REVISED 04-2017

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41I 30111618 BY LINCOLN ROAD RV PARK INC.	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

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On July 5, 2017 Lincoln Road RV Park Inc (Applicant) submitted an Application for Beneficial Water Use Permit No. 41I 30111618 to the Helena Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 4.25 acre-feet (AF) in volume. Water will be diverted from two existing wells that were previously permitted a combined flow rate of 100 gallons per minute (GPM) and an annual volume of 11.0 AF (Permit No. 41I 30046072). Permit No. 41I 30046072 provides the Grand Valley Estates subdivision (GVE) water for multiple domestic use (in-house only) but does not serve as an authorized appropriation for lawn and garden irrigation. Permit No. 41I 30111618 proposes to provide an additional 4.25 AF for lawn and garden irrigation for GVE; no additional flow rate is requested because the flow rate authorized under Permit No. 41I 30046072 (100 GPM) is sufficient to satisfy all proposed water use at GVE. The appropriation will cause depletions to Silver Creek and Prickly Pear Creek to Lake Helena within the Upper Missouri Basin Closure; the Applicant will offset the depletions by the purchase of 5.50 AF of water from the Helena Valley Irrigation District (HVID) and divert the purchased water into an infiltration trench to recharge groundwater depletions related to the volume appropriated for the additional lawn and garden irrigation .The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated December 29, 2017. The Water Right Consultant, Dave Baldwin, responded with information dated January 22, 2018, and April 10, 2019. The Application was determined to be correct and

complete as of February 14, 2020. An Environmental Assessment for this Application was completed on February 14, 2020.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Pre-Application:

- Pre-Application meeting with Dave Baldwin held June 27, 2017

Application as filed:

- Application for Beneficial Water Use Permit, Form GW 600
- Attachments
- Location Maps
- Aquifer Testing Addendum
- Basin Closure Addendum &
- Hydrogeologic Report Addendum

Information Received after Application Filed

- Response to the Department's deficiency letter, by Dave Baldwin, dated January 22, 2018.
- E-mails from Dave Baldwin, Mark R. Beatty, Candance Payne, dated April 27, 2018 through September 21, 2018.
- Revision to mitigation volume and infiltration rate letter, by Dave Baldwin, dated April 10, 2019.

Information within the Department's Possession/Knowledge

- Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, dated November 15, 2018.

- Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, dated November 15, 2018.
- Aerial photos and topographic maps
- Water right records, including file for Permit No. 41I 30046072
- DNRC Technical Report
- Montana Natural Heritage Program Species of Concern List
- Statute and administrative rules
- Environmental Assessment dated February 14, 2020

- The Department also routinely considers the following information. The following information is not included in the administrative file for this application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.
- Current Return Flow Memo
- Current Historic Diverted Memo

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

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater, by means of two existing wells. PWS-1, a 160.9 ft well and PWS-2, a 158 ft well, both located in the SENWSE of Section 18, T11N, R3W, Lewis and Clark County. No additional flow rate is proposed as the previously authorized flow rate of 100 GPM under existing Permit No. 41I 30046072 is adequate. An additional volume of 4.25 AF is proposed for lawn and garden irrigation use for the GVE Subdivision from April 18 to

October 14 each year. The Applicant proposes to irrigate lawns and gardens on a total of 2.39-acres. The place of use is generally located in the SE of Section 18, T11N, R3W, Lewis and Clark County.

2. The location for this application is within the Upper Missouri River Basin legislative closure.

3. Applicant submitted a mitigation plan determined to be correct and complete by Department staff.

4. The proposed groundwater appropriation is anticipated to create surface water depletions in Silver Creek and Prickly Pear Creek to Lake Helena.

5. Any return flows from lawn and garden irrigation, as well as mitigation water of 5.50 AF purchased from HVID, will ultimately return to Silver Creek and Prickly Pear Creek to Lake Helena by way of groundwater recharge.

6. The consumptive use for the proposed appropriation is estimated to be 4.25 AF.

7. The Applicant has agreed to measure the flow rate and volume of water diverted and report these figures to DNRC on an annual basis. The following Conditions apply:

1. **WATER MEASUREMENT RECORDS REQUIRED
   THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE DELIVERY LINE OF THE GROUNDWATER WELLS ASSOCIATED WITH THIS WATER RIGHT. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HELENA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY.

   SUBMIT RECORDS TO:
   HELENA WATER RESOURCES OFFICE
   1424 9TH AVE

PO BOX 201601
HELENA, MT
PHONE: 406-444-6999
FAX: 406-444-9317

2. **MITIGATION PLAN
PRIOR TO COMMENCING DIVERSIONS UNDER THIS PERMIT THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL DIVERT WATER INTO AN INFILTRATION TRENCH FROM THE HELENA VALLEY CANAL. THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATERS IN SILVER CREEK AND TENMILE CREEK ABOVE LAKE HELENA. THROUGH THE PURCHASE OF A HELENA VALLEY IRRIGATION DISTRICT (HVID) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE AT LEAST 5.5 ACRE-FEET PER YEAR. ACTUAL DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPLICANT SHALL SUBMIT TO THE HELENA REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH HVID AS DESCRIBED ABOVE.

BASIN CLOSURE

FINDINGS OF FACT

8. This groundwater permit application is for lawn and garden irrigation use. This application is located within the Legislative Upper Missouri basin closure. Projected depletions to surface water by the proposed appropriation will be offset with contract water from the HVID.

9. Applicant submitted a hydrogeologic assessment determined to be correct and complete.

10. Applicant did not submit an accompanying Application for Change in Water Right.

CONCLUSIONS OF LAW

11. DNRC cannot grant an application for a permit to appropriate water within the upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin. § 85-2-343(1), MCA. The upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(3), MCA).

12. This Application is within the Upper Missouri River Basin closure and is for a permit to appropriate groundwater, which falls under the exceptions for the basin closure, 85-2-343, MCA.

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

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

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

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

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

GENERAL CONCLUSIONS OF LAW

14. 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 . . .

15. 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.

16. 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.

17. 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).

18. 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.

19. 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

20. The two wells proposed for use under this Application were drilled for GVE in 2007 and are associated with existing Permit No. 41I 30046072. PWS-1 (GWIC # 236226) was drilled to a depth of 161 feet below top of casing (btc) and screened from 144 to 159 feet. PWS-2 (GWIC # 236225) was completed to a depth of 158.6 feet (btc) and screened from 143.6 to 156.6 feet. PWS-1 and PWS-2 were evaluated with 24-hour aquifer tests which demonstrated maximum

drawdowns of 28.40 and 31.51 feet, respectively, at a rate of 215 GPM and 210 GPM, respectively. The adequacy of diversion can also be supported by past well operations, including domestic use and some irrigation use, as described in the application materials. (41I 30111618, page 2, GW.8 Adequate Diversion Means and Operation) The two proposed wells have been operated in conjunction with each other for 10 years. (Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 8, dated November 15, 2018).

21. Drawdown is modeled for the period of diversion for the 2 pumping wells assigning each well half of the assumed pumping schedule (Table 1) equivalent to the total volume of 15.25 AF, calculated well efficiency for each pumping well, and adding interference drawdown. The modeling is done using the Theis (1935) solution with a transmissivity of 12,080 ft2/day and a storativity of 0.01. The monthly pumping schedule is obtained by evenly distributing the total proposed volume throughout the entire year and apportioning the requested irrigation volume based on the net irrigation requirement from the Helena station in the Irrigation Water Requirement (IWR) program (NRCS, 2003). (Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 9, dated November 15, 2018).

22. The well efficiency is calculated from modeling each well's respective aquifer test and dividing the predicted drawdown by the observed drawdown to get a well efficiency. The actual drawdown with well loss is calculated by applying the well efficiency to the theoretical maximum drawdown of each well (**Table 2, Figure 1**). The total maximum drawdown is the sum of the actual drawdown and modeled well interference drawdown. The last row in **Table 2** gives the remaining available water column for each of the pumping wells which is equal to the available drawdown above the bottom of each well minus total drawdown. (Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 9, dated November 15, 2018).

Table 1. Pumping schedule for one year of pumping for both domestic use of the provisional permit (41I 30046072) and irrigation use for this application. (Table 3 in Aquifer Test Report by Melissa Schaar. Pg. 9)

Days	Pumping Rate (gpm)
0	6.69
31	7.41
59	6.69
90	7.73
120	10.57
151	13.26
181	15.11
212	13.93
243	10.84
273	7.45
304	6.91
334	6.69

Table 2: Remaining available water column for pumping wells. (Table 4 in Aquifer Test Report by Melissa Schaar. Pg. 10)

Wells	**PWS-1**	**PWS-2**
Well Total Depth (feet)	161	158
Pre-Test Static Water Level (feet btc)	54.1	55.2
Available Drawdown above bottom (feet)	106.9	102.9
Well Efficiency (%)	15.8	14.0
Predicted Drawdown theoretical (feet)	0.3	0.3
Predicted Drawdown including well loss (feet)	1.9	1.9
Predicted Additional Drawdown from Interference (feet)	0.1	0.1
Total Drawdown (feet)	2.0	2.0
Remaining Available Water Column (feet btc)	**104.9**	**100.9**

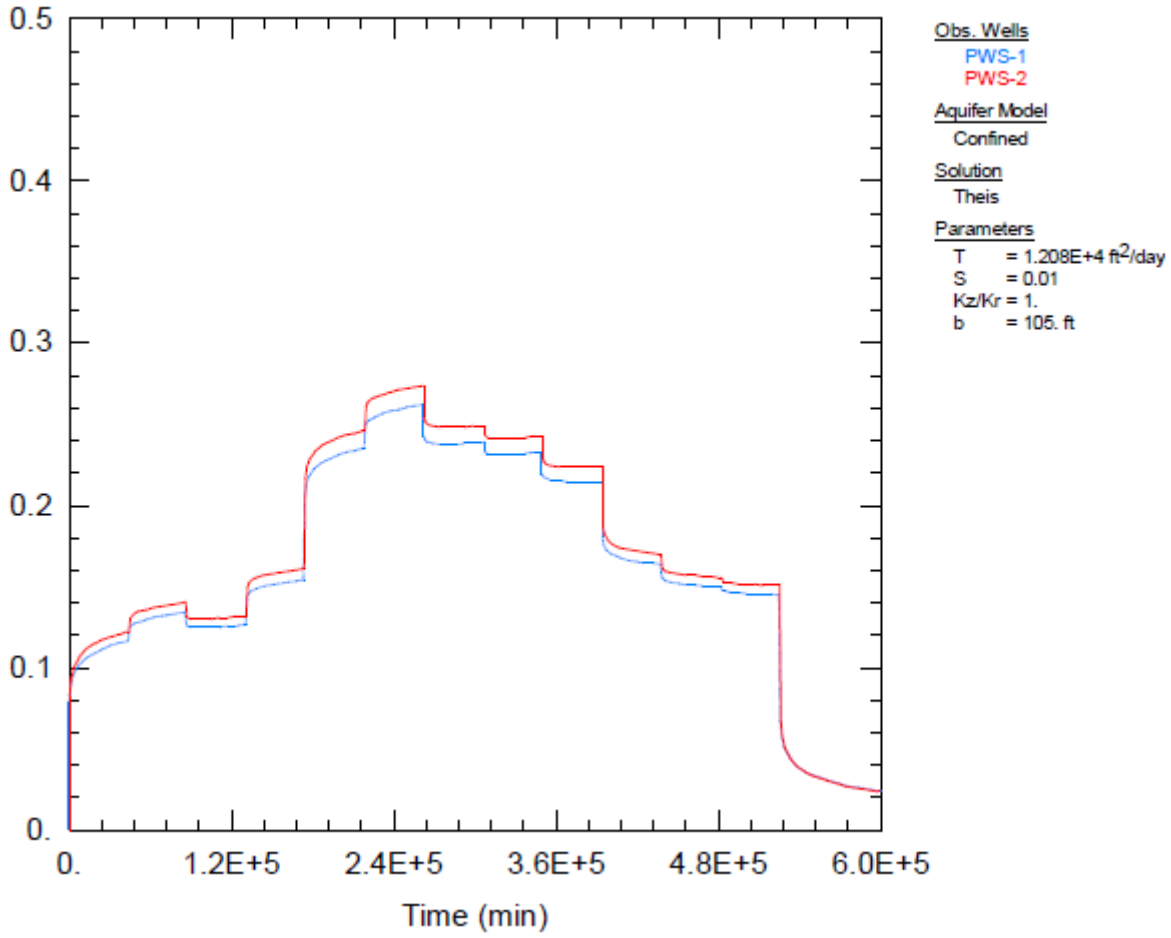

Figure 1: Theis (1935) distance-drawdown plot of the assumed monthly pumping schedule for PWS-1 (blue dotted line) and PWS-2 (red line). (Figure 7 in Aquifer Test Report by Melissa Schaar. Pg. 10)

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. 27665-41I 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).

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 20-22)

Legal Availability:

FINDINGS OF FACT:

27. An evaluation of physical groundwater availability for evaluating legal availability was done by calculating groundwater flux through a Zone of Influence (ZOI) corresponding to the 0.01- foot drawdown contour. Using the Theis (1935) solution, T = 12,080 ft2/day, and S = 0.01, a constant pumping rate of 2.63 gpm (equivalent to the requested volume of 4.25 AF) combined for the two pumping wells, during the period of diversion. The two proposed wells were modeled as one well due to their close proximity. Forward modeling was used to extrapolate drawdown over a radial distance using the aquifer properties estimated from drawdown data. There are no water rights in the source aquifer that are predicted to experience drawdown greater than 1 foot. (Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 10-11, dated November 15, 2018). There are 421 water rights in the water right

database that are completed in the source aquifer within the ZOI with an existing legal demand of 1,706.09 AF. The groundwater flux is equal to 3,704 AF per annum leaving 1,997.91 AF legally available. (Aquifer Test Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 12 & Appendix A, dated November 15, 2018).

1. The pumping wells and infiltration trench are adjacent to the HVID Canal from which water for aquifer recharge will be diverted (**Figure 2**). The nearest surface waters are Silver Creek, Prickly Pear Creek, and Lake Helena. Drains and Silver Creek near Lake Helena and Lake Helena itself are hydraulically connected to and gain flow from groundwater discharge (Warren et al., 2012). The Applicant's original permit (41I 30046072) and nearby terminated application 41I 30028560 identified Prickly Pear Creek, Silver Creek, and Lake Helena (directly via its tributaries) as potentially affected reaches. Ultimately, for permit 41I 30046072, depletions were assigned 50/50 to Silver Creek and Prickly Pear Creek below the Tenmile Creek confluence. (Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 3, dated November 15, 2018).

2. Based on information from the Briar and Madison (1992), Madison (2006), and Warren et al. (2012), stream depletion and aquifer recharge accretions are expected to accumulate in Silver Creek (I-90 to Lake Helena) and Prickly Pear Creek from the confluence of Tenmile Creek to Lake Helena. The closest reach of Silver Creek is approximately 2 miles from GVE and shown on **Figure 2**. (Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 3, dated November 15, 2018).

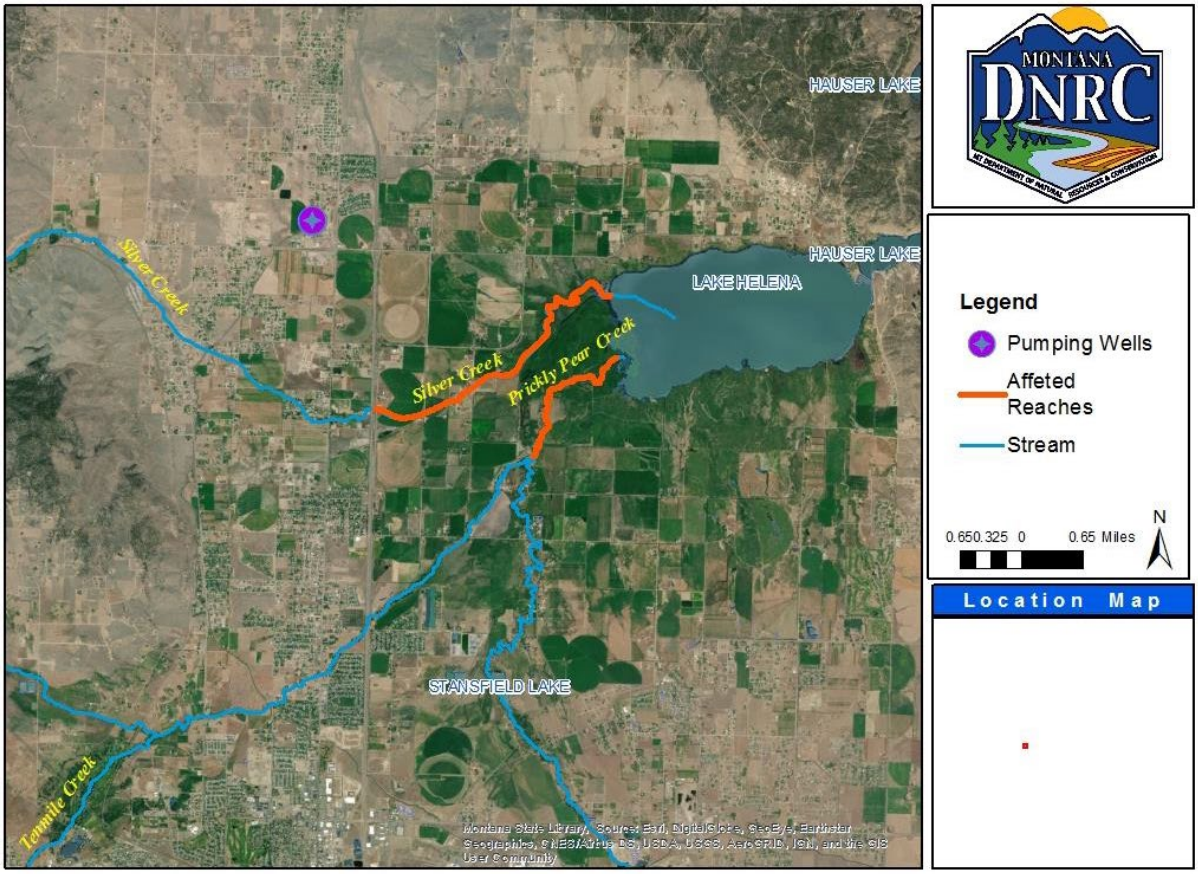

Figure 2. Location Map of GVE Pumping Wells and Potentially Affected Surface Water. (Figure 1 in Depletion Report by Melissa Schaar. Pg. 4)

3. Net Depletion is modeled for monthly consumed volumes based on the assumptions that the place of use and pumping wells are the same relative distance to the potentially affected surface water. The 4.25 AF requested is for the purpose of irrigation and assumed by the Applicant to be entirely consumed without returning to the potentially affected surface water. (Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 4, dated November 15, 2018).

4. Depletion by pumping in the source aquifer primarily occurs through propagation of drawdown through the aquifer capturing groundwater that would have otherwise discharged to

Silver Creek and/or Prickly Pear Creek. This process is modeled using WPDM with the following assumptions:

- the aquifer has infinite areal extent
- the aquifer is homogeneous, isotropic, and of uniform thickness
- the affected surface water fully penetrates the source aquifer
- the river is straight and infinitely long
- boundaries to the aquifer include a bedrock boundary to the north

5. Silver Creek and Prickly Pear Creek were assigned 70% and 30%, respectively, of the depletion using the methodology described in DRNC's Draft Standards (July 6, 2018) and British Columbia Guidance (2016). (Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 4-5, dated November 15, 2018).

6. Applicant has addressed legal availability of surface water by providing a mitigation/aquifer recharge plan which proposes to mitigate the depletions to surface water in full. This mitigation/aquifer recharge plan is fully addressed under "Adverse Effect" below.

7. The physical amount of water available is 3,704 AF and the existing legal demands of groundwater total 1,706.09 AF. The comparison shows that groundwater is legally available for the propose appropriation of X. (3,704 AF – 1,706.09 = 1,997.91 AF).

CONCLUSIONS OF LAW

8. 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).

9. 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.

10. 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 groundwater.§ 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.

11. 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.

12. Based on the Applicant's mitigation plan, the Department finds the 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. Finding of fact #'s?

Adverse Effect

FINDINGS OF FACT

13. GVE proposes to use contract water from the HVID Canal to mitigate the volume and timing of net depletions. The infiltration trench for the proposed aquifer recharge has been constructed and a Special Use Permit for 5.50 AF of water will be issued by HVID upon issuance of this permit. During an appropriate portion of the irrigation season, water will be diverted through a galvanized pipe from the canal into an infiltration trench located adjacent to the canal on GVE property. The infiltration trench is 135 feet from the pumping wells. The infiltration trench has an area of 1,296 ft² (36 feet x 36 feet) and a depth of 12 feet. The bottom four feet is filled with 2-inch washed gravel. The gravel is covered with fabric liner and then backfilled with topsoil. From Applicant conducted seepage tests, the seepage rate is 60 gallons/day/ft2 and the trench is capable of transmitting 77,760 gallons/day or 0.24 AF/day. (Basin Closure Addendum- Mitigation Plan, Pg. 1-2).

The Applicant proposes to divert water from the HVID canal into the infiltration gallery at a flow rate of 15 GPM over a period of 90 days. (Revision to Mitigation Volume and Infiltration Rate Letter, by Dave Baldwin, dated April 10, 2019.)

14. According to well logs for the GVE pumping wells, the wells are completed in a sand and gravel unit that begins 100 feet bgs. Fine grained units made up of clay with stringers of coarser material are reported to a depth of 100 feet bgs. The static water level is approximately 50 feet bgs. While the seepage tests conducted by the Applicant suggest the infiltration trench is capable of transmitting water to the subsurface, the depth of the trench is 12 feet and the static water level is 50 feet bgs.

15. The assumed monthly aquifer recharge schedule in Table 3 and Table 4 is based on the lower infiltration rate of 17 gpm for 61 days, provided by Melissa Schaar, DNRC Groundwater Hydrologist.

Table 3: Difference between net depletion and modeled aquifer recharge for proposed infiltration gallery at an infiltration rate of 17 gpm, period of 61 days, and volume of 5.50 AF for Silver Creek. (Table 4 in Depletion Report by Melissa Schaar. Pg. 7-8)

Month	Aquifer Recharge Pumping Schedule (AF)	Silver Creek Modeled Accretion from Aquifer Recharge (AF)	Net Depletion to Silver Creek (AF)	Silver Creek Difference Between Net Depletions and Accretion (AF)
January	0	0.31	0.27	0.04
February	0	0.31	0.26	0.05
March	0	0.34	0.25	0.09
April	0	0.34	0.24	0.09
May	2.75	0.24	0.24	0.00
June	2.75	0.24	0.23	0.02
July	0	0.29	0.22	0.08
August	0	0.35	0.22	0.13
September	0	0.34	0.24	0.10
October	0	0.36	0.26	0.10
November	0	0.40	0.27	0.13
December	0	0.33	0.28	0.05
Totals	5.50	3.85	2.98	

Table 4: Difference between net depletion and modeled aquifer recharge for proposed infiltration gallery at an infiltration rate of 17 gpm, period of 61 days, and volume of 5.50 AF for Prickly Pear Creek. (Table 3 in Depletion Report by Melissa Schaar. Pg. 7)

Month	Aquifer Recharge Pumping Schedule (AF)	Prickly Pear Creek Modeled Accretion from Aquifer Recharge (AF)	Net Depletion to Silver Creek (AF)	Silver Creek Difference Between Net Depletions and Accretion (AF)
January	0	0.14	0.11	0.04
February	0	0.17	0.11	0.06

March	0	0.13	0.11	0.02
April	0	0.12	0.11	0.01
May	2.75	0.15	0.11	0.04
June	2.75	0.14	0.11	0.04
July	0	0.13	0.11	0.03
August	0	0.13	0.11	0.03
September	0	0.13	0.10	0.02
October	0	0.14	0.10	0.03
November	0	0.14	0.10	0.04
December	0	0.12	0.10	0.02
Totals	5.50	1.65	1.28	

16. The last column in Table 3 and Table 4 show that the modeled accretions from the proposed aquifer recharge schedule for a total infiltration volume of 5.50 AF will offset the monthly timing of net depletion to both Silver Creek and Prickly Pear Creek and therefore no adverse effect. (Depletion Report, by Melissa Schaar, DNRC Water Management Bureau Groundwater Hydrologist, Pg. 7, dated November 15, 2018).

CONCLUSIONS OF LAW

17. 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.

18. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant

is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

19. 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.

20. 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.

21. 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.

22. 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.

23. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-41I by Diehl Development* (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit No. 76H- 30043133 and Application No. 76H-30043132 to Change Water Right Nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

24. § 85-2-360, MCA; e.g., *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC*, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application Nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), affirmed, Montana River Action Network v. DNRC, Cause No. CDV-2007-602, Montana First Judicial District Court, (2008); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12; *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (HB 831, DNRC Final Order 2009) (permit denied in part for failure to analyze legal availability for surface water for depletion of 1.31 AF to Bitterroot River)§ 85-2-360, MCA. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. *In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*, DNRC Final Order (2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC.*(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. See Thompson v. Harvey (1974),154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587. Augmentation/ mitigation is also recognized in other pri*or appro*priation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

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

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

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

26. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. E.g., *In the*

Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC (DNRC Final Order 2008).

27. 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 X)

Adequate Diversion

FINDINGS OF FACT

28. The Applicant proposes to divert groundwater, by means of two existing wells. PWS-1, a 160.9 ft well and PWS-2, a 158 ft well, both located in the NWSE of Section 18, T11N, R3W, Lewis and Clark County. No additional flow rate is proposed as the existing rate of 100 GPM is adequate under existing Permit No. 41I 30046072. An additional volume of 4.25 AF is proposed for lawn and garden irrigation use in the GVE Subdivision from April 18 to October 14 each year. The Applicant proposes to irrigate lawn and garden on 2.39 acres. The place of use is generally located SE of Section 18, T11N, R3W, Lewis and Clark County.

29. GVE proposes to use water from the HVID Canal to mitigate the volume and timing of net depletions to surface waters. According to the application, the infiltration trench for the proposed aquifer recharge has been constructed and a Special Use Permit for 5.50 AF of water will be issued by HVID upon issuance of this permit. During a portion of the irrigation season, water will be diverted through a galvanized pipe from the canal into an infiltration trench located adjacent to the canal on GVE property. The Applicant reports the infiltration trench to be 135 feet from the pumping wells. The infiltration trench has an area of 1,296 ft² (36 feet x 36 feet) and a depth of 12 feet. The bottom four feet is filled with 2-inch washed gravel. The gravel is covered with fabric liner and then backfilled with topsoil. (Basin Closure Addendum-Mitigation Plan, pg. 1-2) (Revision to Mitigation Volume and Infiltration Rate Letter, by Dave Baldwin, dated April 10, 2019).

CONCLUSIONS OF LAW

30. 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.

31. 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.

32. 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 28-29).

Beneficial Use

FINDINGS OF FACT

33. The Applicant proposes to divert groundwater, by means of two existing wells. PWS-1, a 160.9 ft well and PWS-2, a 158 ft well, both located in the NWSE of Section 18, T11N, R3W, Lewis and Clark County. No increase to flow rate is proposed as the existing rate of 100 GPM combined is adequate under existing Permit No. 41I 30046072. An additional volume of 4.25 AF is proposed for lawn and garden irrigation use for the GVE Subdivision from April 18 to October 14 each year. The Applicant proposes to irrigate lawn and garden on 2.39 acres. The place of use is generally located SE of Section 18, T11N, R3W, Lewis and Clark County

34. The Applicant's requested volume of 4.25 AF is based on the Administrative Rules of Montana ARM 36.12.115 (2)(b) and Irrigation Water Requirements for turf grass.

CONCLUSIONS OF LAW

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

36. 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).

37. 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.

38. Applicant proposes to use water for lawn and garden irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence lawn and garden irrigation is a beneficial use and that 4.25 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 34-34)

Possessory Interest

FINDINGS OF FACT

39. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

40. 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.

41. 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.

42. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF No. 39)

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. 41I 30111618 should be GRANTED.

The Department determines the Applicant may divert groundwater by means of two groundwater wells, one well 158 feet deep, and another well 160.9 feet deep, from April 18 through October 14 each year up to a maximum volume of 4.25 AF for lawn and garden irrigation. No additional flow rate is requested under this permit as a flow rate of 100 GPM is authorized under existing Beneficial Water Use Permit No. 41I 30046072, Both points of diversion are located in the SENWSE Sec. 18, T11N, R3W, Lewis and Clark County. The Applicant may irrigate lawn and garden on 2.39 acres. The place of use is located SESWSE Sec. 18, T11N, R3W (0.46 acres), NESWSE Sec. 18, T11N, R3W (1.84 acres), and the SENWSE Sec. 18, T11N, R3W, (0.09 acres), Lewis and Clark County.

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

1. **WATER MEASUREMENT RECORDS REQUIRED
THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE DELIVERY LINE OF THE GROUNDWATER WELLS ASSOCIATED WITH THIS WATER RIGHT. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN MONTHLY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND

UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HELENA WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY.

SUBMIT RECORDS TO:
HELENA WATER RESOURCES OFFICE
1424 9TH AVE
PO BOX 201601
HELENA, MT
PHONE: 406-444-6999
FAX: 406-444-9317

2. **MITIGATION PLAN

PRIOR TO COMMENCING DIVERSIONS UNDER THIS PERMIT THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL DIVERT WATER INTO AN INFILTRATION TRENCH FROM THE HELENA VALLEY CANAL. THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATERS IN SILVER CREEK AND TENMILE CREEK ABOVE LAKE HELENA. THROUGH THE PURCHASE OF A HELENA VALLEY IRRIGATION DISTRICT (HVID) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE AT LEAST 5.5 ACRE-FEET PER YEAR. ACTUAL DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPLICANT SHALL SUBMIT TO THE HELENA REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH HVID AS DESCRIBED ABOVE.

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 11th day of June, 2020.

/Original signed by Bryan Gartland/
Bryan Gartland, Manager
Helena Regional Office
Department of Natural Resources and Conservation

REVISED 04-2017

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 June, 2020, by first class United States mail.

LINCOLN ROAD RV PARK INC
PO BOX 9708
HELENA MT 59604-9708

DAVE BALDWIN
HYDRO SOLUTIONS INC
303 CLARKE ST.
HELENA MT 59601

_____ _____

NAME DATE