurs in wells that are 2,950 feet from the proposed wells. There are 12 water rights in the source aquifer that are predicted to experience drawdown greater than 1 foot. The available water column in the 12 known wells that will experience greater than 1 foot of drawdown is at least 30.2 feet from the bottom of the well.

44. The physically and legally available water in Hogan’s Slough exceeds the predicted net depletion each month of the year.

CONCLUSIONS OF LAW

45. 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.

46. 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).

47. 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.

48. 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.

49. 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.

50. 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.

51. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 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 depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See *In re Application No. 72948-G76L by Cross*, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

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. § 85-2-311(1)(b) , MCA (FOF 42-44)

Adequate Diversion

FINDINGS OF FACT

53. Each of 120 residential lots and a 4 acre park are served by 4 wells completed in a sand and gravel terrace deposit of the Yellowstone River. The wells have been drilled by a licensed Montana water well contractor.

54. The domestic water supply is provided by Well #1, Well #2 and Well #3 which are 72.2, 72.3 and 72.3 feet deep, respectively, with screened intervals approximately 53.5 to 72.3 feet deep. The maximum drawdown in Well #1 after 72 hours of pumping at 229 GPM was 21 feet below the static water level of 18.1 leaving 32.9 feet of available drawdown above the bottom of the well. Dept. modeling of the proposed diversion by the 3 domestic wells is described above in FOF 17-20.

55. The water would be diverted up to 450 GPM up to 155 AF for 120 households with approximately 0.25 AC of lawn and garden each using 3 wells manifold together with C900 PVC pipe. Each well has a Grundfos model 230S200-5 pump with a nominal flow of 230 GPM at 215 feet of total dynamic head. Each pump is controlled with a variable frequency drive controller that maintains constant pressure in the distribution system. The average continuous flow for the development is 82 GPM at full build out, 450 GPM is the peak flow capacity. Water is piped through the subdivision in 8-inch diameter C900 PVC pipe. Individual 1-inch HDPE diameter service lines are connected from the 8-inch mains to the homes. The park well is operated with an irrigation control panel and diverts up to 35 GPM up to 10 AF to irrigate 4 acres. This system is in place and has been diverting water since at least 2006.

CONCLUSIONS OF LAW

56. 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.

57. 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.

58. 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).

59. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).

60. 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 53-55)

Beneficial Use

FINDINGS OF FACT

61. The Applicant proposes to use water for multiple domestic and lawn and garden irrigation which are recognized beneficial uses under § 85-2-102(4), MCA.

62. The requested flow rate of 485 GPM is based on 225 GPM per well for 2 wells at a time for domestic and lawn and garden use and 1 well running up to 35 GPM for park irrigation.

63. The requested volume of 165 AF is based on water meter records supplied by the Applicant showing 90 homes in October of 2013 and a meter reading equal to 420,318 gallons per year per home. This number was projected to 120 homes for a total of 155 AF/Year. The other 10 AF are for the 4 acre park using the DNRC standard of 2.5 AF/AC. The flow meter records don't differentiate between the domestic and lawn and garden use. The Dept. calculated irrigation use of 75 AF for the residential lots based on 0.25 AC/lot and 120 lots for a total of 30 acres at 2.5 AF/AC. The remaining volume of 80 AF was divided evenly by the number of lots and equates to approximately 0.67 AF/household. The volume per household is less than the DNRC standard of 1 AF/household and greater than the DEQ standard of 350 gpd or 0.39 AF/household per year.

CONCLUSIONS OF LAW

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

65. 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).

66. 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.

67. Applicant proposes to use water for multiple domestic and lawn and garden which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence multiple domestic and lawn and garden are beneficial uses and that the 485 GPM up to a diverted volume of 165 AF of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA (FOF 61-63)

Possessory Interest

FINDINGS OF FACT

68. 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

69. 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.

70. 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.

71. 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 68)

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. 43Q 30103018 should be GRANTED.

The Department determines the Applicant may divert groundwater, by means of 4 wells, from January 1 through December 31 at 485 GPM up to 165 AF, from a point in the N2NENW Section 9, T1S, R25E, for multiple domestic use (80 AF) January 1 through December 31 and 34 AC of lawn and garden use (85 AF) from May 1 through October 15. The place of use is located in the Granite Park Subdivision, E2NW Section 9, T1S, R25E, Yellowstone County.

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 21st day of March 2016.

/Original signed by Kimberly Overcast/
Kimberly Overcast, Manager
Billings Water Resources Regional Office
Department of Natural Resources and Conservation