





1 diverted at three points of diversion located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ , the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , and the  
2 NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 5, Township 6 South, Range 24 East, Carbon County, Montana. The  
3 proposed means of diversion is one moveable power take off powered (PTO) pump. The  
4 proposed use is irrigation of 25 acres. The proposed place of use is 25 acres in the S $\frac{1}{2}$  of  
5 Section 5, Township 6 South, Range 24 East, Carbon County, Montana. The proposed period of  
6 diversion and period of use is May 1 through October 31, inclusive, of each year. (Department  
7 file)

8 5. At hearing Applicant further reduced the place of use to 15 acres. The amended place of  
9 use is 15 acres in the S $\frac{1}{2}$  of Section 5, Township 6 South, Range 24 East, Carbon County,  
10 Montana, as shown on McDowell Exhibit 1. Applicant proposes to apply 6 inches of water to  
11 these 15 acres for an annual total volume of 7.5 acre-feet. (testimony of Sam McDowell)]

12 6. The amended place of use is within the noticed place of use. The amended application  
13 is for less water than originally requested. The amendments are a subset of the original  
14 publication. (Department file, McDowell Exhibit 1)

15 7. Applicant has not submitted hydrologic or other evidence, including but not limited to  
16 water supply data, field reports, or other information developed by the Applicant, the  
17 Department, the U.S. Geological Survey, or the U.S. Natural Resources Conservation Service  
18 and other specific field studies demonstrating that the criteria of Mont. Code Ann. § 85-2-311(1)  
19 have been met. Mont. Code Ann. § 85-2-311(5). (Department file)

20 8. The Hearing Examiner hereby takes official notice of the Department Water Right  
21 records between Applicant's upstream proposed point of diversion and the mouth of Bluewater  
22 Creek, and the current Department administrative rules found at Mont. Admin. R. 36.12.115(e).  
23 Parties may contest the materials so noticed in exceptions to this Proposal. Mont. Admin. R.  
24 36.12.221.

### 25 **Physical Availability**

26 9. Applicant has lived near Bluewater Creek all his life and has observed the flow of  
27 Bluewater Creek over those years. Applicant has not measured the flow of water in Bluewater  
28 Creek, or estimated streamflow using various hydrologic modeling or statistical estimation  
29 techniques. Bluewater Creek flows were last measured about 1980. The 1980 measured flow is  
30 not a part of the record. However, it is Applicant's opinion that the stream flows have increased  
31 over time. Applicant attributes this increase to an increase in the diameter of the natural spring  
32 openings in the ground which are the source of water for Bluewater Creek. Applicant argues

1 that larger orifices under the same pressure means more water flow, just as occurs in sprinkler  
2 irrigation nozzles over time, and that this could explain and confirm his observations of  
3 Bluewater Creek. In addition, Applicant presented witness testimony of downstream irrigators  
4 that are irrigating that there is not a shortage of water, and there is water flowing out of  
5 Bluewater Creek into the Clarks Fork of the Yellowstone River that has not been seen before.  
6 (Testimony of Sam McDowell, Clint Spencer)

7 10. The senior water right on Bluewater Creek, 1.5 miles from the Clarks Fork River, has  
8 always been able to exercise his irrigation water right. There is one appropriator downstream  
9 (Morris) of this senior appropriator that has “never had much of a problem at all” obtaining their  
10 water. It is unclear from the record what “never had much of a problem at all” means regarding  
11 the physical availability of water at the proposed point of diversion. (Testimony of Don Phillips)

12 11. Applicant provided no evidence of physical water availability at the proposed point of  
13 diversion other than his own observations, or his witnesses’ observations, of Bluewater Creek.  
14 Objector Rettig who does not live on Bluewater Creek (but is a Bluewater Creek wateruser),  
15 testified that he does not agree that the flows of Bluewater Creek have been increasing over  
16 time. Applicant’s witnesses testified that there is plenty of water in Bluewater Creek for their use,  
17 but did not define in gallons per minute (gpm) what is “plenty of water,” nor did they identify with  
18 specificity where in relation to the proposed points of diversion their observations took place.  
19 There is not sufficient hydrologic evidence in the record to meet the preponderance of evidence  
20 standard to show there is 200 gpm in Bluewater Creek for the proposed appropriation at times  
21 between May 1 and October 31 of each year. (Department file, testimony of Sam McDowell,  
22 Don Phillips, Clint Spencer, Norm Campbell, Bob Lewallen, Bill Rettig)

### 23 **Legal Availability**

24 12. A copy of the Department Water Right Records officially noticed is found in Attachment 1  
25 on page 11. These records indicate there are more appropriators downstream of the proposed  
26 points of diversion than those irrigators testifying for the Applicant at hearing. Existing legal  
27 demands over and above the four appropriators testifying at hearing, and the 800 miner’s  
28 inches identified as the capacity of Orchard Ditch (approximately one-half mile downstream of  
29 Applicant’s proposed point of diversion) have not been included in Applicant’s comparison of  
30 existing legal demands with the amount of water physically available. (Finding of Fact No. 8,  
31 Department Water Right Records; testimony of Norm Campbell)

1 13. Applicant provided observations that water is in the stream and testimony of other  
2 irrigators on Bluewater Creek that they have not been water short, and concluded that water is  
3 legally available for his use. Applicant's identification of existing legal demands on the source of  
4 supply within the area of potential impact is not a listing of all existing legal demands on  
5 Bluewater Creek. Instead it is testimony of some irrigators from Bluewater Creek. It is not clear  
6 whether those testifying are the only appropriators within the area of potential impact.  
7 Applicant's comparison of legal demands with water physically available consists of Applicant's  
8 subjective comparison of the testimony of his witnesses with flows he has observed in  
9 Bluewater Creek. The record does not explain the other Bluewater Creek appropriators shown  
10 on Attachment 1 (on page 11) and whether or not they were exercising their rights at the times  
11 witness testimony suggests there is no shortage of water. The record does not reflect whether  
12 the Water Reservation of Objector Fish, Wildlife and Parks (or the stipulated flows) is  
13 maintained throughout its reach on Bluewater Creek. The record does not contain a comparison  
14 of the physical supply of water at the proposed points of diversion with the existing legal  
15 demands on the supply of water. Without such a comparison, the legal availability cannot be  
16 determined. (Attachment 1 on page 11, Testimony of Sam McDowell, Don Phillips, Clint  
17 Spencer, Norm Campbell, Bob Lewallen, Bill Rettig)

18 **Adverse Effect**

19 14. Applicant provided no list of existing legal demands nor a plan to show that his proposed  
20 use of water can be controlled so the water right of a prior appropriator will be satisfied. Instead  
21 Applicant relies on his observations and conclusions that the flow of Bluewater Creek is  
22 increasing, so an additional appropriation should not affect existing appropriators. Applicant's  
23 proposed means of diversion implies that the moveable pump could be shut down if a call were  
24 made by a downstream appropriator, however, Applicant did not offer such a plan. (Department  
25 file, testimony of Sam McDowell)

26 **Adequacy of Appropriation Works**

27 15. Applicant proposes to use a moveable pump capable of pumping the requested flow rate  
28 that has been used by the Applicant to irrigate other water rights he has. Applicant has shown  
29 the means of diversion is adequate. (Testimony of Sam McDowell)

1 **Beneficial Use**

2 16. Applicant intends to irrigate 15 acres with 6 inches of water to provide sufficient growth  
3 to make one cutting of hay economical. Having a sufficient hay crop to make it worthwhile to cut  
4 would also reduce potential wildfire fuel in the vicinity of his farmstead after the hay crop was  
5 removed. The record does not contain evidence other than Applicant's long irrigation experience  
6 that 6 inches of water is beneficial for crop irrigation. Current Department administrative rules  
7 contain annual volumes of water considered reasonable for crop irrigation for water use permit  
8 applications, and the Hearing Examiner hereby takes official notice of Mont. Admin. R.  
9 36.12.115(e). See Attachment 2 on page 12. This rule indicates the lowest amount (acre-foot  
10 per acre) considered reasonable in any climatic area for a full season of irrigation is 1.26 acre-  
11 feet per acre. Applicant has applied for 0.5 acre-feet per acre, which does not exceed the lowest  
12 amount. The amount requested for the proposed use is reasonable for the intended use.  
13 (Department file, testimony of Sam McDowell, Mont. Admin. R. 36.12.115(e))

14 **Possessory Interest**

15 17. Applicant is the owner of the property which has been designated in the Application as  
16 the place of use. (Department file)

17 **Water Quality Issues**

18 18. No objections relative to water quality were filed against this application nor were there  
19 any objections relative to water classification or to the ability of a discharge permit holder to  
20 satisfy effluent limitations of his permit. (Department file.)

21 Based on the foregoing Findings of Fact and the record in this matter, the Hearing  
22 Examiner makes the following:

23  
24 **CONCLUSIONS OF LAW**

25 1. The Department has jurisdiction to issue a provisional permit for the beneficial use of  
26 water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of  
27 the evidence. Mont. Code Ann. § 85-2-311(1).

28 2. A permit shall be issued if there is water physically available at the proposed point of  
29 diversion in the amount that the applicant seeks to appropriate; water can reasonably be  
30 considered legally available during the period in which the applicant seeks to appropriate, and in  
31 the amount requested, based on an **analysis** of the evidence on physical water availability and

1 the existing legal demands, including but not limited to a comparison of the physical water  
2 supply at the proposed point of diversion with the existing legal demands on the supply of water;  
3 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a  
4 state reservation will not be adversely affected based on a consideration of an applicant's **plan**  
5 for the exercise of the permit that demonstrates that the applicant's use of the water will be  
6 controlled so the water right of a prior appropriator will be satisfied; the proposed means of  
7 diversion, construction, and operation of the appropriation works are adequate; the proposed  
8 use of water is a beneficial use; the applicant has a possessory interest, or the written consent  
9 of the person with the possessory interest, in the property where the water is to be put to  
10 beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not  
11 be adversely affected, the proposed use will be substantially in accordance with the  
12 classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of  
13 a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

14 3. A public notice containing the facts pertinent to the permit application must be published  
15 once in a newspaper of general circulation in the area of the source and mailed to certain  
16 individuals and entities. Mont. Code Ann. § 85-2-307. (See Finding of Fact No. 3 above)  
17 Modifications to an application may be considered in a proceeding previously publicly noticed so  
18 long as other appropriators are not prejudiced, regardless of whether the other appropriators are  
19 parties to the case. If the proposed modification to the application suggests an increase in the  
20 burden on the source beyond that identified in the notification of the application as originally  
21 proposed, that could cause prejudice. Lack of complete notice means that persons potentially  
22 affected by the change could be given insufficient information to determine the likelihood of  
23 whether they would be adversely affected. See In the Matter of the Application for Beneficial  
24 Water Use Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the  
25 Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co.,  
26 Proposal for Decision (1981).

27 Here, the modified application is a subset of the original application. (See Findings of  
28 Fact Nos. 4, 5, 6 above) Other appropriators are not prejudiced and the amended application  
29 does not have to be renoticed according to Mont. Code Ann. § 85-2-307.

30 4. The Applicant has not proven that water is physically available at the proposed point of  
31 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.  
32 Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 9, 10, 11.

1 5. The Applicant has not proven that water can reasonably be considered legally available.  
2 Applicant presented incomplete evidence to identify the existing legal demands on the source of  
3 supply within the area of potential impact. Applicant has not shown that water is physically  
4 available in a manner that can be compared with existing legal demands. Mont. Code Ann. §  
5 85-2-311(1)(a)(ii). See Finding of Fact Nos. 12, 13.

6 6. The Applicant has not proven that the water rights of prior appropriators under existing  
7 water rights, certificates, permits, or state reservations will not be adversely affected. Instead,  
8 Applicant relies on his observation that there is “plenty of water” in the Creek to conclude that  
9 there is sufficient water available for his proposed use and all existing legal demands, and that  
10 there will be no adverse affect on other appropriators. Applicant provides testimony from some  
11 but not all potentially affected prior appropriators as to water availability, but no analysis of  
12 existing water rights. Applicant has not shown that water is legally available (identified existing  
13 legal demands), so this argument fails. Also, Applicant did not present a plan to prevent adverse  
14 effect as required by the criterion. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact No.  
15 14.

16 7. The Applicant has not provided hydrologic evidence required to meet the preponderance  
17 of evidence standard. Mont. Code Ann. § 85-2-311 (5) states "To meet the preponderance of  
18 evidence standard in this section, the applicant in addition to other evidence demonstrating that  
19 the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including  
20 but not limited to water supply data, field reports, and other information developed by the  
21 applicant, the department, the U.S. geological survey, or the U.S. natural resources  
22 conservation service and other specific field studies." Applicant here did not present hydrologic  
23 evidence other than personal observations of the Applicant and his witnesses. That is not  
24 sufficient to meet Applicant’s burden of proof on the issue of physical availability of water. In this  
25 case the Hearing Examiner heard from the Applicant and his witnesses, and was not persuaded  
26 by the strength of Applicant’s evidence. See In The Matter Of Application 41I-111746 by Mineral  
27 Rights Unlimited, L.L.C., Final Order, (2003). The Applicant did not make a prima facie case.  
28 Instead, the Hearing Examiner found it unclear whether other existing appropriators’ water uses  
29 would be affected by the Applicant’s proposed use of water, and whether water is physically  
30 available and legally available. Mont. Code Ann. § 85-2-311(5).

31 Until Applicant has made a prima facie case of proving the criteria, the burden of  
32 production does not shift to the Objectors to provide proof the proposal will adversely affect

1 them. See In re Application for Change of Appropriation of Water Rights for Royston, 249 M  
2 425, 816 P2d 1054 (1991)("The initial burden of producing evidence as to a particular fact is on  
3 the party who would be defeated if no evidence were given on either side. Thereafter, the  
4 burden of producing evidence is on the party who would suffer a finding against him in the  
5 absence of further evidence.") See generally Montana Rail Link v. Byard, 260 Mont. 331, 860  
6 P.2d 121 (1993)(once a prima facie case is made by a plaintiff, the burden of production,  
7 although not the burden of persuasion, shifts to other party) See Finding of Fact No. 7.

8 8. The Applicant has proven that the proposed means of diversion, construction, and  
9 operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See  
10 Finding of Fact No. 15.

11 9. The Applicant has proven the proposed use of water is a beneficial use of water for  
12 which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-311(1)(d).  
13 See Finding of Fact No. 16.

14 10. The Applicant has proven a possessory interest in the property where water is to be put  
15 to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See Finding of Fact No. 17.

16 11. The Applicant is required to prove that the criteria in §§ 85-2-311(1)(f-h) have been met  
17 only if a valid objection is filed. No valid objection was raised as to the issue of water quality of a  
18 prior appropriator being adversely affected, the proposed use not being in accordance with a  
19 classification of water, or as to the ability of a discharge permit holder to satisfy effluent  
20 limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Finding of Fact No. 18.

21 12. The Department may issue a permit subject to terms, conditions, restrictions, and  
22 limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use  
23 permit. Applicant has not met the criteria for issuance of a permit. Mont. Code Ann. § 85-2-312.  
24 See Conclusions of Law Nos. 4, 5, 6, 7.

25 13. The Montana Environmental Policy Act (MEPA) process provides for full public  
26 disclosure of any adverse environmental impacts resulting from Department actions.  
27 Department of Natural Resources and Conservation actions, including decision-making on  
28 water use permits, require MEPA compliance. The Department is required to include in each  
29 recommendation or report on proposals for projects, programs, and other major actions of state  
30 government significantly affecting the quality of the human environment a detailed statement  
31 including the environmental impact of the proposed action. See Mont. Code Ann. § 75-  
32 201(b)(iv). In this Proposal it was discovered that an EA was written and submitted to EQC

1 (Environmental Quality Council) and Jim Bond. However, an electronic or hard copy was not  
2 retained for the Department file. Because the criteria for issuance of a permit have not been  
3 met, the proposed action can not be approved, and there will be no environmental impact from  
4 the action proposed in the Application, there is no need to recreate the missing EA. See Finding  
5 of Fact No. 2, and Conclusion of Law No. 12.

6 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the  
7 Hearing Examiner makes the following:  
8

9 **PROPOSED ORDER**

10 Application For Beneficial Water Use Permit 43D 10220900 by Sam H McDowell is  
11 **DENIED.**

12 **NOTICE**

13 This Proposal for Decision may be adopted as the Department's final decision unless  
14 timely exceptions are filed as described below. Any party adversely affected by this Proposal for  
15 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral  
16 argument. Exceptions and briefs, and requests for oral argument must be filed with the  
17 Department by **January 3, 2007**, or postmarked by the same date, and copies mailed by that  
18 same date to all parties.

19 Parties may file responses and response briefs to any exception filed by another party.  
20 The responses and response briefs must be filed with the Department by **January 16, 2007**, or  
21 postmarked by the same date, and copies must be mailed by that same date to all parties. No  
22 new evidence will be considered.

23 No final decision shall be made until after the expiration of the above time periods, and  
24 due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

25 Dated this 14<sup>th</sup> day of December 2006.  
26

27 / Original Signed By Charles F Brasen /

28 Charles F Brasen  
29 Hearings Officer  
30 Water Resources Division  
31 Department of Natural Resources  
32 and Conservation  
33 PO Box 201601  
34 Helena, Montana 59620-1601

Water Right Owners Downstream from Sam McDowell Application to the Confluence of Bluewater Creek with the Clarks Fork Yellowstone River (11/21/2006 cs)[Highlight added by Hearing Examiner Brasen]

WRNUMBER	OWNER	DIVERSION MEANS	Orchard Ditch Users - see tab 2			
43D 100783 00						
43D 11185 00	Sam McDowell	Pump				
43D 12487 00	Charles & Ann Row	Pump				
43D 15009 00	Morris, Evelyn, & Judith Bauwens	Headgate				
43D 17010 00						
43D 19100 00	Yedlicka Trust, James Yedlicka					
43D 19153 00						
43D 19154 00						
43D 19158 00			Identified @ McDowell Hearing			
43D 19159 00	Hope Dennis, Christian Klier, Brenda Mayes	O'Conner Ditch				
43D 19160 00						
43D 19160 01						
43D 197544 00						
43D 197545 00						
43D 214969 00						
43D 214970 00						
43D 216324 00						
43D 24697 00						
43D 24698 00						
43D 24699 00						
43D 24700 00						
43D 24701 00						
43D 30017693	Montana FWP	Instream Reservation				
43D 33288 00	Lillian Dietz	Livestock Direct				
43D 33291 00						
43D 41829 00	Donald & Grace Phillips	Madsen Ditch				
43D 41830 00	Donald & Grace Phillips	Madsen Ditch				
43D 43371 00						
43D 43372 00						
43D 43405 00						
43D 43406 00						
43D 43407 00						
43D 44585 00	David Young, Gary & Steven Heiken	O'Conner Ditch				
43D 44586 00	David Young, Gary & Steven Heiken	O'Conner Ditch				
43D 44587 00	David Young, Gary & Steven Heiken	O'Conner Ditch				
43D 44588 00	David Young, Gary & Steven Heiken	O'Conner Ditch				
43D 44589 00	David Young, Gary & Steven Heiken	O'Conner Ditch				
43D 45658 00	Wayne & Barbara Moorman	O'Conner Ditch				
43D 45659 00	Wayne & Barbara Moorman	O'Conner Ditch				
43D 45660 00	Wayne & Barbara Moorman	O'Conner Ditch				
43D 5323 00	Michael & Frances Dooley	Pump				
43D 6924 00						
43D 84478 00	Mary Nelson	Pump				

Attachment 1

**36.12.115 WATER USE STANDARDS**

- (2) The department will use the following standards when reviewing notices or applications for new uses of water:
- (e) For irrigation, the following table applies:

Irrigation Standards

	Climatic Area <sup>1</sup> Acre Feet per Acre				
	I	II	III	IV	V
Sprinkler Irrigation 70% Efficiency	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Level Border 60% Efficiency Design Slope Level	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Graded Border 70% Efficiency Slope Group Design Slope .10% Design Slope .20% Design Slope .40%	2.63 - 3.04	2.30 - 2.69	2.08 - 2.41	1.76 - 2.07	1.26 - 1.48
Graded Border 65% Efficiency Design Slope .75% Design Slope 1.5%	2.84 - 3.28	2.48 - 2.90	2.24 - 2.59	1.90 - 2.23	1.36 - 1.60
Graded Border 60% Efficiency Design Slope 3.0%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Furrow 70% Efficiency Design Slope .10% Design Slope .20% Design Slope .40%	2.36 - 2.74	2.11 - 2.44	1.87 - 2.16	1.39 - 1.70	NA
Furrow 65% Efficiency Design Slope .75%	2.54 - 2.95	2.27 - 2.63	2.02 - 2.33	1.50 - 1.83	NA
Furrow 60% Efficiency Design Slope 1.5%	2.75 - 3.19	2.46 - 2.85	2.19 - 2.52	1.62 - 1.98	NA
Contour Ditch 60% Efficiency Design Slope .75%	3.07 - 3.55	2.69 - 3.15	2.43 - 2.81	2.06 - 2.41	1.47 - 1.73
Contour Ditch 55% Efficiency Design Slope 1.5% Design Slope 3.0%	3.35 - 3.87	2.93 - 3.43	2.65 - 3.07	2.24 - 2.63	1.60 - 1.88
Contour Ditch 45% Efficiency Design Slope 6.0%	4.10 - 4.73	3.58 - 4.19	3.24 - 3.75	2.74 - 3.22	1.96 - 2.30

<sup>1</sup> The irrigation climatic areas are identified in the 1986 Irrigation Climatic Areas of Montana map. Climatic area I is high consumptive use, climatic area II is moderately high consumptive use, climatic area III is moderate consumptive use, climatic area IV is moderately low consumptive use, and climatic area V is low consumptive use.

**Attachment 2**  
(emphasis added)

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 14<sup>th</sup> day of December 2006 by first-class United States mail.

SAM H MCDOWELL  
BOX 481  
BRIDGER MT 59014

WILLIAM H & PATRICIA A RETTIG  
RT 1 BOX 1217  
BRIDGER MT 59014

BILL SCHENK - ATTORNEY  
MT FISH WILDLIFE & PARKS  
1420 E SIXTH AVE  
PO BOX 200701  
HELENA MT 59620-0701

**Cc:**  
BILLINGS REGIONAL OFFICE  
WATER RESOURCES DIVISION  
1371 RIMTOP DR  
BILLINGS MT 59105-1978

/ Original Signed By Jamie Price /

Jamie Price  
Hearings Unit  
406-444-6615

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

\*\*\*\*\*

<b>IN THE MATTER OF APPLICATION FOR</b>	)	
<b>BENEFICIAL WATER USE PERMIT NO. 43D</b>	)	<b>FINAL ORDER</b>
<b>10220900 BY SAM H MCDOWELL</b>	)	

\*\*\*\*\*

The proposal for decision in this matter was entered on December 14, 2006. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

**ORDER**

Application For Beneficial Water Use Permit 43D 10220900 by Sam H McDowell is **DENIED.**

**NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the

written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 10<sup>th</sup> day of January 2007.

/Original signed by John E Tubbs/

John E Tubbs, Administrator  
Water Resources Division  
Department of Natural Resources and  
Conservation  
PO Box 201601  
Helena, MT 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 16<sup>th</sup> day of January 2007 by first-class United States mail.

SAM H MCDOWELL  
BOX 481  
BRIDGER MT 59014

WILLIAM H & PATRICIA A RETTIG  
RT 1 BOX 1217  
BRIDGER MT 59014

BILL SCHENK - ATTORNEY  
MT FISH WILDLIFE & PARKS  
1420 E SIXTH AVE  
PO BOX 200701  
HELENA MT 59620-0701

**Cc:**  
BILLINGS REGIONAL OFFICE  
WATER RESOURCES DIVISION  
1371 RIMTOP DR  
BILLINGS MT 59105-1978

/Original signed by Jamie Price/

Jamie Price  
Hearings Unit  
406-444-6615