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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43N 30104338 BY MONTANA LIMESTONE COMPANY	**)** **)** **)**	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On March 22, 2016, Montana Limestone Company (Applicant) submitted Application for Beneficial Water Use Permit No. 43N 30104338 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 115 GPM flow rate and 50 AF volume. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of June 24, 2016. The Department met with the Applicant and consultants Lana Wilson and John Begin for a pre-application meeting on October 28, 2015. Dean Bray and Kurt Kiser were present for the Applicant and Mark Elison and Chris Schweigert were present for the Department. Applicant requested a variance from Aquifer Testing Requirements (ARM 36.12.121 (3)(a & g)) on August 10, 2016, to submit an eight hour yield and drawdown test on one well instead of the 24 hour test when the requested rate is the sum of flow rates on multiple wells and to submit a 24 hour test with no observed drawdown in observation wells. The variance was granted on August 22, 2016. After receiving the Technical Report from the Department, the Applicant provided additional information on June 29, July 29, August 10, and August 23, 2016, related to hydraulic connection to surface water. An Environmental Assessment for this Application was completed on August 4, 2016. An Interim Permit was granted on September 1, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Maps: Aerial photograph at 1 inch = 1500 feet showing proposed place of use and points of diversion. Aerial photographs at 1 inch = 40 feet showing details of infrastructure at each

point of diversion. Topographic map at 1 inch = 1200 feet showing place of use and well locations.

- Aquifer Testing Addendum

Information Received after Application Filed

- E-mail from John Bergin, Consultant, to Mark Elison, Department hydrologist, dated June 29, 2016, discussing hydraulic connection of proposed wells to surface water and requesting a re-evaluation of surface water depletion.
- E-mail from John Bergin, Consultant, to Mark Elison, Department hydrologist, dated July 29, 2016, discussing hydraulic connection of proposed wells to surface water and providing estimates of surface water flow.
- E-mail from John Bergin, Consultant, to Mark Elison, Department hydrologist, dated August 10, 2016, providing details of visually estimated flow in surface water sources.
- E-mail from John Bergin, Consultant, to Mark Elison, Department hydrologist, dated August 23, 2016, providing groundwater elevations in a monitoring well.

Information within the Department's Possession/Knowledge

- Aquifer Test Report by Attila Folnagy, Department hydrogeologist, dated April 25, 2016.
- Depletion Report by Attila Folnagy, Department hydrogeologist, dated April 26, 2016.
- Revised Depletion Report by Attila Folnagy, Department hydrogeologist, dated August 29, 2016.
- Environmental Assessment dated August 4, 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) as follows. **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AF/YR means acre-feet per year; and POD means point of diversion.

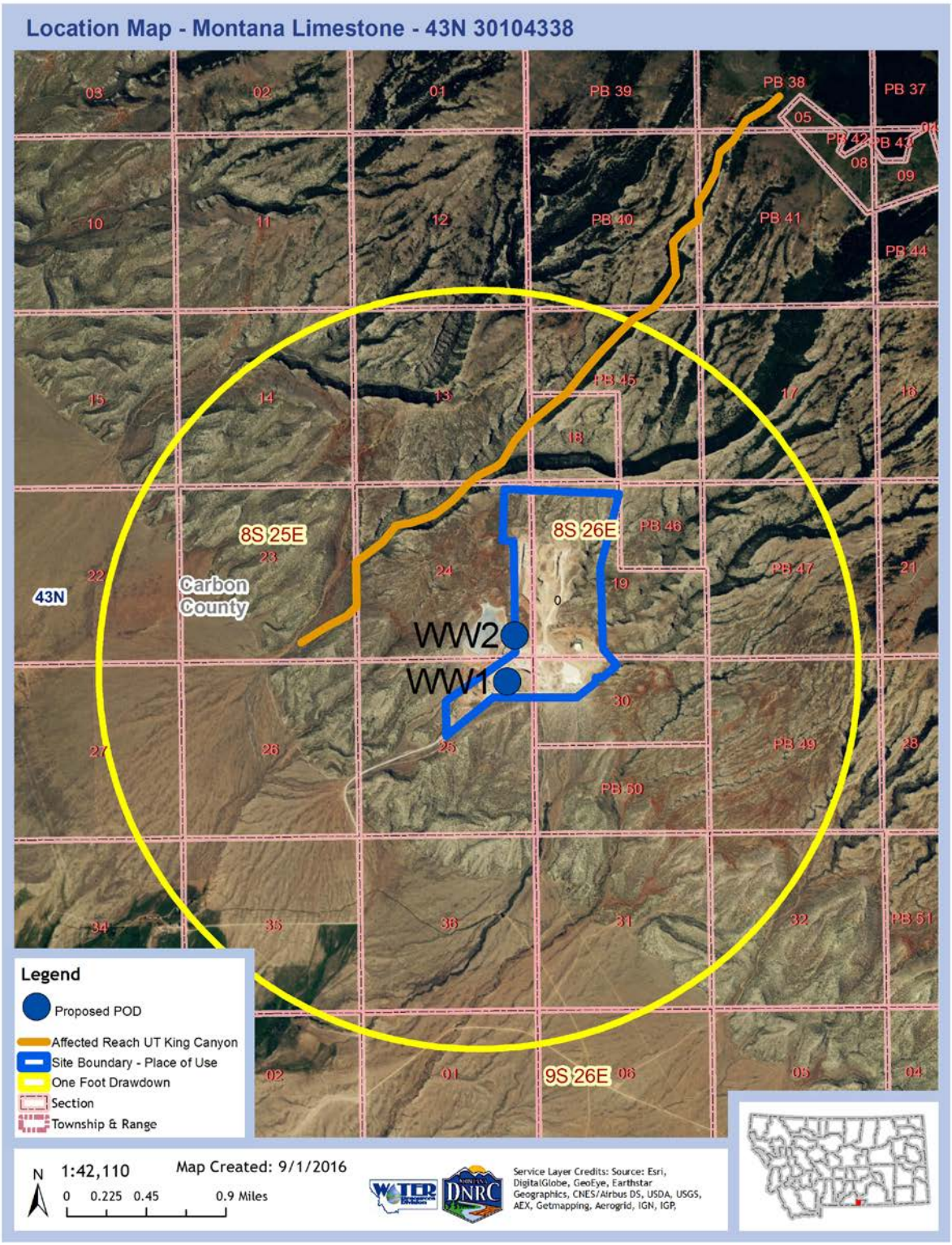
PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the groundwater, by means of two wells 300 feet (WW1) and 384 feet (WW2) deep, from January 1 to December 31 at 115 GPM up to 50 AF, from points in the SWNENE Section 25 T8S R25E and NESESE Section 24 T8S R25E, Carbon County, for industrial use from January 1 to December 31. Applicant proposes a flow rate of 55 GPM from WW1 and 60 GPM from WW2. The place of use is in E2E2 Section 24 T8S R25E, NE Section 25 T8S R25E, W2 Section 19 T8S R26E and NW Section 30 T8S R26E, Carbon County, generally located on the southwest flank of the Pryor Mountains approximately 20 miles southeast of Bridger and 8 miles north of the Wyoming border.

2. The proposed groundwater appropriation lies between King Canyon to the north and Piney Creek to the south on the eastern edge of the Sage Creek valley.

3. The appropriation is for industrial use, primarily dust suppression, and is considered 100% consumptive. Proposed consumptive use is 50 AF/YR.


Location Map - Montana Limestone - 43N 30104338
8S 25E
8S 26E
9S 26E
43N
Carbon County
WW2
WW1
PB 38
PB 39
PB 37
PB 40
PB 41
PB 44
PB 45
PB 46
PB 47
PB 49
PB 50
PB 51
Legend
Proposed POD
Affected Reach UT King Canyon
Site Boundary - Place of Use
One Foot Drawdown
Section
Township & Range
N
1:42,110
0 0.225 0.45 0.9 Miles
Map Created: 9/1/2016
Service Layer Credits: Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP,

§ 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
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> 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 requested a variance from Aquifer Testing Requirements (ARM 36.12.121 (3)(a & g)) on August 10, 2016, to submit an eight hour yield and drawdown test on one well instead of the 24 hour test when the requested rate is the sum of flow rates on multiple wells and to submit a 24 hour test with no observed drawdown in observation wells. The variance was requested due to the proximity of the observation well and the second proposed well which would have affected the observation well if pumped. There were observation wells but there was no observed drawdown in the observation wells requiring the variance request.

11. Department Hydrogeologist, Attila Folnagy, modeled results of a 24-hour aquifer test on WW-2 at 60 GPM and the results of an 8-hour drawdown and yield test on WW-1. The

transmissivity and storativity values recommended from the modeling are 1,135 ft^2/day and 0.003, respectively (see Aquifer Test Report in file).

12. Using those aquifer parameters and a constant pumping rate of 31 GPM (the rate needed to produce the requested annual volume) for one year, the 0.01 foot drawdown contour occurs at 37,500 feet from the proposed wells. A groundwater gradient of 0.01 ft./ft. was taken from published data. The volume of total aquifer flux each year within the zone of influence as defined by 0.01 foot of drawdown is given by the transmissivity times the width of zone of influence times the groundwater gradient (1,135 ft^2/day x 75,000 ft x 0.01 ft/ft) and equals 851,250 ft^3/day or 7,133 AF/YR.

13. The Applicant is requesting 50 AF/YR.

CONCLUSIONS OF LAW

14. 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."

15. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I 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).

16. 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).

17. 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 - 13)

Legal Availability

FINDINGS OF FACT

18. According to Attila Folnagy, Department Hydrogeologist, there are 11 groundwater rights within the zone of influence defined by the 0.01 foot drawdown contour whose well depth is listed and are completed in the source aquifer.

Water Rights Within the Zone of Influence (Legal Demands)				
WR NUMBER	ALL OWNERS	MEANS OF DIVERSION	FLOW RATE (CFS)	VOLUME
43N 16875 00	BIG HORN LIMESTONE CO	WELL	0.04	1.50
43N 69495 00	SAGE CREEK LAND LLC	DEVELOPED SPRING		1.00
43N 30002166	YELLOWSTONE ENERGY LIMITED PARTNERSHIP	WELL	0.11	80.65
43N 92975 00	YELLOWSTONE ENERGY LIMITED PARTNERSHIP	WELL	0.04	9.28
43N 99157 00	YELLOWSTONE ENERGY LIMITED PARTNERSHIP	WELL	0.15	94.10
43N 99157 00	YELLOWSTONE ENERGY LIMITED PARTNERSHIP	WELL	0.15	94.10
43N 11772 00	BOWLER FLATS RANCH INC	WELL	8.91	3115.00
43N 30007324	MONTANA LIMESTONE CO	WELL		10.00
43N 115307 00	SAGE CREEK LAND LLC	LIVESTOCK DIRECT FROM SOURCE	3.75	1.70
43N 56238 00	JEANNE THIELMANN; RICHARD THIELMANN	WELL	0.02	0.38
43N 60437 00	CLYDE A TIPPETS; MARY LOUISE TIPPETS	WELL	0.02	0.00
				3407.71

These water rights appropriate a combined 3407.71 AF/YR. Below is a comparison of the water supply and current legal demands for groundwater within the source aquifer that could be reduced due to the proposed appropriation.

Physically Available (AF/year)	**Existing Legal Demands (AF/year)**	**Physically Available minus Existing Legal Demands (AF/year)**
7,133	3407.71	3725.29

19. The physical amount of water available is 7,133 AF/YR and the existing legal demands of groundwater total 3407.71 AF/YR. The comparison shows that water is legally available.

20. Information pertaining to the physical and legal availability of surface water hydraulically connected and potentially depleted by this appropriation is contained under Adverse Effect (FOF 27 – 29).

CONCLUSIONS OF LAW

21. 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).

22. 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.

23. A flow of water on a given date does not show that water is legally available without showing that all prior appropriators were diverting all claimed water at that moment. Sitz Ranch

v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 5-6. A flow of water past a point on a particular date or dates does not demonstrate that water is legally available. Id.

24. 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 18 – 20)

Adverse Effect

FINDINGS OF FACT

25. The Applicant's plan to prevent adverse effect is to discontinue use of the wells and seek an alternative source of water for this purpose if call is made. The Applicant can obtain water from Yellowstone Energy Limited Partnership if an alternative supply is required.

26. Modeling by Department hydrogeologists indicates that after five years, drawdown in excess of one foot would occur in wells that are within 12,200 feet of the proposed wells. There are five groundwater rights within the source aquifer that are predicted to experience drawdown of more than one foot. For all the wells that have recorded depth and static water level, there would be a minimum of 92.8 feet of available water column after predicted drawdown.

Groundwater Rights Predicted to Experience More Than One Foot of Drawdown.

Water Right #	Owner	Distance (ft)	Well Depth (ft)	Static Water Level (ft)	Drawdown (ft)	Available Water Column (FT)
43N 99157 00	YELLOWSTONE ENERGY L.P.	1800	230	80	2.6	170.4
43N 30002166	YELLOWSTONE ENERGY L.P.	1800	225	127	2.6	95.4
43N 92975 00	YELLOWSTONE ENERGY L.P.	1800	220	97	2.6	120.4
43N 99157 00	YELLOWSTONE ENERGY L.P.	2800	220	47	2.2	147.8
43N 16875 00	BIG HORN LIMESTONE CO	650	0	0	3.4	NA

27. The Applicant provided information to the Department on June 29, July 29, August 10 and August 23, 2016, regarding the hydraulic connectivity of the aquifer proposed for appropriation to local surface water sources. A revised depletion analysis by Department hydrogeologists, dated August 29, 2016, (see file) considered all available evidence and determined that the depleted reach for calculation of stream depletion is an unnamed tributary (UT) to King Canyon downstream of Angus Spring.

28. The proposed appropriation is year-round and considered 100% consumptive so predicted depletion to the UT of King Canyon is consistent at 4.2 AF in each month and varies from 30.7 to 33.9 GPM depending on the number of days in each month.

29. There are no water rights that appropriate water from the UT or King Canyon below the confluence of the UT and King Canyon and therefore no legal demands within the potentially depleted reach.

CONCLUSIONS OF LAW

30. 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.

31. 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).

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant's burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source.").

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

> Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

39. Constant call is adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler (*DNRC Final Order 1987); *In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen (*DNRC Final Order 1993); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (*DNRC Final Order 1992)(applicant must show that at least in some years no legitimate call will be made): *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company (*DNRC 2006).

40. 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).

41. 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 25 - 29)

Adequate Diversion

FINDINGS OF FACT

42. Maximum drawdown in the wells, calculated as the sum of modeled drawdown at the end of one year and drawdown at the time to produce July's daily volume, is 34.1 feet for WW-1 and

78.2 feet for WW-2. This maximum drawdown would leave 146 feet and 149 feet, respectively above the bottom of the wells. An alternative method extrapolates drawdown on a semi-logarithmic plot to 365 days assuming the wells are pumped continuously and adds interference drawdown. This method indicates that the wells would have 136 feet and 144 feet of water column, respectively, above the bottom of the wells.

43. Both wells are equipped with 4-inch high thrust model FPS4400 Franklin Electric submersible pumps capable of delivering the requested volume for each well.

44. Water from WW1 is pumped to a pipeline with a value that allows water to flow to an office/shop or to a 20,000 above ground storage tank. Water from WW1 that goes to the office/shop is permitted under Ground Water Certificate 43N 30007324. WW2 pumps directly to a 42,000 gallon above ground storage tank. The water storage tanks are equipped with adjustable float switches to control pump operation.

45. Water from both storage tanks is offloaded onto water trucks for dust suppression use within the Warren Quarry permit boundary.

CONCLUSIONS OF LAW

46. 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.

47. 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.

48. 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).

49. 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).

50. 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 41 - 44).

Beneficial Use

FINDINGS OF FACT

51. The Applicant proposes to use water for industrial use (dust suppression). The Applicant is requesting 115 GPM up to 50 AF/YR.

52. The Applicant has used an average of 15.04 million gallons per year for dust suppression (46 AF/YR) and is requesting 50 AF/YR as a contingency for drought years or years when higher volumes are required.

53. The average flow rate to meet the maximum requested volume of 50 AF/YR is 31 GPM. The requested flow rate of 115 GPM is necessary because during peak demand months (July through September) average use of 7.86 million gallons requires a constant 60 GPM flow rate and doesn't account for the variation in timing of use over the day and the time to refill the tanks during peak hours.

CONCLUSIONS OF LAW

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

55. 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).

56. 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.

57. Applicant proposes to use water for industrial use which is a recognized beneficial use. § 85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence industrial use is a beneficial use and that 115 GPM flow rate and 50 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 50 - 52)

Possessory Interest

FINDINGS OF FACT

58. Robert J. Bartosh, Senior Vice-President and COO of Dakota Coal Company, the parent company of Montana Limestone Company, signed the application form for the Applicant 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

59. 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.

60. 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.

61. 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 57)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 42L 30104338 should be granted subject to the following.

The Department determines the Applicant may divert water from groundwater, by means of two wells, 300 and 384 feet deep, respectively, from January 1 to December 31 at 115 GPM up to 50 AF, from points in the SWNENE Section 25 T8S R25E and NESESE Section 24 T8S R25E, Carbon County for industrial use from January 1 to December 31. The place of use is in E2E2 Section 24 T8S R25E, NE Section 25 T8S R25E, W2 Section 19 T8S R26E and NW Section 30 T8S R26E, Carbon 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 a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, 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(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the

Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 8th day of September 2016.

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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this _____day of _____, 2016, by first class United States mail.

MONTANA LIMESTONE COMPANY
1717 E. INTERSTATE AVENUE
BISMARCK, ND 58503

HYDROMETRICS, INC
C/O JOHN BERGIN
5602 HESPER ROAD
BILLINGS, MT 59106

_____ _____

MARK ELISON DATE